



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS APPLICATION NO. 60 OF 2019**

**REPUBLIC .....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT**

**AND**

**IMAP INTERNATIONAL LTD AND ADDRESSING HOMES LLC.....1<sup>ST</sup> INTERESTED PARTY**

**BRANDED SOLUTIONS SERVICES LTD.....2<sup>ND</sup> INTERESTED PARTY**

**AND**

**COMMUNICATIONS AUTHORITY OF KENYA.....EX PARTE APPLICANT**

**JUDGEMENT**

**The case for the *ex parte* applicant**

1. Pursuant to the provisions of Order 53 Rule 1 of the 2010 Civil Procedure Rules, sections 8 and 9 of the Law Reform Act, section 175 (1) of the Public Procurement and Disposal Act, 2015, (herein after referred to as PPADA) and all other enabling laws, the *ex parte* applicant has applied for the following orders. An order of certiorari to quash the entire decision of the Respondent relating to application for **Review No. 15 of 2019, *Imap International Ltd and Addressing Systems V Communication Authority of Kenya*** dated 26<sup>th</sup> February 2019. Additionally, it also seeks an order that costs of this application to be costs in cause.
2. The application is supported by the affidavit of Phillip Kiplagat, the statutory statement and the verifying affidavit. In its statutory statement the *ex parte* applicant has made the following major averments. The *ex parte* applicant is a regulatory authority for the communication sector in Kenya established under the Kenya Information and Communication Act, 1998.
3. The respondent is a public body established section 27 Public Procurement and Asset Disposal Act, 2015.
4. The first and second interested parties are limited liability companies, who carry on business in Kenya.
5. February 2019, the respondent delivered its ruling by which it reversed the decision of the *ex parte applicant*, who had awarded the tender to the winning bidder (the 2<sup>nd</sup> Interested party) in respect of tender No CA/PROC/RFP/13/2018-2019 FOR THE PROVISION OF CONSULTANCY SERVICES TO UNDERTAKE IMPLEMENTATION OF NATIONAL ADDRESSING SYSTEM (NAS). The respondent thereafter directed the procuring entity to award the tender to the 1<sup>st</sup> Interested party, who had lost the bid. According to the *ex parte* applicant, the respondent erred in law and fact in making wrong findings in respect of the interpretation of section 130 of the PPADA as regards the subject tender and in doing so acted unreasonably and illegally.
6. Furthermore, the *ex parte* applicant has averred that “section 130 of the Act is Only applicable to subsequent tenders relating to the procurement of Goods, Services or Works as defined in the Act while the subject tender was ONLY with respect to procurement of consultancy services as is properly described under part X of the ACT.” The *ex parte* applicant has stated that the respondent gave too much weight to a previous tender, which was not subject to challenge by the interested bidders and therefore not within the purview of the

respondent. The deponent has further averred that the respondent failed to appreciate that the only provisions that would disqualify a bidder in the subject tender were sections 55 and 66 of the PPADA, 2015.

7. Finally, he has averred that the respondent illegally and unreasonably upheld the Request for review filed by the 1<sup>st</sup> Interested Party and directed the *ex parte* applicant to award the tender to the 1<sup>st</sup> Interested Party. It is for the foregoing reasons that the *ex parte* applicant is seeking an order of certiorari to quash the decision of the respondent and allow the *ex parte* applicant to proceed to enter into a contract with the winning bidder namely the 2<sup>nd</sup> Interested Party in the interests of justice and time.

#### **The Submissions of the *ex parte* applicant.**

8. Counsel for the *ex parte* applicant has submitted that the respondent acted illegally in the process of interpreting section 130 of the PPADA. Counsel cited the decision of Mativo, J in ***Constitutional Petition No. 56 of 2017, Council of County Governors v AG & Others*** in which that court leaned in favour of adopting a purposive and liberal interpretation of statutes. Counsel has further submitted that the tender in question relates to the development of the National Addressing System (NAS), which is a long term project that encompasses various phases with distinct demands for various consultancy services and expected deliverables. In all these phases the process will attract various stakeholders and expertise. The expected outcome of the project is the ability to have naming and numbering of streets, numbering of properties for ease in identification and location and the actual signboards together with the data base and the system of managing the naming.

