

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 5/2020 OF 16<sup>TH</sup> JANUARY 2020**

**BETWEEN**

**PWANI TELECOMMS LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER**

**KENYA PORTS AUTHORITY.....RESPONDENT**

Review against the decision of the Kenya Ports Authority with respect to Tender No. KPA/024/2019-20/ICT for Provision of Internet and MPLS Services for Kenya Ports Authority

**BOARD MEMBERS**

- |                           |              |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa       | -Chairperson |
| 2. Mr. Steven Oundo       | -Member      |
| 3. Mr. Alfred Keriolale   | -Member      |
| 4. Ms. Phyllis Chepkemboi | -Member      |

**IN ATTENDANCE**

- |                         |                              |
|-------------------------|------------------------------|
| 1. Mr. Philemon Kiprop  | -Holding brief for Secretary |
| 2. Ms. Maryanne Karanja | -Secretariat                 |

## **PRESENT BY INVITATION**

### **APPLICANT**

**-PWANI TELECOMMS  
LIMITED**

1. Mr. Kiarie Mungai

-Advocate

### **1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS**

**-THE ACCOUNTING  
OFFICER KENYA PORTS  
AUTHORITY**

1. Mr. Amos Cheruiyot

-Advocate

2. Mr. Ahmed Abdalla

-Senior Procurement Officer

## **INTERESTED PARTIES**

### **A. FRONTIER OPTICAL**

1. Ms, Rebecca Waithera

-In house Counsel

2. Mr. James Ng'ang'a

-Sales

### **B. XTRANET**

1. Mr John Kirungu

-Pre-Sales Manager

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

The Kenya Ports Authority (hereinafter referred to as "the Procuring Entity") advertised Tender No. KPA/024/2019-20/ICT for Provision of

Internet and MPLS Services (hereinafter referred to as “the subject tender”), in MyGov pullout on 3<sup>rd</sup> September 2019. Interested eligible bidders were directed to download the tender documents from the Procuring Entity’s website [www.kpa.co.ke](http://www.kpa.co.ke). Bidders were further advised to regularly visit the Procuring Entity’s website to obtain any additional information/addendum on the tender.

### **Bid Submission Deadline and Opening of bids**

A total of five (5) firms/bidders submitted bids and the same were opened on 15<sup>th</sup> October 2019 in the presence of bidders and their representatives who chose to attend and bids were recorded as follows:

<b>Item</b>	<b>Bidder(s)</b>
1.	Safaricom
2.	Xtranet
3.	Frontier Optical Networks
4.	China Telecom (K) Ltd
5.	Pwani Telecomms Ltd

### **Evaluation of Bids**

The Evaluation Committee conducted evaluation of bids in the following three stages:-

- Preliminary Evaluation
- Technical Evaluation;
- Financial Evaluation.

## **1. Preliminary/Technical Evaluation**

At this stage of evaluation, bids were evaluated against the mandatory requirements as listed in Clause 2.15.1 Instruction to Tenderers (ITT).

Four (4) firms were found non-responsive to the mandatory requirements hence were disqualified from further evaluation process. The remaining one (1) firm met all the mandatory requirements and therefore proceeded to the next stage of technical evaluation.

## **2. Technical Evaluation**

At this stage of evaluation, one (1) bidder was evaluated in accordance with Clause 2.23.4 Instruction to Tenderers of the Tender Document. Bidders were required to score a minimum of 80% at this stage of evaluation to proceed to the next stage of opening and evaluation of financial bids.

The results were as follows:-

### **i. M/s Xtranet Communication Limited – 94%**

The above firm attained the required pass mark of 80% as detailed in the evaluation report and therefore proceeded to the next stage of opening and evaluation of financial bids.

### 3. Financial Evaluation

The financial bid for the above firm, M/s Xtranet Communication Limited, was opened on 22<sup>nd</sup> November 2019 and details of the proceedings were captured in the financial opening minutes.

The Financial Evaluation was done on 28<sup>th</sup> November 2019 and the summary of the total amount/cost quoted by the bidder is as indicated below:-

NO	FIRM	TOTAL AMOUNT QUOTED IN (KES)
1	M/s. Xtranet Communication	<b>130,939,200.00</b>

### The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of subject tender to **M/s Xtranet Communication** for being the only responsive bidder at their total quoted bid price of **Kshs. 130,939,200.00 (One hundred and thirty million, Nine hundred and thirty Nine Thousand and Two Hundred shillings only).**

### Professional Opinion

Pursuant to section 84 (1) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"), the Head of Procurement reviewed the Evaluation Report and concurred with the recommendation of award made by the Evaluation Committee which was approved by the Accounting Officer on 30<sup>th</sup> December 2019.

## **THE REQUEST FOR REVIEW**

M/s Pwani Telecomms Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 11<sup>th</sup> January 2020 and filed on 16<sup>th</sup> January 2020 (hereinafter referred to as "the Request for Review") together with a Verifying Affidavit sworn on 11<sup>th</sup> January 2020 and filed on 16<sup>th</sup> January 2020 (hereinafter referred to as "the Applicant's Affidavit") in addition to a statement also dated 11<sup>th</sup> January 2020 and filed on 16<sup>th</sup> January 2020 (hereinafter referred to as "the Applicant's Statement").

In response, the Kenya Ports Authority (hereinafter referred to as "the Procuring Entity") filed a Response to the Request for Review dated 24<sup>th</sup> January 2020 and filed on 27<sup>th</sup> January 2020 (hereinafter referred to as "the Procuring Entity's Response") together with an Affidavit in Support of the Respondent's Response sworn on 24<sup>th</sup> January 2020 and filed on 27<sup>th</sup> January 2020 (hereinafter referred to as "the Procuring Entity's Affidavit").

