REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLENOUS CIVIL APPLICATION NO. 362 OF 2010

REPUBLIC …….…… APPLICANT

VERSUS

THE PUBLIC PROCUREMENT

ADMINSTRATIVE REVIEW BOARD ……. 1ST RESPONDENT

KENYA PIPELINE COMPANY LIMITED .....2ND RESPONDENT

FLOWSERVE B.V. NETHERLANDS .....… INTERESTED PARTY

EX-PARTE

HYOSUNG EBARA COMPANY LIMITED

RULING

This ruling is in respect of the ex parte applicant's application dated 14th December, 2010. The application seeks the following orders:

"(a) An order of certiorari removing into this court for purposes of being quashed the decision of the Public Procurement Administrative Review Board dated and delivered on 29th November 2010 in Review Application No. 60/2010 of 4th November, 2010; HYOSUNG EBARA COMPANY LIMITED VERSUS KENYA PIPELINE COMPANY LIMITED.

(b) An order of mandamus compelling the 2nd respondent to tender afresh the Supply Installation and commission of main line pump sets line 1 third pump, project number SU/QT/349N/10 and to process the tenders strictly in accordance with section 2 and 66 of the Public Procurement and Disposal Act, 2005 ("the Act") and rule 52 of the Regulations made thereunder ("the Regulations").

(c) The costs of this application be in favour of the applicant."

The application was based on the following grounds:

"(a) The applicant responded to the 2nd respondent's open tender advertisement contained in the local dailies on 20th and 21st July, 2010 for the supply installation and commissioning of main line pump sets line 1 third pump, project number SU/QT/349N/10.

(b) The applicant's bid was found to be responsive by the 2nd respondent's Technical Valuation Committee and passed the Preliminary Evaluation Stage as provided under rule 47 of the Public Procurement and Disposal Regulations 2006 (the Regulations) and proceeded for the detailed technical evaluation stage as provided under rule 49 of the Regulations, whereupon the applicant's bid scored 90% and was thus qualified to proceed to the final evaluation, which was the final stage in the tender evaluation process.

(c) Upon the completion of the technical evaluation process, the Technical Evaluation Committee submitted its findings to the 2nd respondent's Tender Committee as provided under rule 11 of the Regulations and recommended that the applicant together with four other bidders do proceed for the financial evaluation stage.

(d) The Tender Committee upon considering the submissions, findings and the recommendations of the Technical Evaluation Committee maliciously and in an unfair manner overstepped its mandate as expressed under rule 11 of the Regulations and proceeded to illegally and unlawfully disqualify the applicant from the tender process on the alleged ground that the applicant's bid was non-responsive and ought not to have proceeded for the detailed technical evaluation stage for want of manufacturer's authorization.

(e) The Tender Committee claimed that though the applicant had submitted a proper manufacturer's authorization, the same had been implicitly withdrawn by virtue of a letter allegedly written to the 2nd respondent by one of the competitors claiming that the joint corporation agreement between the applicant and Ebara Corporation of Japan had been terminated.

(f) Under rule 11 of the Regulations, the Tender Committee has no capacity/mandate to disqualify a bidder who had been evaluated by the Technical Evaluation Committee and passed to proceed to the next stage. Where the Tender Committee rejects the submission of the Technical Evaluation Committee as was the case herein, the law expressly provides under rule 11 that such submissions will be re-submitted to the Technical Evaluation Committee for re-consideration.

(g) Resulting from the above illegal action, the 2nd respondent on 26th October, 2010, wrote to the applicant alleging that it had evaluated the applicant's tender but that the same did not attain the minimum qualifying mark and that therefore the tender was not capable of proceeding for financial evaluation.

(h) The applicant sought clarification on the contents of the said letter but in its response dated 27th October, 2010, the respondent changed the story by claiming that the applicant's tender had been disqualified because of failure to comply with a mandatory requirement for a manufacturer's authorization.

(i) Aggrieved by the above actions of the 2nd respondent, the applicant on 4th November, 2010 lodged the Review Application No. 60/2010 with the 1st respondent challenging the unlawful and irregular method employed by the 2nd respondent in disqualifying the applicant's bid as against the express provisions of section 2 and 66 of the Act and the tender document.

