

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 17/2020 OF 7<sup>TH</sup> FEBRUARY 2020**  
**BETWEEN**

**AFRA HOLDINGS LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER**

**EXPORT PROCESSING ZONE AUTHORITY.....RESPONDENT**

**AND**

**PROPERTY DYNAMICS LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**AND**

**ERDEMANN PROPERTY LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

Review of the decision of the Export Processing Zone Authority with respect to Tender No RFP/EPZA/2019-2020 for Development of Affordable Housing at Athi River Under Joint Venture Partnership

**BOARD MEMBERS**

- |                        |              |
|------------------------|--------------|
| 1. Ms. Faith Waigwa    | -Chairperson |
| 2. Mr. Ambrose Ngare   | -Member      |
| 3. Dr Joseph Gitari    | -Member      |
| 4. Mr Alfred Keriolale | -Member      |

## **IN ATTENDANCE**

1. Mr. Stanley Miheso -Holding brief for Secretary
2. Ms. Judy Maina -Secretariat

## **PRESENT BY INVITATION**

1. Mr. Abdallah Busaidy -Advocate, Busaidy Mwaura Ng'arua & Company Advocates
2. Ms Juddy Gioche -QS, Afra Holdings Limited
3. Mr Wilson Chege -QS, Afra Holdings Limited

## **-AFRA HOLDINGS LIMITED**

## **1<sup>ST</sup> & 2<sup>ND</sup> RESPONDENT**

1. Mr. Anthony Kiprono -Advocate, A.E. Kiprono & Associates
2. Mr. Edgar Abayo -Acting Supply Chain Manager

## **-THE ACCOUNTING OFFICER, EXPORT PROCESSING ZONE AUTHORITY**

## **1<sup>ST</sup> INTERESTED PARTY**

1. Ms. Mary Mwaura -Advocate, Anne Munene & Company Advocates

## **-PROPERTY DYNAMICS LIMITED**

2. Ms Anne Munene -Advocate, Anne Munene & Company Advocates

**2<sup>ND</sup> INTERESTED PARTY**

**-ERDEMANN PROPERTY LIMITED**

1. Mr Innocent Muganda -Advocate, Caroline Oduor & Associates

2. Ms Eva Kimathi -Advocate, Caroline Oduor & Associates

3. Ms. Ruth Hinga -Advocate, Erdemann Property Limited

**THE PRELIMINARY OBJECTION**

Export Processing Zone Limited (hereinafter referred to as “the Procuring Entity) lodged a Preliminary Objection dated 18<sup>th</sup> February 2020 and filed on 19<sup>th</sup> February 2020 alleging that:-

***“The Board lacks jurisdiction to entertain the Request for Review herein by dint of the provisions of section 167 (1) and section 170 of the Public Procurement and Asset Disposal Act, 2015”***

M/s Erdemann Property Group Limited (hereinafter referred to as the 2<sup>nd</sup> Interested Party) also lodged two Preliminary Objections both dated and filed on 24<sup>th</sup> February 2020.

In its first Preliminary Objection, the 2<sup>nd</sup> Interested Party alleges as follows:-

***"The Request for Review is fatally defective and incompetent as it offends the mandatory provisions of section 170 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 in that the following were not made parties to the Request for Review in the first instance:***

- i. The Accounting Officer of the Procuring Entity being the Chief Executive Officer of the Respondent herein and***
- ii. The successful tenderer being the 2<sup>nd</sup> Interested Party herein"***

In its second Preliminary Objection, the 2<sup>nd</sup> Interested Party alleges as follows: -

***"The Board lacks jurisdiction to hear and determine the Applicant's Amended Request for Review Application on the following grounds: -***

***1. The instant Amended Request for Review is fatally defective and incompetent as it offends the mandatory provisions of section 167 (1) of the Public Procurement and Asset Disposal Act No. 33 of 2015 in that the nature of the amendment equated the Amended Request for Review to a fresh/new request for review that has been filed out of the mandatory stipulated timeline of fourteen days of notification of the award thus fatally and incurably defective and is for dismissal with costs.***