The Applicant sought for the following orders in the Request for Review:-

- i. An order for nullification of the entire procurement process in the subject tender including the notification of award dated 3<sup>d</sup> January 2020 addressed to Xtranet Communications Limited and notification of unsuccessful bids dated 3<sup>d</sup> January 2020 to unsuccessful bidders;***

***ii. An order directing the Procuring Entity to tender afresh for Provision of Internet and MPLS services to Kenya Ports Authority;***

***iii. In the alternative, an order directing the Procuring Entity to re-evaluate all the submitted bids within the law;***

***iv. An order condemning the Procuring Entity to pay the costs of the Request for Review to the Applicant.***

During the hearing, the Applicant was represented by Mr. Kiarie Mungai on behalf of the firm of Masika & Koross Advocates whereas the Procuring Entity was represented by its In House Counsel, Mr. Amos Cheruiyot.

## **PARTIES' SUBMISSIONS**

### **The Applicant's Submissions**

In his submissions, Counsel for the Applicant, Mr. Mungai, fully relied on the Request for Review, the Applicant's Affidavit, the Applicant's Statement and supporting documentation thereto.

Mr Mungai submitted that the first ground for review is that the successful bidder did not meet the mandatory requirement as stipulated under Clause 2.15.1 on pages 20 and 21 of the Tender Document. According to this Clause, bidders were required to submit an original copy and two copies of both the technical and financial proposal which was a mandatory requirement under the subject tender. On the date of

opening the tenders, that is, 15<sup>th</sup> October 2019, it was determined that only three of the four bidders had complied with this mandatory requirement. It was therefore the Applicant's submission that the successful bidder only submitted an original and one copy of its bid and therefore failed to comply with the said mandatory requirement, which Counsel submitted was a fact not in contention in these review proceedings.

However, Mr Mungai submitted that on one hand the above requirement was waived by the Procuring Entity with respect to the winning bidder. On the other hand, the Applicant was disqualified based on the requirement for pagination which was also a mandatory requirement under the subject tender and it was therefore the Applicant's submission that the Procuring Entity was applying double standards and discriminating other bidders by waiving a mandatory requirement in favour of one bidder and not another.

Mr Mungai submitted that it was the Procuring Entity's contention that the mandatory requirement it waived with respect to the winning bidder did not go to the substance of the tender which rationale he argued should also have been applied with respect to the Applicant's bid as the requirement for pagination did not also go to the substance of the bid.

On the second ground for review, Counsel referred the Board to section 80 (6) of the Act which provides that evaluation should be carried out within thirty (30) days. According to Counsel, the Procuring Entity



conceded in paragraph six of its Response to the Request for Review that technical evaluation was done on 30<sup>th</sup> October 2019, which was fifteen (15) days after the tender was opened on 15<sup>th</sup> October 2019 and further, that financial evaluation, which is the final stage of evaluation, was conducted on the responsive tenderer on 22<sup>nd</sup> November 2019. It was therefore the Applicant's submission that thirty (30) days after opening the tender lapsed on 15<sup>th</sup> November 2019 and therefore financial evaluation was conducted seven days after the 30 day period had lapsed contrary to section 80 (6) of the Act.

In reference to the preliminary objection raised by the Procuring Entity that the Applicant had failed to include the winning bidder as a party to its Request for Review Application in accordance with section 170 of the Act, Mr Mungai submitted that section 170 as read together with section 167 of the Act required that once an applicant filed its request for review application, the Review Board is required to notify all other parties who participated in the tendering process, including the successful bidder, of the existence of the Request for Review and invite the said parties to the hearing of the matter.

Mr Mungai admitted that the Applicant was aware who the successful bidder was but since the successful bidder was present during the hearing of the review application, the Board should allow its Request for Review.

In response to an enquiry from the Board, Mr Mungai submitted that the Applicant was also disqualified from the bidding process based on another requirement under the Tender Document, that is, the Applicant had not submitted key personnel on the detailed workload. Mr Mungai conceded that the Applicant did provide the list of key personnel but did not provide the said list on the Gantt Chart as required under the Tender Document. Nevertheless, Mr Mungai contended that in the same way the Procuring Entity waived the mandatory requirement with respect to the winning bidder's bid, the Procuring Entity should have applied the same standard with respect to the Applicant's bid.

In response to an enquiry from the Board, Mr Mungai submitted that if the Board found that the Procuring Entity had conducted the evaluation under the subject tender in thirty days, then the Applicant would not ask for a re-tender. In turn he urged the Board to consider the Applicant's alternative prayer that the Procuring Entity should conduct a re-evaluation using the same criteria for all the tenderers and not waive some requirements with respect to certain bidders and apply them strictly for others.

Further, Mr Mungai submitted that it was possible for a procuring entity to waive mandatory requirements as they do not go to the substance of the bid and in support of his submission he referred the Board to its decision in Application No. 5 of 2019. He contended that where a procuring entity elected to waive a mandatory requirement it should apply across the board with respect to all bidders.

In conclusion, he urged the Board to allow the Request for Review and grant the orders therein.

### **The 1<sup>st</sup> & 2<sup>nd</sup> Respondents'/Procuring Entity's Submissions**

In his submissions, the Procuring Entity's In House Legal Counsel, Mr Cheruiyot, fully relied on the Procuring Entity's Response, the Procuring Entity's Affidavit and supporting documentation thereto.

Mr Cheruiyot contended that the Applicant was incorrect in its submissions that the Board had previously held that pagination is a minor deviation. Mr Cheruiyot submitted that the correct position was that according to the Board, pagination was a mandatory requirement and therefore could not be waived by a procuring entity.

With respect to evaluation, Mr Cheruiyot submitted that the evaluation process commenced on 30<sup>th</sup> October 2019 and ended on 28<sup>th</sup> November 2019 and referred the Board to the confidential documents submitted to it with respect to the subject procurement process by the Procuring Entity. Counsel submitted that a signed evaluation report was received by the Head of Procurement on 28<sup>th</sup> November 2019 which demonstrated that evaluation was completed by the said date.