(j) The application was heard inter partes and the 1st respondent delivered the impugned decision herein on the 29th November, 2010.

(k) The said decision as delivered by the 1st respondent is unreasonable, based on extraneous,

irrelevant and unlawful considerations, arbitrary, ultra vires and in excess of jurisdiction conferred on it by law on the grounds, inter alia, that:

(i) The 1st respondent took it upon itself to determine whether the applicant had met the mandatory requirements by submitting a competent manufacturer's authorization letter, an issue which under the law falls within the mandate of Technical Evaluation Committee of the procuring entity to determine and which had in fact been considered and determined by the 2nd respondent's Technical Evaluation Committee.

(ii) The 1st respondent failed to appreciate that its jurisdiction was limited to determining whether or not the applicant's bid was subjected to a fair and transparent evaluation process as required under the Act.

(iii) The 1st respondent in basing its decision on whether or not the applicant's manufacturer's authorization had been withdrawn proceeded to take into account extraneous and irrelevant considerations relating to an unsolicited communication received clandestinely and in breach of the law by the procuring entity from third parties who were not parties to the tender process.

(iv) The 1st respondent failed to take into consideration relevant factors, in particular that the applicant was the manufacturer of the pump in question and therefore under the terms of the tender did not require any authorization to offer its products in its bid.

(v) The 1st respondent failed to appreciate that its mandate as set out under the Act, is to ensure accountability and transparency in the tender process and to enhance fair competition in the tender process.

(vi) The 1st respondent in arriving at the impugned decision made grave errors of law in failing to apply mandatory provisions of the Public Procurement and Disposal Act, 2005, (the Act) which led to its upholding a decision based on a process that was flawed and contrary to the requirements of the Act.

(vii) The 1st respondent in arriving at its decision failed to appreciate and to give effect to mandatory provisions of the Act relating to the confidentiality of the procurement process.

(viii) In reaching its decision, the 1st respondent made grave errors of law in failing to apply Regulation 52 of the Regulations and clause 26 of the tender document.

(ix) The 1st respondent failed to appreciate that the effect of its decision is to allow procurement entities to unlawfully solicit for information from competing bidders during the tender evaluation process and apply to apply such information to disqualify most competitive bids to create room for less competitive bids to win the tender process.

(x) The entire purpose of the Public Procurement and Disposal Act which is to make public procurement a fair, transparent and accountable process will be defeated if third parties are allowed to write letters to disqualify their competitors."

The application was supported by a statutory statement and a verifying affidavit sworn by **Sunil Pandya,** the Kenyan representative of the ex parte applicant. The affidavit is basically a rehash of the aforesaid grounds on which the application was made. The deponent annexed to his affidavit a copy of the applicant's submitted bid and other relevant documents referred to in the aforesaid grounds.

The 1st respondent was represented by the Attorney-General. A replying affidavit was sworn by **Cornel R. Amoth**; its Secretary. He deposed that following the ex parte applicant's filing of a request for review against the decision of the tender committee, the Board heard the appeal and dismissed it vide its ruling delivered on 29th November, 2010. The Board noted that the applicant did not supply the required Manufacturer's Authorization letter as stipulated in the tender documents. The Board further noted that the applicant in its submissions stated that it was not providing a pump under Ebara Corporation licence but its own pump, hence it was not necessary for it to provide manufacturer's authorization, which argument it did not support with relevant supporting documents in the tender.

Mr. Amoth added that the Board also noted that the applicant had included a joint venture agreement with Ebara Corporation which had been terminated by mutual consent by an agreement dated 30th July, 2010 but failed to include the termination agreement in its bid. Further, since technical competence of the bidders was paramount for the intended project, the Board held that the applicant should have provided sufficient and accurate information to support its bid, Mr. Amoth deposed.

The 2nd respondent filed a replying affidavit that was sworn by **Nicholas Gitobu,** its Procurement Manager. He denied that the tender committee acted maliciously, illegally, unlawfully or unfairly in disqualifying the ex parte applicant's bid for being non-responsive. He stated that the reason for disqualification of the ex parte applicant's bid was as a result of receipt of a letter dated 24th September, 2010 by the 2nd respondent from Ebara Corporation, Japan, notifying it of the termination of a Joint Venture Agreement and termination of the Technical Licence Agreement between itself and the ex parte applicant. The letter stated that the agreement was effective from 31st August, 2010 and further warned the 2nd respondent that the Corporation would no longer offer any support for, or bear any responsibility or warranty for the products offered, manufactured or sold by the ex parte applicant.