***2. The Amended Request for Review is fatally defective and incompetent as it offends the mandatory provisions of section 2 and 170 of the Public Procurement and Asset Disposal Act No. 33 of 2015 as read with section 2 of the Public Finance Management Act, 2012 and section 6 (2) of the Export Processing Zones Act, Cap 17 in that the Chief Executive Office of the Respondent herein has not been made a party to the subject Amended Request for Review.”***

The Board having considered submissions by parties on the Preliminary Objections finds that the following issues call for determination:-

***I. Whether the Amended Request for Review filed on 20<sup>th</sup> February 2020 was lodged outside the statutory period***

***under section 167 (1) of the Act thus ousting the jurisdiction of this Board;***

***II. Whether the Request for Review filed on 7<sup>th</sup> February 2020 is fatally incompetent for the following reasons: -***

*a) The Applicant's failure to join the Accounting Officer as a party to the Request for Review;*

*b) The Applicant's failure to join the Chief Executive Officer of the Procuring Entity as a party to the Request for Review;*

*c) The Applicant's failure to join the successful tenderer as a party to the Request for Review*

The nature of a preliminary objection, was explained in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696** as follows:-

***"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."***

The Board observes that both the Procuring Entity and the 2<sup>nd</sup> Interested Party raised Preliminary Objections based on section 167 (1) and section

170 of the Act which are preliminary points that do not require the Board to delve into the substantive Request for Review to make a determination.

Hence, the Board allowed parties to make their respective arguments only on the Preliminary Objections in order to make a determination on the same in the first instance. It is only after the Preliminary Objections are dismissed, the Board would then proceed to hear and determine the substantive Request for Review.

The Board will now proceed to the first issue for determination: -

As stated in the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**, jurisdiction is everything and without it, a court or any other decision making body has no power to make one more step the moment it holds that it has no jurisdiction.

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** held that:

***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise***

***jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."***

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:

***"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. "***

Accordingly, once a jurisdictional issue is before a court or a decision making body, it must be addressed at the earliest opportune moment and it therefore behooves upon this Board to determine whether it has the jurisdiction to entertain the substantive Request for Review.



The jurisdiction of this Board flows from section 167 (1) of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act") which provides that:-

***"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed"***

The Board observes that section 167 (1) of the Act has two limbs within which a candidate or tenderer may file a request for review namely;

- **Within fourteen days of notification of award; or**
- **Within fourteen days from the date of occurrence of an alleged breach at any stage of the procurement process, or disposal process.**

The Board considered the use of the word 'or' and notes that the Concise Oxford English Dictionary (11 Edition, Oxford University Press) defines "or" as a ***'conjunction used to link alternatives.'***

Applying the foregoing construction, the Board notes that the use of the word “or” in section 167 (1) of the Act connotes a conjunction that gives alternatives. The first option which an aggrieved candidate or tenderer has, is to file its Request for Review within fourteen (14) days of notification of award. The alternative option is to file a Request for Review within fourteen (14) days from the date the aggrieved candidate or tenderer learns of the alleged breach by the Procuring Entity at any stage of the procurement process or disposal process.

The jurisdiction of this Board was challenged by the 2<sup>nd</sup> Interested Party who contended that due to the nature of the amendments to the Request for Review filed on 7<sup>th</sup> February 2020, the Amended Request for Review filed on 20<sup>th</sup> February 2020 amounted to a fresh/new request for review which was filed outside the statutory period of fourteen days as provided under section 167 (1) of the Act.

The Board notes that in order to determine the time when the Applicant ought to have filed its Amended Request for Review, we find it necessary to give a brief background to the subject procurement process and the proceedings before this Board.

The Procuring Entity, through a Request for Proposals, invited interested and eligible tenderers to submit their bids with respect to the subject

tender on 5<sup>th</sup> November 2019. By the tender closing date of 20<sup>th</sup> December 2019, the Procuring Entity received a total of four (4) bids which were evaluated by the Procuring Entity's Evaluation Committee.

Upon conclusion of the evaluation process, the Procuring Entity's Evaluation Committee recommended award of the subject tender to the 2<sup>nd</sup> Interested Party herein, that is, M/s Erdemann Property Limited.

The Accounting Officer approved the recommendations made by the Evaluation Committee, having been reviewed by the Head of Procurement function. All successful and unsuccessful bidders were duly notified of the outcome of their bids via letters dated 20<sup>th</sup> January 2020.