9. According to counsel, the object of section 130 of the Act is to stop the experts who advised and formulated the specifications for the goods, works and services from participating in the tender of the same, which is not the case in the subject tender.

10. Furthermore, counsel has submitted that the tendering process must be guided by the spirit of article 227 of the Constitution, which requires “*fair, equitable, transparent, competitive and cost effective.*” In the light of this spirit counsel has therefore submitted that section 130 of the Act is only applicable to subsequent tenders relating to the procurement of goods, services and works, while the subject tender is only in respect of procurement of consultancy services. Counsel has also submitted that the only provisions that would disqualify a bidder in the instant tender are sections 55 and 66 of the PPADA. And that section 7 (2) (i) (ii) (iv) of the Fair Administrative Action Act elaborates that a decision is amenable to judicial review on grounds of unreasonableness and irrationality. It is for these reasons that the *ex parte* applicant seeks an order of certiorari to quash the entire decision of the respondent dated 26<sup>th</sup> February 2019.

#### **The case for the respondent.**

11. The respondent has through its secretary (Mr. Henock Kirungu), filed a 20 paragraphs replying affidavit in opposition to the application. In that affidavit he has deposed to the following major matters. He has deposed to matters in relation to the background of the instant application that I find it unnecessary to recite in this ruling. He has then proceeded to depose to findings of the respondent in its ruling upon which the respondent based its decision including the averment that the provisions of section 130 of the PPADA were not complied with. And further that the 1<sup>st</sup> Interested Party was eligible for the award of the tender as it was the only remaining compliant bidder at the financial stage. He also has averred that the decision of the respondent is in accordance with the law and is based on the material placed before it. Finally, he has averred that the application is made in bad faith and is calculated to ultimately eroding the public’s confidence in the procurement processes.

#### **The submissions of the respondent.**

12. The Attorney General, who is counsel for the respondent, has supported the decision of the review board of the respondent, which set aside the decision of the procuring entity in its letter of 31<sup>st</sup> January 2019 awarding the subject tender to the Branded Solutions Services Ltd. Counsel has submitted that the criteria for the issuance of orders of judicial review are well settled; and they include illegality, impropriety of procedure and irrationality. In support thereof Counsel has cited ***Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43***. Other grounds upon which orders of judicial review may be granted were set out in the case of ***Pastoli v Kabale District Local Government Council & Others [2008] EA 300***, which include among others, where the decision making authority commits an error of law in the process of making the decision and acting without jurisdiction.

13. Furthermore, counsel cited in ***REPUBLIC V KENYA REVENUE AUTHORITY, ex parte Yaya Towers Ltd, [2008] ECLR*** in which the court held that the remedy of judicial is concerned with reviewing not the merits of the decision, but the decision making process itself and it is not part of that purpose to substitute the opinion of the court for that of the authority which is constituted by law to decide the matter in question. THAT court went further and stated that: “unless that restriction on the power of the court is observed, the court will, under guise of preventing abuse of power, be itself, guilty of usurpation of power.” Counsel also cited other authorities which I have perused. Those authorities have restated the same position in law.

14. Counsel has finally submitted that the *ex parte* applicant has not demonstrated any breaches of the law or procedure which would entitle this court to intervene in this matter and grant the orders sought. Additionally, counsel has submitted that the *ex parte* applicant has not demonstrated that the respondent was in breach of any statutory provision or that it acted in excess of jurisdiction or that it breached the rules of natural justice. He has therefore urged the court to dismiss the application.