The circumstances under which the said letter was sent to the 2nd respondent were not disclosed in the replying affidavit. A copy of the letter is annexed to Mr. Gitobu's affidavit as annexture **"NG1".** Mr. Gitobu further stated that the said letter was brought to the attention of the technical evaluation committee which sat and deliberated on 18th October, 2010. He added that the committee merely noted the contents of the letter but proceeded with the evaluation on the basis of the criteria on technical specifications as set out in the tender document because their mandate did not allow them to consider a matter that rightly belonged to the sphere of mandatory requirements. However, when the tender committee met to deliberate on the evaluation report it acknowledged that the letter from Ebara Corporation was in effect a withdrawal of the mandatory manufacturer's authorization letter which they had earlier written to the 2nd respondent. For that reason, the applicant's bid could no longer be sustained, Mr. Gitobu stated.

The deponent further deposed that the tender committee recognized the gravity of the matter and decided that the action to disqualify the applicant's bid could only be taken after the procuring entity had satisfied itself that the letter was genuine and it indeed emanated from Ebara Corporation, Japan. He therefore telephoned Ebara Corporation and the corporation confirmed that the letter was authentic. The 2nd respondent then decided to bring the contents of the said letter to the attention of the ex parte applicant through a letter dated 27th October, 2010. In turn, the ex parte applicant responded through his advocates vide a letter dated 1st November, 2010. A copy of the said letter was annexed to Mr. Gitobu's affidavit. The relevant portion thereof stated as hereunder:

"We advice that the purported explanation that our client did not comply with the mandatory requirement of a Manufacturer's authorization letter is not tenable, acceptable or genuine for there is a mutual termination agreement between our client and Ebara Corporation dated 30th July, 2010 which agreement clearly stipulates that the agreement has a grace period of 4 months after which the agreement will become effective. This is at 30th December, 2010 and therefore cannot be cited as an excuse or impediment to a tender award or positive evaluation or consideration. A copy of the agreement is attached for your records.

We further put you on notice that your attempt to disqualify or block our client in this line is

unlawful, unsubstantiated and unsustainable in law and unless you stop the tender award process or re-advertise afresh, then we shall proceed to institute the appropriate legal action to vindicate, protect and assert our client's lawful rights. You will note that your initial letter of 26th October, 2010 did not mention any letter from Ebara Japan it only stated that our client's technical mark was not sufficient."

The 2nd respondent further stated that clause 4 section A of the tender documents required a bidder to provide a duly filled Manufacturer's authorization form but the ex parte applicant did not supply that mandatory document but instead sent a letter appointing Unitech Industrial Agencies Limited as its exclusive representative for supplying pumps as well as joint venture agreement and a licence agreement between itself and Ebara Corporation to manufacture and sell pumps and related products. Since the joint venture agreement had been the sole proof of authority from the manufacturer to the applicant, it meant that once the authority was withdrawn it ceased to have capacity to supply the goods being manufactured, Mr. Gitobu stated. He further stated that since the applicant's bid did not meet all the mandatory requirements, it could not proceed to financial evaluation stage.

The 2nd respondent referred to clauses 2 and 4 of the tender document which stated that the advertised project was intended to be commenced and completed within a period of 12 to 18 months from the date of commencement and that meant that the grace period relied upon by the applicant would expire on 31st December, 2010 and that raised serious doubt about the applicant's ability to perform the contemplated contract. The ex parte applicant had deliberately withheld the Mutual Termination Agreement when it submitted its tender, the deponent stated.

Mr. Gitobu referred to the provisions of **Section 31(5)** of the **Public Procurement and Disposal Act** which empowers the procuring entity to disqualify a person for submitting false, inaccurate and incomplete information about his qualifications at whatever stage the inaccuracy is detected. He denied that the 2nd respondent solicited for information from competing bidders or strangers in order to disqualify its bid as alleged at paragraph 12 of the applicant's affidavit.