In response to an enquiry from the Board, Counsel submitted that between the tender opening date and the date evaluation commenced,

that is 30<sup>th</sup> October 2019, the Procuring Entity was involved in mobilization of members of the evaluation committee who had to be called in to agree on a date for evaluation due to exigencies of work at the Procuring Entity. Mr Cheruiyot submitted that despite the delay occasioned between the tender opening date and the date evaluation commenced, the tender documents received by the Procuring Entity were safe as they were kept under lock and key at the Managing Director's office.

In response to the Applicant's contention that it was unfair for the Procuring Entity to waive a mandatory requirement with respect to the successful bidder's bid, Mr Cheruiyot submitted that it was a minor deviation that does not go to the heart of the tender and did not affect the contents of the tender. Mr Cheruiyot contended that no other bidder was disqualified on the basis of this mandatory requirement.

Mr Cheruiyot submitted that the purpose of a copy of a tender is to ensure safe custody of a tender and for the purposes of evaluation. It was therefore the Procuring Entity's submission that one original and one copy of the tender would suffice. Mr Cheruiyot submitted that for purposes of evaluation, the original took precedence and the extra copy was for safe custody in case of any eventuality. In this regard therefore, Mr Cheruiyot submitted that this requirement did not affect the content of a tender, specifically the successful bidder's bid. In any event, Mr Cheruiyot submitted that the Procuring Entity suffered no prejudice as a result of the successful bidder submission of one original and a copy of

its bid instead of one original and two copies of its bid as per the requirement in the Tender Document.

In response to an enquiry from the Board, Mr Cheruiyot submitted that the consequence of not complying with a mandatory requirement as per the Tender Document was that the said bid was disqualified from further evaluation. However, as stipulated under Clause 2.20.3 on page 16 of the Tender Document, Mr Cheruiyot submitted that the same Tender Document allowed the Procuring Entity to waive any minor deviation in determining preliminary responsiveness.

Mr Cheruiyot submitted that the purpose of a mandatory requirement was to determine responsiveness and addresses what a procuring entity needs in order to determine responsiveness of bids received under a subject procurement process.

In response to an enquiry from the Board, Mr Cheruiyot submitted that the issue of key personnel with respect to the Applicant's bid was a mandatory requirement noting that the experience and qualifications of the bidder tasked to undertake a particular procurement affected the substance of the tender and therefore could not be waived as a minor deviation.

With respect to its preliminary objection, Mr Cheruiyot referred the Board to the High Court's decision in *El Roba Enterprises Limited and 5*

*Others v. James Oyondi t/a Betoyo Contractors and 5 Others* which was subsequently affirmed by the Court of Appeal in *Petition No. 50 of 2017*.

In conclusion therefore, Mr Cheruiyot urged the Board to find that the Applicant's pleadings before the Board were incompetent and for the Request for Review to be dismissed.

### **The Applicant's Rejoinder**

In a rejoinder, Mr Mungai submitted that the Clause 2.22.5 on page 34 of the Tender Document was clear that evaluation was supposed to commence immediately after tender opening.

In response to the case law submitted by the Procuring Entity in support of its preliminary objection, Mr Mungai contended that in the instant case the successful bidder was clearly notified of the existence of the Request for Review and that the said case law did not apply in the present review proceedings. Counsel urged the Board to consider the decision of the High Court in *Judicial Review Miscellaneous Application No. 358 of 2018 Ministry of Defence Attorney General, PPARB and Kenya Tents Limited* in making its determination on this issue.

Mr Mungai contended that according to the above decision, failure to include a successful bidder as a party to a request for review application was a technical issue and that it was normal practice for the Board to inform all interested parties affected by a request for review that the

same has been filed before the Board. He argued that in the interests of justice and for the Board to be seen that it was executing its functions within Article 227 (1) of the Constitution, he urged the Board to admit the Request for Review noting that the successful bidder is present before it and therefore not excluded from these proceedings.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, the documents before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act") and the oral submissions by all parties to the Request for Review.

The issues for determination are as follows:-

***I. Whether the Request for Review is fatally incompetent for the Applicant's failure to join the successful tenderer as a party to the Request for Review;***

*Depending on the outcome of the above issue: -*

***II. Whether the Procuring Entity evaluated the Applicant's bid in accordance with section 80 (2) of the Act as read together with Article 227 (1) of the Constitution of Kenya***

***2010 with respect to the following mandatory requirement in the Tender Document:***

- a) MR 2: Shall have pages in the whole document numbered in the correct sequence including all appendixes and attachments; and*
- b) MR xi: Provide detailed project plan for the entire project indicating key personnel for each implementation on the Gantt Chart. Provide details of delivery and completion period from the time of receipt of order.*

***III. Whether the Procuring Entity evaluated the successful bidder's bid in accordance with section 80 (2) of the Act as read together with Article 227 (1) of the Constitution of Kenya 2010 with respect to the following mandatory requirement in the Tender Document:***

- a) MR. 4: Shall be submitted in one original and two copies of the original*

***IV. Whether the Procuring Entity evaluated the bids received in the subject tender within the maximum period provided for under section 80 (6) of the Act; and***

***V. Whether the Applicant is entitled to the orders as sought in the Request for Review***



The Board will now proceed to determine the issues framed for determination as follows:

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."***

This finding has also been made in the case of **George Oraro v. Barak Eston Mbaja, Civil Suit No 85 of 1992**, where Ojwang, J (as he then was) observed as follows:-

***"I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection... I am in agreement with learned counsel, Mr.***

***Ougo, that "where a Court needs to investigate facts, a matter cannot be raised as a preliminary point."***

In its submissions, the Procuring Entity raised a preliminary objection requesting the Board to strike out the Request for Review for the Applicant's failure to comply with the express mandatory provisions of section 170 of the Act. It was the Procuring Entity's submission that the Applicant had failed to include the successful bidder as a party to its request for review application contrary to section 170 of the Act which in the Procuring Entity's view, rendered the review application incompetent.