On 29<sup>th</sup> January 2020, the Applicant received its letter of notification of unsuccessful bid which reads as follows: -

***"Further to your response to the above referenced tender dated 20<sup>th</sup> December 2019, the Export Processing Zones Authority wishes to inform you that you were not successful.***

***Your results for Evaluation Score***

<b><i>No</i></b>	<b><i>Description</i></b>	<b><i>Score</i></b>	<b><i>Weighted</i></b>
<b><i>1</i></b>	<b><i>Technical Score</i></b>	<b><i>86.625</i></b>	<b><i>34.65</i></b>
<b><i>2</i></b>	<b><i>Financial Score</i></b>	<b><i>86.2</i></b>	<b><i>52.465</i></b>

	<i>Total</i>		<i>87.115</i>
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***Your score was second lowest.***

***The Export Processing Zones Authority takes this opportunity to thank you for having shown interest in working with the Authority and wish you well in your business endeavors.***

***Attached please find a copy of the original letter sent via post.”***

Aggrieved with the Procuring Entity’s decision, the Applicant filed its Request for Review on 7<sup>th</sup> February 2020.

Upon being served with the Request for Review on 10<sup>th</sup> February 2020, the Procuring Entity filed a Memorandum of Response on 18<sup>th</sup> February 2020 and subsequently a Notice of Preliminary Objection to the Request for Review on 19<sup>th</sup> February 2020.

When the Request for Review came up for hearing before the Board on 19<sup>th</sup> February 2020, the Applicant sought an adjournment in order to file a

response to the Procuring Entity's Preliminary Objection, which was served upon the Applicant on the hearing date.

The Board granted the adjournment and directed the Applicant and 1<sup>st</sup> Interested Party to file and serve all parties with their further statements in support of the Request for Review by close of business on 21<sup>st</sup> February 2020. The Procuring Entity and 2<sup>nd</sup> Interested Party were also directed to file their further responses to the Request for Review by close of business on 25<sup>th</sup> February 2020. A second hearing was then scheduled for 26<sup>th</sup> February 2020 at 12 noon where the matter would proceed by the Board first hearing and determining the Preliminary Objection, before proceeding with the substantive matter, if need be.

On 20<sup>th</sup> February 2020, the Applicant proceeded to file an Amended Request for Review before the Board.

The Board considered the decision of the High Court in the case of **Institute for Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR**, where the Honorable Justice Lenaola, (as he then was), Ngugi and Majanja, JJs. stated as follows: -

***"The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false***

***hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”***

However, as was explained by the Honourable Justice Thande in **Judicial Review No. 21 of 2019, Republic v Public Procurement Administrative Review Board v Kenya Ports Authority & Another ex parte Jalaram Industrial Suppliers Limited (2019) eKLR: -**

***“It is however well settled that the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party. In the case of Orbit Chemical Industries Ltd v National Bank of Kenya Limited [2006] eKLR, Azangalala, J. (as he then was) considered the issue of amendments of pleadings. He cited the holding of the Court of Appeal in Eastern Bakery – v – Castelino [1958] E.A. and stated:***

*The court further cited with approval the English case of Weldon – vs – Neal (6) [1887] 19 Q.B.D. 394 where it was held:*

*"The court will refuse leave to amend where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ."*

***Following Azangalala, J and duly guided by the Court of Appeal in the Eastern Bakery case (supra), I find that by allowing the Interested Party to amend the Request for Review to include the omitted parties, the Respondent deprived the Ex Parte Applicants of a defence that had accrued to them. The Respondent in effect assisted the Interested Party to steal a march over the Ex Parte Applicants."***

Accordingly, the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party. Moreover, a court or adjudicating body should refuse leave to amend where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment.

In the instant case, the Board notes, the Applicant filed an Amended Request for Review on 20<sup>th</sup> February 2020, without seeking leave from the Board to amend its pleadings. The Board further notes that the Applicant filed its Amended Request for Review after its initial Request for Review filed on 7<sup>th</sup> February 2020 was challenged by the Procuring Entity, through its Preliminary Objection which it filed on 19<sup>th</sup> February 2020.