For the aforesaid reasons, Mr. Gitobu defended the 2nd respondent's decision, saying that it acted beyond reproach and promoted the objects of the Public Procurement and Disposal Act, 2005, by acting fairly and with extreme caution to ensure that public interest was enhanced by awarding the tender to parties whose capacity to perform the intended contract was not in dispute thereby promoting integrity and public confidence in the entire process. He further stated that following the ruling by the 1st respondent on 29th November, 2010 which rejected the applicant's complaints and directed the procuring entity to proceed with the process, a letter of award dated 1st December, 2010 was sent to the successful bidder, Flowserve B.V. Netherlands, the interested party. The contract was subsequently executed on 16th December, 2010 although this court has since stayed further execution of that contract. The 2nd respondent urged the court to dismiss the application for the orders of certiorari and mandamus.

The interested party filed a replying affidavit that was sworn by **George Odindo Opiyo**, the Kenyan representative of the interested party. He stated that the interested party responded to the 2nd respondent's tender advertisement for the supply, installation and commissioning of main line pump sets and its bid was found to be responsive by the 2nd respondent's technical evaluation committee. It passed the preliminary evaluation stage and proceeded to the detailed technical evaluation stage where the bid scored 93%, the highest score attained at that stage, and was qualified to proceed to the financial evaluation which was the final stage in the tender evaluation process. Upon completion of the technical evaluation process, the technical evaluation committee submitted its findings to the respondent's tender committee and recommended that the interested party together with four other bidders to proceed to financial evaluation stage.

Mr. Opiyo further deposed that he was aware that the applicant's tender was disqualified on grounds, *inter alia*, that it concealed material facts and/or provided inaccurate or incomplete information about its qualification. He stated that he had been informed by the interested party's advocate and which he verily

believed to be true, that the evaluation committee of the 2nd respondent did not take into consideration the letter from Ebara Corporation but referred the same to the tender committee for consideration. He had further been informed by the said advocate that:

· **Under Regulation 10(2) (a) of the Public Procurement and Disposal Regulations, a tender committee of a procuring entity has the power to review, verify and ascertain that all procurement and disposal are undertaken in accordance with the Act, the Regulations and the terms set out in the tender documents.**

· **That Section 93(1) of the Public Procurement and Disposal Act confers upon the 1st respondent the power to determine whether any candidate has suffered or risk suffering loss or damage due to the breach of a duty imposed on a procuring entity by the Act or the Regulations and that the complaint raised by the applicant fell within the jurisdiction or mandate of the Board.**

· **That the letter from Ebara Corporation falls within the ambit of Section 44 of the Act because it was in the public interest for the corporation to inform the 2nd respondent about termination of the joint venture between itself and the applicant.**

· **That Section 52(1) of the Act does not apply to the tender under consideration because the applicant's bid was disqualified before the tender evaluation process was completed.**

· **That Section 100(4) of the Act provides that if judicial review is not declared by the High Court within 30 days from the date of filing the decision of the Review Board must take effect.**

For the aforesaid reasons, the interested party urged the court to dismiss the ex parte applicant's application.

The parties filed their respective written submissions. Prof. Mumma for the ex parte applicant, Mr. Menge for the 1st respondent, Mr. Lilan for the 2nd respondent and Mr. Oyalo for the interested party highlighted their respective clients' written submissions.

At the outset, I wish to reproduce the objectives of the Public Procurement and Disposal Act, 2005 as set out under **section 2** thereof which provides as hereunder:

"The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by the public entities to achieve the following objectives –

(a) to maximize economy and efficiency;

(b) to promote competition and ensure that competitors are treated fairly;

(c) to promote integrity and fairness of those procedures;

(d) to increase transparency and accountability in those procedures; and

(e) to increase public confidence in those procedures;

(f) to facilitate the promotion of local industry and economic development."

In determining this application, the relevant provisions of the Act should be read together with various relevant provisions of the **Public Procurement and Disposal Regulations, 2006.**

The functions of a procuring entities' tender committee are set out under **Regulation 10(2)**. They include reviewing, verifying and ascertaining that all procurement and disposal has been undertaken in accordance with the Act, the Regulations and the terms set out in the tender documents. The committee also approves the selection of the successful tender and awards procurement contracts.