In support of its submissions, the Procuring Entity referred the Board to **Petition No. 50 of 2017 El Roba Enterprises Limited & 5 Others v James Oyindi t/a Betoyo Contractors & 5 Others (2018) eKLR** (hereinafter referred to as Petition No. 50 of 2017) where the High Court addressed the mandatory requirement of parties to a review as stipulated under Section 170 of the Act and held that the accounting officer of a procuring entity must be made a party to a request for review application.

The Procuring Entity further submitted that this position was affirmed in the case of ***James Oyondi t/a Betoyo Contractors & another v El Roba Enterprises Limited & 8 others [2019] eKLR*** where the Court of Appeal while upholding the decision in Petition No. 50 of 2017 found that section 170 of the Act is explicit and the language compulsive in

who should be included as a party to request for review proceedings. It was therefore the Procuring Entity's prayer that the Board should find the Request for Review incompetent and strike it out forthwith.

In response, the Applicant was of the view that in line with Regulation 74 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations"), once an applicant lodges their request for review application, the Review Board is mandated to inform all other parties that participated and are affected by the subject procurement process of the existence of the request for review and subsequently invite them to the hearing of the matter.

The Applicant conceded that it knew the identity of the successful bidder but was of the view that the omission of the successful bidder as a party to its review application should be treated as a mere technicality as the successful bidder was aware of the review proceedings and was present before the Board during the hearing.

The Applicant invited the Board to consider the decision of the High Court in **Judicial Review Miscellaneous Application 358 of 2018 Republic v Principal Secretary, Ministry of Defence & 2 others; Kenya Tents Limited (Interested Party) Ex parte Unique Supplies Ltd [2019] eKLR**. According to the Applicant, if the High Court in this instance had been provided with an affidavit of service demonstrating that the successful bidder had been notified of the request for review, the High Court would not have held that failure to

enjoin the successful bidder in the review proceedings or notify it about the Request for Review was a gross violation of the rules of natural justice, as the successful bidder, had been granted the benefit of a hearing.

The Board having considered submissions by parties on the Preliminary Objection finds that the following issue calls for determination:-

***Whether the Request for Review is fatally incompetent for the Applicant's failure to join the successful tenderer as a party to the Request for Review***

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

***"Parties to review***

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

***(a) the person who requested the review;***

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

***(c) the tenderer notified as successful by the procuring entity; and***

***(d) such other persons as the Review Board may determine."***

The Board considered the use of the word "shall" in the above section and studied the High Court's interpretation of the same 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") when it held as follows:-

***"The requirement that the accounting officer and the successful tenderer to be made parties to a request for review is both statutory and mandatory. Section 170 is couched in mandatory and express terms. It was therefore not open to the Interested Party to pick and choose against which party to file the Request for Review. In the present case, the Interested Party failed to enjoin both the accounting officer of the procuring entity and the successful tenderer as required by law. The Ex Parte Applicants therefore raised the PO challenging this omission."***

***It is well settled that parties form an integral part of the trial process and if any mandatory party listed in Section 170 of the Act is omitted in proceedings then a request for review cannot be sustained. Failure to comply with these express provisions rendered the Request for Review filed by the Interested Party incompetent. No Court or tribunal has jurisdiction to entertain an incompetent claim brought before it."***

***In El Roba Enterprises Limited & 5 others v James Oyondi t/a Betoyo Contractors 5 others [2018] eKLR, Ogola, J. addressed the issue of the mandatory requirement of Section 170 of the Act that the accounting officer of a procuring entity be made a party. He stated as follows and I concur:***

*'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.'*

***The learned Judge went on to state:***

*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 also affirmed in James Oyondi t/Betoyo Contractors & another v El Roba Enterprises Limited & 8 others [2019] eKLR where the Court of Appeal while upholding Ogola, J in the Betoyo case (supra) found that section 170 of the Act is explicit and the language compulsive. 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.'*

***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 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.***

***This was the holding in Institute for Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR,***

***where Lenaola, J. (as he then was), Ngugi and Majanja, JJ. stated:***

*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.*

***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 – Castellan [1958] E.A. and stated:***

***The court further cited with approval the English case of Weldon – v – 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.'*

***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"***

However, the High Court in **Judicial Review Miscellaneous Application No. 356 & 362 of 2015 (Consolidated) Republic v. Public Procurement Administrative Review Board & 2 Others ex parte MIG International Limited & another (2016) eKLR** (hereinafter referred to as "JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015") took a different position and held that:-

***"On the face of the Request for Review, it is clear that there were only two parties to the application and these were the interested party and the procuring entity. Clearly therefore, the Request fell foul of section 96 of the Public***

***Procurement and Disposal Act (i.e. section 170 of the 2015 Act). It is however clear that the applicants were made aware of the said application. The law, as I understand it, is that Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that a party has attempted to comply with the rules but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the proceedings. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect, it has been held, ought not to be treated as nullifying the legal instruments thus affected. In those instances, the court should rise to its calling to do justice by saving the proceedings in issue. See Microsoft Corporation vs. Mitsumi Garage Ltd & Another Nairobi HCCC No. 810 of 2001; [2001] 2 EA 460.***

***In Boyes vs. Gathure [1969] EA 385, it was held by Sir Charles Newbold, P that:***

***"Using an incorrect form of procedure which has, in fact, brought the parties before the court and has, in fact, enabled the parties to present their respective***

*cases to the court is not an incorrect act of such a fundamental nature that it should be treated as if it, and everything consequent upon it, did not exist and never had existed."*

*It is therefore my view that the mere fact that the interested party did not make the applicants [successful bidders] parties to the Request for Review as mandated under the law does not render those proceedings fatally incompetent."*

The two cases cited above were both entertained by the High Court whose decisions are binding on this Board, subject to certain exceptions. The High Court in JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015 took a different position regarding parties to a review compared to the High Court while entertaining JR No. 21/2019.