In the Board's view, this Amended Request for Review was clearly prompted by the Procuring Entity's Notice of Preliminary Objection filed on 19<sup>th</sup> February 2020 and in essence deprived the Procuring Entity of a defence that had accrued to it by the time it filed its preliminary objection. The Procuring Entity was further deprived the opportunity to respond to the Amended Request for Review as filed by the Applicant on 20<sup>th</sup> February 2020.

Nevertheless, the Board examined the Request for Review filed on 7<sup>th</sup> February 2020 and notes that the cause of action therein is between two parties, that is,

***"Afra Holdings Limited.....Applicant***

***And***

***Export Processing Zone Authority.....Respondent"***



The Board further examined the Amended Request for Review filed on 20<sup>th</sup> February 2020 and notes that the cause of action therein is between the following parties, that is: -

***"Afra Holdings Limited.....Applicant***

***And***

***The Accounting Officer,***

***Export Processing Zone Authority.....Respondent***

***And***

***"Property Dynamics.....1<sup>st</sup> Interested Party***

***And***

***Erdemann Property Limited.....2<sup>nd</sup> Interested Party"***

From the foregoing, it is evident that the cause of action between the parties in the Amended Request for Review filed on 20<sup>th</sup> February 2020 are different from the parties in the initial Request for Review filed on 7<sup>th</sup> February 2020.

In this regard therefore, the Amended Request for Review filed on 20<sup>th</sup> February 2020 amounted to a fresh/new Request for Review, noting that the Amended Request for Review was filed against new parties not included in the initial Request filed on 7 February 2020.

Having found that the Amended Request for Review amounted to a fresh/new request for review, the question that the Board must now answer is when did an alleged breach of duty occur for the fourteen-day period under section 167 (1) of the Act to start running

The Board observes that the Procuring Entity's decision to award the subject tender was communicated to all bidders via letters dated 20<sup>th</sup> January 2020. This therefore means an alleged breach of duty could only occur as at this date when the Applicant was notified that its tender was not successful and an award had been made, thereby necessitating the Applicant to lodge its Request for Review within fourteen (14) days from notification of award.

This decision became known to the Applicant when it received its letter of notification of unsuccessful bid on 29<sup>th</sup> January 2020.

Given that the Amended Request for Review was filed on 20<sup>th</sup> February 2020, which was twenty two days after the date the Applicant received its letter of notification of the outcome of its bid from the Procuring Entity, the Board finds that the Amended Request for Review was filed outside the statutory period under section 167 (1) of the Act.

The Board therefore holds that it lacks the jurisdiction to entertain the substantive issues raised in the Amended Request for Review filed on 20<sup>th</sup> February 2020.

The Board will now proceed to determine: -

***Whether the Request for Review filed on 7<sup>th</sup> February 2020 is fatally incompetent for the Applicant's failure to join the Accounting Officer as a party to the Request for Review***

Before addressing our minds to the second issue for determination, this Board would like to make an observation that the first limb and the second limb of the second issue for determination are closely related in the sense that the Procuring Entity and the 2<sup>nd</sup> Interested Party challenged the Applicant's failure to join the Accounting Officer of the Procuring Entity as a party to the Request for Review. Secondly, the 2<sup>nd</sup> Interested Party further challenges the Applicant's failure to join the Chief Executive Officer of the Procuring Entity.

The Board heard submissions from the Applicant that the Board should be guided by Article 159 (2) (d) of the Constitution of Kenya, 2010 which provides: -

***"In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***

***(a).....***

***(b).....***

***(c).....***

***(d) justice shall be administered without undue regard to procedural technicalities;*** [Emphasis by the Board]

The Applicant submitted that in the spirit of public procurement law as articulated under section 3 of the Act and Article 227, 201 and 10 of the Constitution of Kenya 2010, the Board should not be limited by procedural technicalities. The Applicant contended that the Preliminary Objections before the Board were an attempt to prevent the Board from determining the Request for Review on its merits and hinder substantive justice to the Applicant.

The Applicant further submitted that the Constitution of Kenya, 2010 increased the locus of parties that can approach an adjudicating body and

in its view, no prejudice or harm would be suffered by the Board allowing the Request for Review to be heard on its merits.