Regulation 11(2), (3) and **(4)** states as follows:

"(2) The tender committee shall not –

(a) modify any submission in respect to the recommendations for contract award or in any other respect;

(b) reject any submission without justifiable and objective reasons.

(3) Where the tender committee rejects the recommendation of the evaluation committee, the decision shall be reported to the head of the procuring entity or to the accounting officer.

(4) Any submission rejected by the tender committee may be resubmitted and the tender committee shall provide an explanation and a justification for its decision thereon."

The ex parte applicant's major complaint is that its bid, having gone through the technical evaluation process and subsequently submitted to the 2nd respondent's tender committee, the latter unlawfully disqualified the same on the strength of the letter dated 24th September, 2010 from Ebara Corporation, Japan. It was contended that the tender committee had no capacity to disqualify the bid, the same having been evaluated by the technical evaluation committee. Where the tender committee rejects the submission of the technical evaluation committee as was the case herein, such submissions ought to have been re-submitted to the technical evaluation committee for re-consideration.

The applicant further contended that the consideration of the letter dated 24th September, 2010 by the tender committee was in violation of **Section 44(1)** of the Act which requires total confidentiality in the tendering process. The said section states as hereunder:

"44(1) During or after procurement proceedings, no procuring entity and no employee or agent of the procuring entity or member of a board or committee of the procuring entity shall disclose the following –

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests or inhibit fair competition.

(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) the contents of tenders, proposals or quotations."

The impugned decision of the 1st respondent was annexed to the ex parte applicant's affidavit as annexture **"SP2".** At page 12 of the said decision a chronology of events that led to the decision to disqualify the ex parte applicant's tender is given. The procuring entity stated, *inter alia*:

"5. The Tender Committee then decided to disqualify the applicant's bid after satisfying itself and confirming that indeed the letter was genuine and emanated from Ebara Corporation in Japan."

In its ruling at page 23 the 1st respondent stated, inter alia:

"Finally on the issue of relevant facts, the Board notes upon receipt of a letter dated 24th September, 2010, the procuring entity tender Committee disqualified the applicant's bid and its financial proposal was returned. It is therefore clear that the applicant's disqualification in this tender was on the basis of the termination of the Joint Venture Agreement between it and Ebara Corporation."

Prof. Mumma submitted that in basing its decision on the fact that the manufacturer's authorization had been withdrawn, the 1st respondent failed to take into account relevant considerations and instead took into account extraneous and irrelevant considerations. He submitted that the said action by the 2nd respondent was contrary to the evaluation criteria as set out in the tender document and offended **Section 66(2)** of the **Act** for the reason that a procuring entity has no power to solicit for information from third parties and apply the same to disqualify competitive bids. The said subsection provides as hereunder:

"66(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used."

It is trite law that in judicial review proceedings the court is not concerned with the merits or otherwise of the impugned decision but with the decision making process. See **CHIEF CONSTABLE OF THE NORTH WALES POLICE v EVANS [1982] 3 All ER 141.** It is therefore paramount that the court considers whether the decision by the 1st respondent to dismiss the ex parte applicant's application for review was arrived at upon consideration of the relevant procedure under the law. In making a decision, a decision making body must consider all the relevant factors and must not take into account irrelevant ones.

It was strongly argued that the 1st respondent failed to appreciate that the effect of its decision to allow procurement entities to unlawfully solicit information from competing bidders during the tender evaluation process and to apply such information to disqualify competent bidders is contrary to the provisions of the Act and the Regulations. The 2nd respondent did not state in its affidavit the circumstances under which the letter from Ebara Corporation, Japan, was sent to it. Even though it was denied that the 2nd respondent or any of the bidders solicited for it, it is note worthy that the letter was sent at a crucial time when the tender committee of the 2nd respondent was evaluating the last five tenders before proceeding to the final stage.