Regarding the exceptions to the general rule that decisions of higher courts are binding on lower courts, tribunals and other decision making bodies, the court in **Petition No 288 of 2015, Okiya Omtatah Okioti & Another v Attorney General & 2 Others [2015] eKLR** (hereinafter referred to as Petition No. 288 of 2015) held that: -

*"Based on the principle of stare decisis and by virtue of the Supreme Court being at the apex in the hierarchy of the Kenyan Court System its decision is binding on this Court in so far as similar matters are concerned. A court must*

***strictly follow the decisions handed down by higher courts within the same jurisdiction.***

***The circumstances in which a Court may decline to follow a decision which would otherwise be binding on it are limited to (a) where there are conflicting previous decisions of the court or (b) the previous decision is inconsistent with a decision of another court binding on the court; or (c) the previous decision was given per incuriam.***”[Emphasis by the Board]

Noting the above finding in Petition No. 288 of 2015 and the conflicting decisions of the High Court in JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015 and JR No. 21/2019, the Board must first consider the circumstances in each of the two High Court cases, compared with the circumstances of the instant review in order to determine whether or not to decline following a decision which would otherwise be binding on this Board.

The Board studied the decisions of the High Court in JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015 and JR No. 21/2019 and proceeds to make the following findings:-

The genesis of JR No. 21/2019 is Request for Review Application No. 34/2019 which was the subject of proceedings before the Board, before

the matter went to the High Court by way of Judicial Review. In Review Application No. 34/2019, four bidders were determined to be successful bidders. These are:-

- a)M/s Bek Suppliers Ltd;
- b)M/s Synergy Gases Kenya Ltd;
- c)M/s Weldequip Production Ltd;
- d)M/s Tamps Ventures Ltd.

From the Board's file, the matter first came up for hearing on 10<sup>th</sup> April 2019 and notification letters dated 4<sup>th</sup> April 2019 were issued to all bidders who participated in the tender. The attendance sheet of 10<sup>th</sup> April 2019 shows that only the Applicant, the Procuring Entity and another bidder not determined to be successful (i.e. M/s Bol Kenya Plc) were present for the hearing.

The hearing of the matter was stood over to 11<sup>th</sup> April 2019. From the Board's attendance sheet, it is only the Applicant, the Procuring Entity and M/s Bol Kenya Plc who were present for the hearing. On this day, the Board allowed the Applicant to amend its Request for Review and the hearing of the Request for Review was again stood over to 15<sup>th</sup> April 2019.

The Applicant filed its Amended Request for Review on the same date of 11<sup>th</sup> April 2019, whereas the Procuring Entity filed an Amended Response to the Request for Review on the same date. However, the Board notes that it is not clear whether or not all successful bidders

were served with the Amended Request for Review or whether or not they were notified that the hearing of the Request for Review was stood over to 15<sup>th</sup> April 2019.

Nevertheless, it is evident from the Proceedings of Request for Review No. 34/2019 that no successful bidders participated in the proceedings or filed pleadings before the Board. Hence, the court in JR No. 21/2019 observed that the failure by the Applicant to join the successful bidders to its Request for Review was fatal, since none of the successful bidders participated in the proceedings before the Board.

In JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015, the Court noted that the successful bidder had been notified by the Board of the existence of the Request for Review and consequently received a letter of notification from the Board Secretariat informing it of the scheduled date of the hearing of the review application. Further, the successful bidder was present on the hearing date, but contended that the Board had failed to avail other pleadings attached to the filed Request for Review application.

The High Court further addressed the question whether the successful bidder sought an adjournment in order to study the pleadings filed by the Applicant and found that the successful bidder intimated that it was ready to proceed with the hearing and did not suffer prejudice by the Applicant's failure to strictly comply with section 96 (c) of the Public



Procurement and Disposal Act, 2005 (which is now section 170 (c) of the Act).

Accordingly, the Court in JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015 found that the Request for Review was not fatally defective for the Applicant's failure to join the successful bidder as a party to the Request for Review who fully participated in the review proceedings and suffered no prejudice.

Turning to the circumstances of this case, the Board would like to distinguish JR No. 21/2019 from the present Request for Review in that the successful bidder herein, that is, M/s Xtranet Communications Limited received a notification of hearing of the Request for Review on 28<sup>th</sup> January 2020. It then participated in the review proceedings when the matter came up for hearing on 29<sup>th</sup> January 2020 and through its representative, that is, one Mr John Kirungu, informed the Board that it would not be making any submissions during the proceedings.

Unlike the successful bidder in JR No. 21/2019, the successful bidder herein, was notified of the review proceedings and has participated in these proceedings from inception. Hence, the circumstances in the instant review differ from those of JR No. 21 of 2019 but are similar to the circumstances in JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015.

The Board in its examination of section 170 (c) of the Act notes that the mischief that the said section intends to cure is to eliminate instances where a Request for Review is heard and determined by the Board in the absence of a successful bidder who was neither joined as a party to the Request for Review nor notified of the hearing. In such an instance, when the successful bidder becomes aware that a decision on the issue was rendered by the Board, such decision may have adversely affected the award made on the successful bidder.

The failure therefore by an Applicant to join a successful bidder or the failure to notify a successful bidder of the hearing interferes with the successful bidder's right to a fair hearing who subsequently learns that a decision was made against its award. The right to a fair hearing is a principle of natural justice recognized under Article 50 of the Constitution which states as follows: -

***"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."***

This position was articulated by the High Court in **Judicial Review Miscellaneous Application 358 of 2018 Republic v Principal Secretary, Ministry of Defence & 2 others; Kenya Tents Limited (Interested Party) Ex parte Unique Supplies Ltd [2019] eKLR** where the Honourable Justice Mativo opined as follows with respect to section 170 (c) of the Act: -

***"....Natural Justice has by now assumed the importance of being, so to say, "an essential inbuilt component" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement. It ensures a strong safeguard against any Judicial or administrative, order or action, adversely affecting the substantive rights of the individuals.***

***In Local Government Board v. Arlidge, Viscount Haldane observed, "...those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice." (Emphasis added)***

***What is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not.***

***The constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate***

***expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.***

***Section 4 of the Fair Administrative Act re-echoes Article 47 of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Sub-section 4 obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing.***