The Board notes a determination on this issue falls squarely on interpretation of section 170 (b) of the Act which states as follows:-

***"Parties to review***

***The parties to a review shall be—***

- (a) .....***;
- (b) the accounting officer of a procuring entity;***
- (c) .....***;
- (d) ....."***

The Board considered the use of the word "shall" in the above section and studied the High Court's interpretation of the same in ***El Roba Enterprises Limited & 5 others v James Oyondi t/a Betoyo Contractors 5 others [2018] eKLR***, where the Honorable Justice Ogola stated as follows: -

***'In my view, there must be a reason as to why Parliament saw it fit to introduce the accounting officer of the procuring entity as a necessary party to the review. A keen reading of Section 170 of the Act reveals that the term "shall" is used. According to the Black's law dictionary the term "shall" is***

***defined as "has a duty to; more broadly, is required". As such the provision should be read in mandatory terms that the accounting officer of a procuring entity must be a party to a review.'***

***Parties form an integral part of the trial process and if a party is omitted that ought not to be omitted then the trial cannot be sustained. In this case, the omission of the accounting officer of the procuring entity from the applications filed before the 5<sup>th</sup> Respondent is not a procedural technicality. The Applicants (the 1st and 2nd Respondents herein) in the review applications ought to have included the accounting officer of the procuring entity in the proceedings before the 5<sup>th</sup> Respondent. The failure to do so meant that the 5<sup>th</sup> Respondent could not entertain the proceedings before it. The 5<sup>th</sup> Respondent ought to have found review applications No. 76 of 2017 and 77 of 2017 to be incompetent and dismissed the applications."***

This position was affirmed by the Court of Appeal in **James Oyondi t/a Betojo Contractors & another v El Roba Enterprises Limited & 8 others [2019] eKLR** where the Court stated as follows:

***"It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replace it, the PPADA, requires***

*that the accounting officer of the procuring entity, be the party. Like the learned Judge we are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is where the Board's importation of the law of agency floundered. When the procuring entity was the required party, it would be represented in the proceedings by its officers or agents since, being incorporeal, it would only appear through its agents, though it had to be named as a party. Under the PPADA however, there is no such leeway and the requirement is explicit and the language compulsive that it is the accounting officer who is to be a party to the review proceedings. We think that the arguments advanced in an attempt to wish away a rather elementary omission with jurisdictional and competency consequences, are wholly unpersuasive. When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply.'*

Citing the above two decisions, the Honorable Justice Thande in **Judicial Review No. 21 of 2019, Republic v Public Procurement Administrative Review Board v Kenya Ports Authority & Another**

**ex parte Jalaram Industrial Suppliers Limited (2019) eKLR** (hereinafter referred to as "JR No. 21/2019") held as follows:-

***"In the instant case, the Request for Review was incompetent from inception for failure to enjoin mandatory parties. An incompetent request for review is for striking out and cannot be cured by amendment. The Respondent could not exercise its powers under Section 173 of the Act in the absence of a competent Request for Review before it. By purporting to entertain an incompetent Request for Review, the Respondent acted ultra vires its powers. This was the holding in 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] eKLR, where Mativo, J stated:***

*'The Respondent's wide powers under section 173 of the Act can only be invoked if there is a competent Request for Review before it. Invoking powers under section 173 where there is no competent Request for Review or where the Request for Review is filed outside the period prescribed under the law is a grave illegality and a ground for this court to invoke its Judicial Review Powers. As earlier stated, the act prescribes very rigid time frames and since the substance of the Notification was*



*clear, the Interested Party knew at that point in time that its bid had been rejected.*

***It is noted that the Respondent did not strike out the Request for Review but proceeded to entertain the same in spite of the PO raised by the Ex Parte Applicants. It is further noted that the Respondent allowed the Interested Party to amend the same to include the omitted parties. The Interested Party contends that the Respondent acted within its powers and jurisdiction by allowing the amendment and that a party may at any time before judgment be allowed to amend its pleadings. I am in agreement that a party may be granted leave to amend its pleadings at any stage of the proceedings if the justice of the case requires that such leave be granted. Amendment will be allowed to bring out the true facts of a party's case that will assist the Court to make a determination on merit.***

***.....From the foregoing, it is clear that the Request for Review and the amended Request for Review were both incompetent. As a result, the Respondent lacked the jurisdiction to entertain the amended Request for Review which was a nullity. In the circumstances, the Court is satisfied that the Respondent acted ultra vires the jurisdiction conferred upon it by the Act"***