#### **The case for the 1<sup>st</sup> Interested party.**

15. The 1<sup>st</sup> Interested party has filed a 35 paragraphs replying affidavit through its managing director (Evans Kipngetch) in support of the decision of the respondent. He has deposed that he has read and understood the application of the *ex parte* applicant, which he opposes. He has deposed to the following major matters. That the *ex parte* applicant is guilty of non-disclosure and concealment of material facts that are relevant to the application, which warrant the dismissal of the instant application. In 2016 the *ex parte* applicant invited tenders for the

provision of consultancy services for steering of the proposed national addressing system (NAS), UNDER TENDER No. CA/PROC/RPF/07/2016-2017, hereinafter referred to as the previous tender. Both the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties were bidders in that tender. That tender was awarded to the 2<sup>nd</sup> Interested party. By virtue of the terms of clause 3. 2. 2. of the general conditions of the contract of the previous tender, the successful tender therein agreed that it shall be disqualified from providing related services or any services resulting from those procured in the previous tender. The said contract is binding upon both interested parties. In January 2019 the applicant invited tenders for the provision of consultancy services to undertake implementation of the national addressing system (NAS), which is the subject tender. The *ex parte* applicant failed to disclose to the court the tender document for the subject tender, which is related to the previous tender, which is annexed to the affidavit and marked as EK-01

16. Furthermore, the subject tender is related to the previous tender because in the subject tender the *ex parte* applicant sought to procure a consultant to inter alia review, update, validate, adopt and implement the draft documents developed in the previous tender by the 2<sup>nd</sup> Interested party. The 1<sup>st</sup> Interested party bid price for the subject tender was Kshs 43, 522, 644. 08 while the bid price of the 2<sup>nd</sup> Interested party was Kshs 80, 266, 200/=. The decision of the review board if enforced, would ensure prudent use of public resources. Additionally, it is manifestly unreasonable for the *ex parte* applicant to insist on awarding the subject tender to the 2<sup>nd</sup> Interested party, due to the breach of section 130 of the PPADA as well as the market difference between tender prices.

17. Based on the advice from its counsel, the 1<sup>st</sup> Interested party believes that the *ex parte* applicant has invited the court to conduct a merit review of the respondent's decision, which is a process that can only be undertaken in an appeal process as opposed to judicial review proceedings. The applicant has also failed to demonstrate that it is aggrieved by the decision of the review *ex parte* board. Finally, the 1<sup>st</sup> Interested party has deposed that the instant application has been filed solely to delay the tendering process and the implementation of the project to the detriment of the public interest.

#### **The submissions of the 1<sup>st</sup> Interested party.**

18. Counsel for the 1<sup>st</sup> Interested party has submitted that the submission of counsel for the *ex parte* applicant that the object of section 130 of the PPADA is to stop the experts who advised and formulated the specifications for the goods, works and services does not hold as the mandate to formulate specifications for goods, services and works is conferred upon the accounting officer of the procuring entity in consultation with the user departments in terms of section 70 (4) PPADA. He has further submitted that the review board took into account all the relevant considerations in interpreting and giving effect to section 130 of the PPADA. Counsel cited ***Kenya Pipeline CO Ltd v Hyosung Ebara Co Ltd [2012] ECLR*** in which the Court of Appeal underscored the significance of the powers of the review board of the respondent. That court explained that the review board is a specialized statutory tribunal that deals with all complaints of breach by the procuring entity. That court again pointed out that complaints to that board are in the nature of an appeal and that it is better equipped than the High Court to handle disputes relating to breach of duty by the procuring entity, whose decisions should not be lightly interfered with.