***Procedural fairness contemplated by Article 47 and the Fair Administrative Action Act demands a right to be heard before a decision affecting ones right is made. The minimum requirement is that the person gets the chance to present his case.***

***....The ex parte applicant was not enjoined as a party in the proceedings before the Review Board. The failure to enjoin the ex parte applicant in the proceedings or notify it about the Request for Review was a gross violation of the Rules of Natural Justice. As the successful bidder, the ex parte applicant was a necessary party in the proceedings. Such a scenario meant granting orders affecting a party without giving it the benefit of a hearing. The Supreme Court of India in Prabodh Verma vs. State of UP and Tridip Kumar Dingal vs. State of WB laid down the law in cases of this nature. The Indian Apex Court held that if a person challenges a selection process, successful candidates or at least some of them are necessary parties."***

The Board notes that similar to JR No. 21/2019, the successful bidder in the abovementioned case was not notified of the request for review proceedings. Here the High Court held that failure to enjoin the ex parte applicant in the proceedings or notify it about the Request for Review was a gross violation of the Rules of Natural Justice as the successful bidder was a necessary party to the proceedings by virtue of section 170 (c) of the Act and therefore the successful bidder was denied the benefit of a hearing and an opportunity to present its case in proceedings in which it had an interest.

The Board notes that in the instant case, the successful bidder's right to a fair hearing has not been affected and finds that the successful bidder

has suffered no prejudice by the Applicant's omission to join it as a party to the Request for Review.

In totality, it is the Board's finding that the Applicant's failure to join the successful bidder to this Request for Review does not make the review application fatally incompetent in this instance, noting the successful bidder was duly notified of the review proceedings and was present and afforded an opportunity to address the Board thereby exercising its right to a fair hearing under Article 50 of the Constitution.

Accordingly, the Preliminary Objection raised by the Procuring Entity fails and the same is hereby dismissed.

The Board will now proceed to entertain the substantive Request for Review.

A brief background to the review is that the Procuring Entity advertised the subject tender on 3<sup>rd</sup> September 2019 and invited interested and eligible bidders to participate in the said tender. On the tender opening date of 15<sup>th</sup> October 2019, the Procuring Entity received a total of five (5) bids which were read out by the Procuring Entity's Tender Opening Committee in the presence of bidders and their representatives.

The Procuring Entity's Evaluation Committee evaluated the bids as received and at the conclusion of the evaluation process, recommended

award of the subject tender to M/s Xtranet Communications Limited who was duly notified of the same. All unsuccessful bidders, including the Applicant, were also notified of the outcome of their bids via letters dated 3<sup>rd</sup> January 2020.

The Applicant's letter of notification of unsuccessful bid from the Procuring Entity read as follows: -

***"Reference is made to your participation in the captioned tender.***

***This is to inform you that pursuant to section 87 (3) of the Public Procurement and Asset Disposal Act, 2015, your bid was not successful because of the following reasons: -***

- i. Page numbering not clearly indicated***
- ii. The detailed project plan did not provide key personnel for each implementation***

***The successful bidder for this tender is M/s Xtranet Communications Limited.***

***We however thank you for your participation in the tender and look forward to working with you in future. Should you require any further clarification, please do not hesitate to contact the office of the undersigned"***

Aggrieved with the Procuring Entity's decision, the Applicant moved the Board through this Request for Review.

Having considered all the documents, pleadings and submissions by parties, the Board must now determine whether the Procuring Entity evaluated the Applicant's bid at Preliminary Evaluation in accordance with section 80 (2) of the Act as read together with Article 227 (1) of the Constitution of Kenya 2010 with respect to the following requirements under the subject tender : -

**Sub issue (a)**

**Whether the Applicant paginated its bid document in the correct sequence in accordance with Mandatory Requirement No 2 of Clause 2.15.1 in the Appendix to Instructions to the Tenderers on page 20 of the Tender Document**

It was the Applicant's contention that its bid document was properly paginated in accordance with the requirement under the Tender Document and therefore unfairly disqualified by the Procuring Entity.

It was the Applicant's submission that in the event the Procuring Entity did find that there was non-compliance by the Applicant with respect to this requirement, it did not affect the substance of its bid and therefore the Procuring Entity ought to have waived this requirement in its favour and treated the same as a minor deviation.



In support of its submission, the Applicant referred the Board to its decision in **Application No. 5 of 2019 Automatic Park Services Limited v Kenya Railways Corporation** where it held that the procuring entity ought to have treated the manner in which the applicant serialized its bid document as a minor deviation pursuant to section 79 (2) of the Act given that the same did not affect the substance of the applicant's bid.

In response, the Procuring Entity submitted that contrary to the Applicant's submissions, the Board has consistently held that pagination of bids is a mandatory requirement and therefore cannot be waived or treated as a minor deviation by a procuring entity.

The Procuring Entity submitted that the Applicant's bid was not clearly paginated and was therefore disqualified from further evaluation for failure to comply with a mandatory requirement under the Tender Document.

Mandatory Requirement No 2 of Clause 2.15.1 in the Appendix to Instructions to the Tenderers on page 20 of the Tender Document reads as follows: -

***"Shall have pages in the whole document numbered in the correct sequence including all appendixes and attachments (Mandatory)"***

***Note: Non-compliance with any MANDATORY requirement will automatically result in disqualification”***

According to the above provision of the Tender Document, a bidder’s entire bid document, including all appendixes and attachments, was required to be paginated in the correct sequence from the first page to the last page. Further, failure to comply with this mandatory requirement would result in disqualification of a bid.

The Board examined the Applicant’s bid and observes that its bid was paginated from page 1 to page 418. However, the Board observes that on some pages the pagination was faint, but still visible upon closer examination.