Accordingly, it is clear from the above excerpt that an accounting officer of a procuring entity is a necessary party to a review in accordance with section 170 (b) of the Act. The High Court in JR. No. 21 of 2019 further held that failure by an applicant to include an accounting officer as a party to a request for review rendered the said application incompetent and fatally defective. This holding was reiterated by the Honorable Justice Ogola in **El Roba Enterprises Limited & 5 others v James Oyondi t/a Betoyo Contractors 5 others [2018] eKLR** cited hereinabove whose decision was upheld by the Court of Appeal in **James Oyondi t/a Betoyo Contractors & another v El Roba Enterprises Limited & 8 others [2019] eKLR**, also cited hereinabove.

Further, the Board notes that the Court of Appeal in **James Oyondi t/a Betoyo Contractors & another v El Roba Enterprises Limited & 8 others [2019] eKLR**, was of the view that failure to include the accounting officer as a party to a request for review application was not a procedural technicality, noting that section 159 (2) (d) of the Constitution (as cited by the Applicant herein) was never intended to oust the obligation of litigants to comply with procedural requirements as they seek justice from courts and other adjudicating bodies. In its view, procedural rules and timelines are necessary to ensure that justice is served in a fair, just, certain and even handed manner.

Turning to the circumstances of the case, the Board observes that the parties included in the Request for Review filed on 7<sup>th</sup> February 2020 are as follows: -

***"Afra Holdings Limited.....Applicant***

***And***

***Export Processing Zone Authority.....Respondent"***

The Board observes that the Applicant only included the Respondent as a party to its Request for Review.

The Board however notes that the Public Procurement and Disposal Regulations (hereinafter referred to as the 2006 Regulations), made pursuant to the repealed Public Procurement and Disposal Act, 2005 and which remain applicable in so far as they do not contradict the 2015 Act, still guide applicants to join procuring entities as one of the parties to their review applications hence the reason why applicants still join the "procuring entity" as a party to the Review.

The Board is cognisant of the holding of the Court of Appeal in **Civil Appeal No. 131 of 2018, James Oyondi t/a Betoyo Contractors, John Kivunzi t/a Jona Pestcon & 9 Others** which stated as follows: -

***"It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings***

***the current statute which replaced it, the PPADA, requires that the Accounting officer of the procuring entity, be the party.”***

From the above finding, it is now well settled that despite the 2006 Regulations identifying a procuring entity as a party to a request for review, the necessary party is the accounting officer of the procuring entity as required in section 170 (b) of the Act which expressly states that: -

**“The parties to a review shall be—**

**(a) .....**;

**(b) the accounting officer of a procuring entity;**

In view of the foregoing, it is the Board’s view that the Accounting Officer must be joined as a party to a review application, noting that any orders issued by this Board are taken up by the Accounting Officer, being the person responsible for overseeing the entire procurement process to its conclusion. This does not however mean that “the Procuring Entity” lacks any responsibility to bidders, or that the accounting officer is substituted for the procuring entity. In essence, the Board finds, the Accounting Officer is the necessary party to a review application.

In addressing the second limb of the second issue for determination, which as already noted relates to the first limb of the second issue, this Board observes that the 2<sup>nd</sup> Interested Party raised this issue with respect to the Amended Request for Review which the Board has found to be filed out of time.

Even assuming that the Amended Request for Review was filed within the statutory period under section 167 (1) of the Act, the Board observes that the question whether or not the Applicant ought to have joined the Chief Executive Officer of the Procuring Entity as a party to the Amended Request for Review or even the initial Request for Review, lies in determining the import of section 170 (b) of the Act.