19. Furthermore, counsel cited many other authorities including Halsbury's Laws of England treatise, 4<sup>th</sup> Edition Vol. 1 (1), para. 86 in which it is stated that a decision of the tribunal will be quashed for irrationality, or as often said, for Wednesbury unreasonableness. For such decision to be quashed, it must be shown that the decision is so perverse that no reasonable tribunal properly directing itself as to the applicable law could have reached such a decision. It is further stated that circumstances in which the court may quash decisions based on this ground are very limited. Counsel also cited ***Republic Public Procurement Administrative Review Board & Another, ex parte Ex press DDB Kenya Ltd [2018] ECLR*** in which it was held that judicial review is concerned with the decision making process, not the decision itself and that it is not an appeal and therefore rules governing appellate review are inapplicable. Counsel cited Order 51 rule 4 of the Civil Procedure Rules, which requires every application to be supported by grounds. The *ex parte* applicant failed to state the grounds upon which its motion is based. Counsel has therefore urged the court to dismiss the application with costs to the 1<sup>st</sup> Interested party.

#### **The case for the 2<sup>nd</sup> Interested party.**

20. The 2<sup>nd</sup> Interested party has filed a 10 paragraphs affidavit through its director (James Koileken Naikuni) in opposition to the decision of the respondent. The director has deposed to the following major averments. He averred that it is true that the 2<sup>nd</sup> Interested party won and was awarded the previous tender namely tender No. CA/PROC/RPF/07/2016-2017 and that under clause 3. 2. 2. of the general conditions of contract, the successful bidder could have been disqualified from providing goods, works or services (other than the services and any continuation of the original tender or previous tender) for subsequent projects resulting from or closely related to the services provided in the original contract. He has averred that the 1<sup>st</sup> interested party and the respondent wrongly interpreted clause 3. 2. 2. Of the general conditions of the original contract; since the subject contract was a continuation of the original contract and there is no way the 2<sup>nd</sup> interested party could have been disqualified from participation. He has further averred that the subject contract is in fact a continuation of the original contract and was only necessitated by the Government 's fiscal budget period which the applicant must adhere to. He has finally averred that section 130 of the PPADA is unconstitutional and that the respondent's interpretation of section 130 aforesaid was narrow and incorrect.

#### **The submissions of the 2<sup>ND</sup> Interested party.**

21. Counsel for this party has submitted that his client was recommended for the subject award after it was ranked first with the highest combined technical and financial scores, a recommendation which the *ex parte* applicant approved. Counsel has submitted that his client complied with all the legal requirements and was rightly awarded the subject tender. Counsel cited ***Republic v Public Procurement Administrative Review Board, ex parte Meru University of Science & Technology; M/s Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eCLR***, in which Mativo, J held a bid qualifies as a responsive bid if it meets all requirements as set out in the bid document. Counsel then cited section 130 of the PPADA, which reads as follows: "130. a person who enters into a contract resulting from procurement by a request for a proposal shall not enter into any other subsequent contract for the procurement of goods, services or works related to that original contract." Based on this provision of the law counsel has submitted that the subject tender is a continuation of the original tender and has also submitted that clause 3. 2. 2. of the general conditions of the original contract similarly does not bar his client from participating in the subject tender. He also submitted that section 130 of PPADA is unconstitutional for it is blatantly discriminatory and

prejudicial for barring the 2<sup>nd</sup> Interested party from participating in the subject tender. He has therefore urged the court to reverse the decision of the respondent.

### ISSUES FOR DETERMINATION.

22. I have considered the affidavit evidence of the parties, their submissions and the applicable law. I find the following to be the issues for determination.

1. Whether or not clause 3. 2. 2. of the general conditions of the original contract is applicable and binding upon the parties.
2. Whether or not section 130 of PPADA is unconstitutional.
3. Who bears the costs of this application?