From the Procuring Entity’s Technical Evaluation Report dated 30<sup>th</sup> October 2019, the Board notes that at the conclusion of Preliminary Evaluation, the Evaluation Committee made the following comments as captured on page 8 of the report: -

***“M/s Pwani Telecomms Limited***

- ***The page numbers were not clearly indicated to ascertain correct sequence”***

From the above excerpt the Board observes that the Procuring Entity’s Tender Evaluation Committee noted that the Applicant’s bid was

paginated but the page numbers were not clearly paginated to ascertain the correct sequence.

It is therefore evident from the observation of the Procuring Entity's Tender Evaluation Committee and our observation as a Board that the Applicant's bid was paginated from the first to the last page, albeit faintly, and the sequence of page numbers could be deduced upon closer examination of its bid.

The Board therefore finds that the Procuring Entity unfairly evaluated the Applicant's bid with respect to Mandatory Requirement No 2 of Clause 2.15.1 in the Appendix to Instructions to the Tenderers on page 20 of the Tender Document, noting that the Applicant duly paginated its entire bid document in accordance with the said mandatory requirement.

### **Sub-issue (b)**

**Whether the Applicant provided a detailed project plan for entire project indicating key personnel in accordance with Mandatory Requirement No xi of Clause 2.15.1 in the Appendix to Instructions to the Tenderers on page 22 of the Tender Document**

Mandatory Requirement No xi of Clause 2.15.1 in the Appendix to Instructions to the Tenderers on page 22 of the Tender Document reads as follows: -

***"Provide detailed project plan for the entire project indicating key personnel for each implementation on the Gantt Chart. Provide details of delivery and completion period from the time of receipt of order (Mandatory)"***

***Note: Non-compliance with any MANDATORY requirement will automatically result in disqualification"***

According to the above provision, bidders were required to provide a detailed project plan indicating key personnel for implementation on the Gantt Chart. Further, failure to comply with this mandatory requirement would result in disqualification of a bid.

The Applicant submitted that it did provide a detailed project plan in its bid but conceded in its submissions that it provided its key personnel next to the Gantt Chart and not on it.

Nevertheless, the Applicant contended that the Procuring Entity ought to have waived this omission on the Applicant's part and treated it as a minor deviation as it did not go to the substance of the tender.

In response, the Procuring Entity contended that the requirement in question affected the substance of the Applicant's bid as it involved a determination as to whether the Applicant had the necessary experience and qualifications to provide the services as procured for by the

Procuring Entity. In this regard therefore, this requirement could not be waived or treated as a minor deviation by the Procuring Entity.

To begin with, the Board examined the Applicant's bid and observes that the Applicant provided as follows with respect to the aforementioned requirement:

- a) On page 179 to page 198 - 'Project plan/Methodology'
- b) On page 199 to 201 – 'Implementation schedule/ Gannt Chart'
- c) On page 203 to 204 – 'Personnel'

From the above outline, the Board observes that the Applicant did not provide the personnel to be involved in implementation of the project on the Gannt chart as required under the Tender Document.

Upon examination of the Procuring Entity's Technical Evaluation Report dated 30<sup>th</sup> October 2019, the Board notes that at the conclusion of Preliminary Evaluation, the Evaluation Committee made the following comments as captured on page 8 of the report: -

***"M/s Pwani Telecomms Limited***

- ***The bidder provided detailed project plan for entire project but did not provide key personnel on the Gannt Chart"***

With respect to the Tender Evaluation Committee's findings, the Board heard submissions from the Applicant that the Procuring Entity ought to have waived this omission and treated it as a minor deviation as it did not go to the substance of the tender.

In its determination of this issue, the Board addressed the question: what is a mandatory requirement and what is its purpose?

The Board notes that section 79 of the Act is instructive on this aspect as it states:-

***"A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."***

Accordingly a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender document.

These eligibility and mandatory requirements were considered by the Honourable Justice Mativo in **Miscellaneous Civil Application 85 of 2018 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**

***"Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets all requirements as set out in the bid***

***document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment or post qualification. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.....***

***.....Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established....."***

Accordingly, a responsive bid is one that meets all the mandatory requirements as set out in the bid document which are in essence the first hurdle that bidders must overcome for further consideration in an

evaluation process. These eligibility and mandatory requirements are therefore considered at the Preliminary and Technical Evaluation stages after which Financial Evaluation is conducted. Further, bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids.

The question that now arises is what is a minor deviation?

Following the definition of a responsive tender as provided hereinabove, section 79 (2) and (3) of the Act provides as follows with respect to minor deviations: -

***"(2) A responsive tender shall not be affected by—***

***(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or***

***(b) errors or oversights that can be corrected without affecting the substance of the tender.***

***(3) A deviation described in subsection (2) (a) shall—***

***(a) be quantified to the extent possible; and***

***(b) be taken into account in the evaluation and comparison of tenders.*** [Emphasis by the Board]

This provision stipulates that the responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document. It further defines a minor



deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

The Honourable Justice Mativo in **Miscellaneous Civil Application 85 of 2018 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** (hereinafter referred to as Miscellaneous Civil Application No. 85 of 2018) considered what amounts to a minor deviation and determined as follows: -

***The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable.***

In this regard therefore, a minor deviation:

- a) Does not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents;

- b) Does not touch on the substance of the tender.
- c) Can be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

The Honourable Justice Mativo in Miscellaneous Civil Application No. 85 of 2018 continued as follows: -

***"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."***

From the foregoing, it is evident that a mandatory requirement cannot be waived by a procuring entity or termed as a 'minor deviation' as a mandatory requirement is instrumental in determining the responsiveness of a bid and is the first hurdle a bid must overcome in order to be considered for further evaluation.