Mr. Gitobu, the Procurement Manager of the 2nd respondent, stated in his affidavit that upon receipt of the said letter, he telephoned Ebara Corporation and confirmed the authenticity of the letter in question. There can be no dispute therefore that the 2nd respondent engaged in communication with a third party during the tender processing exercise in a manner that was prejudicial to the ex parte applicant's interests. That was in violation of **Section 44(1)** of the **Act**. This is an important issue that ought to have been given due consideration by the 1st respondent. That letter and the subsequent discussion between Mr. Gitobu and Ebara Corporation further affected the evaluation of the applicant's bid contrary to the provisions of **Section 66(2)** of the **Act**.

No other criteria apart from the ones set out in the tender documents should have been relied upon in carrying out the evaluation. The spirit of confidentiality as stated under **Section 44** of the **Act** and strict adherence to the evaluation criteria of tenders in the tendering process as required in **Section 66** of the **Act** must be guarded jealously if the objectives of the Public Procurement and Disposal Act are to be realized. If it were not so, nothing would prevent a competitor from causing damaging information to be sent to a procuring entity or its committees during the various stages of the procurement process with a view to causing disqualification of other competitors.

It was therefore important for the 1st respondent to determine whether the letter of 24th September, 2010 from Ebara Corporation was properly introduced during the tender evaluation process or not and whether it was appropriate for Mr. Gitobu or any other officer of the 2nd respondent to engage in any form of communication with the said company at that particular time. In my view, the procuring entity breached important provisions of the Act and the Regulations and the 1st respondent treated those breaches casually.

The 1st respondent should also have taken into consideration the fact that the ex parte applicant was not given an opportunity to comment on the letter from Ebara Corporation, Japan, before the 2nd respondent's tender committee disqualified its bid. Under **Section 62(1)** of the **Act**, the procuring entity can request a clarification of a tender to assist in evaluation and comparison of tenders. The tender committee could have sought clarification from the ex parte applicant regarding the letter from Ebara Corporation before making its decision to disqualify the tender on the strength of the said letter.

The Committee, having disqualified the applicant's bid initially gave the reason thereof as failure to attain the required qualifying mark. It was only after the applicant sought clarification that the 2nd respondent changed the story and stated that its tender had been disqualified because of failure to comply with a mandatory requirement of a manufacturer's authorization and alluded to the letter from Ebara Corporation, Japan. This aspect of giving two conflicting reasons for disqualifying the tender does not inspire confidence in the tendering process and creates doubt as to whether the process was transparent. Rules of natural justice required the 2nd respondent to grant the ex parte applicant an opportunity to comment on the said letter before taking any adverse action against it.

I do not agree with Mr. Oyalo's submissions that rules of natural justice are not applicable in a tendering process. To the contrary, the Public Procurement and Disposal Act and the Regulations made thereunder contain many provisions which are intended to promote integrity, fairness and transparency in tendering processes. The facts in **KENYA NATIONAL EXAMINATIONS COUNCIL vs REPUBLIC ex parte GEOFFREY GATHENJI NJOROGE Civil Appeal No. 266 of 1996,** which was cited by Mr. Oyalo to fortify the aforesaid submission are easily distinguishable from the facts of this matter.

In the cited case, the Court of Appeal held, *inter alia*, that the Kenya National Examinations Council is not bound to hear a candidate before it cancels his/her results if it is satisfied that the candidate was involved in examination irregularities. Such an examination involves thousands of candidates and it may be very taxing for the examinations council to adopt such a procedure. And in any event, the rules and regulations governing the way in which national examinations are administered are very different from those applicable to tendering procedure under the Public Procurement and Disposal Act.

Another issue which the 1st respondent ought to have taken into consideration was whether the 2nd respondent's tender committee complied with the mandatory requirements of **Regulation 11(2)** and particularly the one that requires it not to modify any submission or reject without justifiable or objective reasons. Further, where the tender committee rejects the recommendation of the evaluation committee, it is required to make a report to the head of the procuring entity or the accounting officer. It was not stated whether that was done.

Another reason that was advanced by the 1st respondent in rejecting the review application made by the ex parte applicant was that the applicant had concealed material facts and/or provided inaccurate or incomplete information about its qualifications. That conclusion was reached because the applicant had failed to disclose that it had entered into a mutual termination agreement with Ebara Corporation. By failing to do so it intended to mislead the procuring entity, the Board ruled.