### ISSUE 1

23. It should be borne in mind that clause 3. 2. 2. of the general conditions of the contract is part of the original contract which also is known as the previous contract or tender. It is common ground that both the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties participated in the original contract, in which the 2<sup>nd</sup> Interested party was the successful bidder. Both these parties signed the original contract, which reads: “*The bidder agrees that, during the term of this contract and after its terminate, the bidder and his affiliates, as well as any sub-bidder and any of his affiliates, shall be disqualified from providing goods, works or services (other than the services and any continuation thereof) for any project resulting from or closely related to the services.*” I find from the affidavit evidence that the current subject tender is not a continuation of the original tender. I further find that the original contract is valid and is binding upon the contracting parties including the 2<sup>nd</sup> Interested party. It therefore follows that the 2<sup>nd</sup> Interested party was disqualified from participating in the current instant tender.

### ISSUE 2

24. According to counsel for the *ex parte* applicant, the object of section 130 of the Act is to stop the experts who advised and formulated the specifications for the goods, works and services from participating in the tender of the same, which is not the case in the subject tender. I do not agree with counsel that this is the object of the provisions of that section.

25. I find that the object of section 130 of the PPADA is to ensure that the 2<sup>ND</sup> Interested party is excluded from participating in the current instant tender in order to enable it to concentrate its efforts and all resources in executing and finalizing the original contract. The other object is to ensure fairness and equitable award of tenders to contractors among similarly placed contractors as required by article 227 (1) of the 2010 Constitution of Kenya. Finally, the other object is to avoid planting seeds for the growth and development of monopolies which are dangerous to market forces namely effective competition in terms of article 227 (1) of the 2010 Constitution of Kenya.

26. Furthermore, if the tender were to be enforced in favour of the 2<sup>nd</sup> Interested party, the public interest will suffer; since the bid price of the 2<sup>nd</sup> Interested party is Kshs. 80, 266, 200/=, while that of the 1<sup>st</sup> Interested party is Kshs 43, 522, 644. It therefore follows that the award of the tender to the 2<sup>nd</sup> Interested party is prejudicial to the public interest since the tax payer will be forced to pay more money, which in turn will erode public confidence. An enquiring public will ask as to why pay more money for the services or goods, when the same services or goods are available for less money. Common sense will dictate that one has to go for the less expensive services or goods than the expensive services or goods and that is the essence of competition in the market place as envisaged in article 227 (1) of the Constitution of Kenya. Again this is yet another reason for the disqualification of the 2<sup>nd</sup> Interested party in terms of section 130 of the PPADA.

27. I find that sections 55 and 66 of PPADA are inapplicable in the instant application. In addition to the foregoing, counsel for the *ex parte* applicant submitted that the decision of the respondent was unreasonable and illegal. I have perused and considered the decision of the respondent and I have found it to be well reasoned and is based on the material placed before it. I find that the decision is reasonable and lawful. I further find that the matter was within the purview of the respondent. The fact that the participation of the 2<sup>nd</sup> Interested party was not challenged by the other parties did not stop the respondent from acting on its own motion. I find as persuasive **Republic Public Procurement Administrative Review Board & Another, ex parte Express DDB Kenya Ltd [2018] ECLR** that this court is not sitting as a court of appeal but it is exercising a supervisory jurisdiction. It is therefore not concerned with the merits of the decision but the decision making process. This process cannot be faulted. I therefore find that section 130 of the PPADA is constitutional.

28. The procuring entity is hereby directed to award the subject tender to Imap International Ltd and Addressing Homes LLC to proceed with the procurement process.

### ISSUE 3.

29. In the premises, I find that the *ex parte applicant's* notice of motion dated 26<sup>th</sup> March 2019 is not merited, and it accordingly fails. It is hereby dismissed with costs to the 1<sup>st</sup> Interested Party and the respondent.

**Judgement signed and dated at Narok this 25<sup>th</sup> day of November 2019,**

**J. M. Bwonwong'a**

**Judge**

**and**

Judgement signed and delivered in open court at Nairobi this 4<sup>th</sup> day of December, 2019 in the presence of Mr. Mburu for the 2<sup>nd</sup> Interested party and N/A for the applicant and N/A for the Respondent.

**J. M. Mativo**

**Judge**

**4/12/2019**