The Board already addressed its mind on the responsibilities of the accounting officer in a procurement process. It is worth noting that section 2 of the Act states that

***"accounting officer has the meaning assigned to it under section 2 of the Public Finance Management Act, 2012 (No. 18 of 2012)"***

On its part, section 2 of the Public Finance Management Act, 2012 (No. 18 of 2012) states that: -

***"accounting officer means***

- a) An accounting officer of a national government entity referred to in section 67;***
- b) An accounting officer of a county government entity referred to in section 148;***
- c) In the case of the judiciary, the Chief Registrar of the Judiciary or***
- d) In the case of the Parliamentary Service Commission***
  - i. The clerk of the senate in respect of the senate***
  - ii. The clerk of the national assembly in respect of the national assembly;***
  - iii. Such other officer in the parliamentary service in respect of any other office in the parliamentary service...."***

Further, section 6 (1) and (2) of the Export Processing Zone Act Chapter 517 of the Laws of Kenya, provides that

***(1) The Minister may, on recommendation of the Authority, appoint a chief executive of the Authority whose conditions and terms of employment including remuneration shall be determined by the Minister***

***(2) The chief executive shall, subject to the general direction and control of the Authority, be charged with the direction of the affairs and transactions of the Authority, the exercise, discharge and performance of its objectives, functions and duties, and the administration and control of the servants of the Authority.***

From the foregoing, the Board observes that a chief executive officer may be appointed by the Minister on recommendation by the Procuring Entity and that the chief executive officer would be charged with the direction of the affairs and the transactions of the Procuring Entity which functions are akin to the functions of an accounting officer of a procuring entity. This therefore means that a chief executive officer is merely the designated title of the holder of the office of the Accounting Officer of the Procuring Entity herein.

Therefore, if an applicant were to initiate request for review proceedings challenging a decision of the Accounting Officer of the Procuring Entity, such an applicant would in essence be challenging the decision of the Chief Executive Officer of the Procuring Entity.

Accordingly, the Board finds that the Applicant was only required to join the Accounting Officer of the Procuring Entity as a party to its Request for

Review for such an application to meet the threshold of section 170 (b) of the Act.

In totality of the first and second limb of the second issue, the Board finds that the Request for Review filed on 7<sup>th</sup> February 2020 is fatally incompetent, for the Applicant's failure to join the Accounting Officer of the Procuring Entity as a party to the Request for Review in accordance with section 170 (b) of the Act.

As opined by the Honourable Justice Mativo in **Miscellaneous Civil Application No. 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru Univeristy Science and Technology; M/s Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR,**

***"The Respondent's wider powers can only be invoked if there is a competent Request for Review before it. Invoking powers under section 173 where there is no competent Request for Review or where the Request for Review is filed outside the period prescribed under the law is a grave illegality and a ground for this court to invoke its Judicial Review Powers."***



As was held in the above case, once this Board finds that a request for review is incompetent, the Board would be committing an illegality to entertain the substantive issues raised in the request for review.

Accordingly, having established that the Request for Review filed on 7<sup>th</sup> February 2020 is fatally incompetent for the Applicant's failure to join the Accounting Officer of the Procuring Entity as a party to the Request for Review, the Board holds that it lacks the jurisdiction to entertain the substantive issues raised in the Request for Review and proceeds to down its tools at this point.

In totality, the Request for Review filed on 7<sup>th</sup> February 2020 is hereby struck out for want of jurisdiction and the Board makes the following orders: -

### **FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

- 1. The Amended Request for Review filed by the Applicant on 20<sup>th</sup> February 2020 with respect to Tender No. RFP/EPZA/2019-2020 for Development of Affordable**

**Housing at Athi River Under Joint Venture Partnership is hereby struck out.**

- 2. The Request for Review filed by the Applicant on 7<sup>th</sup> February 2020 with respect to Tender No. RFP/EPZA/2019-2020 for Development of Affordable Housing at Athi River Under Joint Venture Partnership is hereby struck out.**
- 3. The Procuring Entity is at liberty to proceed with the procurement process with respect to Tender No. RFP/EPZA/2019-2020 for Development of Affordable Housing at Athi River Under Joint Venture Partnership to its logical conclusion.**
- 4. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi, this 27<sup>th</sup> day of  
February, 2020**

**CHAIRPERSON**

**PPARB**

**SECRETARY**

**PPARB**

**Delivered in the presence of: -**

- i.** Mr. Busaidy for the Applicant;
- ii.** Mr. Kiprono for the 1<sup>st</sup> & 2<sup>nd</sup> Respondent;
- iii.** Ms. Mwaura for the 1<sup>st</sup> Interested Party;
- iv.** Mr. Muganda for the 2<sup>nd</sup> Interested Party.