While I agree that this was an important aspect that ought to have been brought to the attention of the procuring entity, the 1st respondent failed to appreciate that **Section 31(5)** of the **Act** which empowers the procuring entity to disqualify a person for submitting false, inaccurate or incomplete information about his qualifications only applies where both the technical and the financial evaluations have been completed and the procuring entity is at the final stage of awarding the tender to the successful bidder. **Section 31**

ought to be read together with **Regulation 52.**

It is also doubtful if the 1st respondent could competently determine whether the ex parte applicant had met the mandatory requirements. I believe that is an issue that fell within the mandate of the technical evaluation committee. That committee had already given its green light to the ex parte applicant's bid.

Mr. Lilan urged the court to take into consideration that the contract that was the subject matter of the tender is of great public interest whose value is in the region of Kshs. 800 million and dismiss the application so that the project may be undertaken. He cited a recent decision of the Court of Appeal in **KENYA PIPELINE COMPANY LIMITED vs STANLEY MUNGA GITHUNGURI, Civil Application No. NAI 300 of 2010**, where the Court refused to stay implementation of a multi-billion contract citing public interest. The project concerned was extension of the pipeline to serve Kenya, Uganda and the Great Lakes region. The respondent had filed an application before the High Court seeking an injunction to restrain the applicant from excavating his land or laying new pipes pending hearing and determination of a suit and the High Court granted the injunction.

However, the facts in that case are distinguishable from those obtaining herein. The Court of Appeal appreciated that the intended project was of great public importance whereas the respondent's loss could be compensated by an award of damages.

An issue regarding the provisions of **Section 100(4)** of the **Act** was raised by the interested party. The same provides as hereunder:
"If judicial review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board shall take effect."

Mr. Oyalo submitted that the application was filed on 14th December, 2010 and no decision has been made by this court to date. Accordingly, the decision of the 1st respondent took effect from 15th January, 2011.

A similar argument had been raised by the 2nd respondent on 11th February, 2011 when an application regarding stay of the 1st respondent's decision was argued. The court, in its ruling dated 18th February, 2011, in ordering stay of the said decision observed that the 2nd respondent had violated the provisions of **Section 100(1)** of the **Act** which states as hereunder:

"A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision."

The court held that judicial review proceedings had been commenced within the fourteen days period and therefore it was improper and contrary to the law for the 2nd respondent to enter into the contract with the interested party shortly thereafter. The interested party did not take part in the said proceedings.

But if I may briefly revisit the provisions of **Section 100(4)** aforesaid, although it appears that the intention of the Legislature was to ensure that judicial review proceedings relating to public procurement are disposed of expeditiously, and in any event within thirty days from the date of filing, I think that provision is unconstitutional. The Constitution requires the court to render substantial justice in all matters that come before it. Determination of some of the disputes can take a very long time, even where the court is ready and able to determine them much faster. The speed at which matters are resolved is dependent on many factors. There are instances where the parties cannot file all the necessary pleadings, submissions and authorities and argue the case within the given period of time, as was the case herein. It would amount to abdication of its constitutional mandate for a court to fail to give its determination simply because the hearing has lasted more than thirty days from the date the matter was filed.

Having considered all the major issues raised by the parties in their affidavits and submissions, I find

and hold that the decision of the 1st respondent took into consideration some irrelevant factors and disregarded some relevant ones. The ex parte applicant was also not subjected to fair and transparent evaluation process as required under the Act.

While I agree with Mr. Lilan that granting the orders sought by the ex parte applicant will cause delay and expense in implementing the intended project, I must state that that is an unavoidable consequence which cannot bar a court from granting any deserved orders. **Section 27** requires a public entity to ensure that the Act, the regulations and any direction of the Authority are complied with respect to each of its procurements. Where that is not done the court will act accordingly in an effort to ensure that the objects of the Act are realized.

I grant prayers (a) and (b) of the ex parte applicant's application. The respondents shall bear the costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MAY, 2011.

D. MUSINGA
JUDGE

In the presence of:
Nazi – court clerk
Mr. Agwara holding brief for Prof. Mumma for the Ex Parte Applicant
Mr. Kipkogei holding brief for Mrs. Natome for the 1st Respondent
Mr. Lilan for the 2nd Respondent
Mr. Oyalo for the Interested Party