As explained by the Honourable Justice Mativo in the aforementioned decision, it is important for bidders to compete on an equal footing and therefore where a procuring entity waives a mandatory requirement in favour of only one bidder, the same runs contrary to the public procurement principles of fairness and equity as espoused under Article 227 (1) of the Constitution which states as follows: -

***"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective."*** [Emphasis by the Board]

To buttress this point, the High Court in **Miscellaneous Civil Application 140 of 2019 Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR** stated as follows: -

***"It is evident that compliance with the requirements for a valid tender process including terms and conditions set out in the bid documents, issued in accordance with the constitutional and legislative procurement framework, is***

***thus legally required. These requirements are not merely internal prescripts that a bidder or the Respondent may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Mandatory requirements in bid documents must be complied with. Deviations from mandatory bid requirements should not be permissible.***

In the instant case, the Applicant failed to indicate its key personnel on the Gantt Chart as was required under the Tender Document and was therefore disqualified from further evaluation for failure to comply with a mandatory requirement.

The Board therefore finds that the Procuring Entity fairly evaluated the Applicant's bid with respect to Mandatory Requirement No xi of Clause 2.15.1 in the Appendix to Instructions to the Tenderers on page 22 of the Tender Document.

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

***III. Whether the Procuring Entity evaluated the successful tenderer's tender in accordance with section 80 (2) of the Act as read together with Article 227 (1) of the Constitution of Kenya 2010 with respect to the***

***following mandatory requirement in the Tender Document:***

- a) MR. 4: Shall be submitted in one original and two copies of the original*

Mandatory Requirement No. 4 of Clause 2.15.1 in the Appendix to Instructions to the Tenderers on page 21 of the Tender Document reads as follows: -

***"Shall be submitted in one original and two copies of the original. This shall apply to the technical and financial bids (Mandatory)"***

***Note: Non-compliance with any MANDATORY requirement will automatically result in disqualification"***

Accordingly, all bidders were required to submit one original and two copies of their original technical and financial bids. Further, failure to comply with this mandatory requirement would result in disqualification of a bid.

It was the Applicant's contention that the successful bidder, that is, M/s Xtranet Communications Limited submitted one original and one copy of its tender document instead of one original and two copies, contrary to the aforementioned mandatory requirement under the Tender Document. Nevertheless, the Procuring Entity found the successful bidder's bid responsive at Preliminary Evaluation and proceeded to award the subject tender to the said bidder.

The Applicant argued that the Procuring Entity ought to have found the successful bidder's bid non-responsive as per Clause 2.15.1 on page 21 of the Tender Document. In the Applicant's view, the Procuring Entity's waiver of the aforementioned mandatory requirement, in favour of the successful bidder, was discriminatory and unfair to other bidders who participated in the subject procurement process which was further in violation of Article 227 (1) of the Constitution of Kenya, 2010.

In response, the Procuring Entity contended that the submission by the successful bidder of one original and one copy of its tender document instead of one original and two copies was not a material deviation but a minor deviation under the Tender Document and was therefore waived by the Procuring Entity during preliminary evaluation of the tenders. According to the Procuring Entity, this waiver did not impede competition between the bidders or jeopardize in any way the evaluation of any of the bids received under the subject tender.

It was also the Procuring Entity's submission that it suffered no prejudice as a result of the minor deviation.

The Board first examined the Tender Opening Minutes dated 15<sup>th</sup> October 2019 and notes that with respect to the successful bidder's bid, the Procuring Entity's Tender Opening Committee recorded as follows: -

<b>No.</b>	<b>Name of Bidders</b>	<b>Tender Security of Kshs 100,000</b>	<b>Envelope B Submitted/Not</b>	<b>No. of Copies</b>
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		<b>in form of Banker's Guarantee Insurance Guarantee or</b>		<b>Submitted</b>	
02	M/s Xtranet	Resolution Insurance	180 days	✓	2

Notably, the successful bidder submitted two copies of its bid to the Procuring Entity.

The Board then examined the Procuring Entity's Tender Evaluation Report and observes on page 3 of the report that the Evaluation Committee indicated that the successful bidder submitted one original and two copies of its bid, in compliance with Mandatory Requirement No. 4 of Clause 2.15.1 in the Appendix to Instructions to the Tenderers on page 21 of the Tender Document. However, this was contrary to what was received by the Procuring Entity's Tender Opening Committee.

Having established that a mandatory requirement cannot be waived by a procuring entity or termed as a 'minor deviation' since a mandatory requirement is instrumental in determining the responsiveness of a bid, it therefore follows that the successful bidder ought to have been disqualified at Preliminary Evaluation for failure to comply with the said mandatory requirement.

The Board therefore finds that the Procuring Entity failed to evaluate the successful bidder's bid with respect to Mandatory Requirement No. 4 of Clause 2.15.1 in the Appendix to Instructions to the Tenderers on page

21 of the Tender Document in accordance with section 80 (2) of the Act and Article 227 (1) of the Constitution.

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

***IV. Whether the Procuring Entity evaluated the bids received in the subject tender within the maximum period provided for under section 80 (6) of the Act; and***

The Invitation to Tender on page 3 and 4 of the Tender Document indicated that the subject tender was scheduled to open on 27<sup>th</sup> September 2019. However, the Procuring Entity issued an Addendum No. 2 dated 24<sup>th</sup> September 2019 which pushed the tender submission deadline to Tuesday 15<sup>th</sup> October 2019.

According to the Tender Opening Minutes, which the Board observes are not dated, the Procuring Entity received a total of four (4) bids on the tender opening date. The Board studied the Procuring Entity's original/confidential file submitted to it pursuant to section 67 (3) (e) of the Act and notes that the Procuring Entity's Head of Procurement initially appointed a tender evaluation committee via a memo dated 19<sup>th</sup> September 2019 and subsequently issued a further memo dated 26<sup>th</sup> September 2019 appointing a differently constituted tender evaluation committee.

From the Procuring Entity's Tender Evaluation Report and from the Procuring Entity's submissions, it is clear that technical evaluation commenced on 30<sup>th</sup> October 2019 but it is not clear on which date it was finalized.



With respect to Financial Evaluation, the Financial Opening Report indicates that financial bids were opened on 22<sup>nd</sup> November 2019. The Financial Evaluation Report however, is not dated and does not indicate when financial evaluation commenced and on what date it was concluded. However, the said report was stamped received by the Office of the Head of Procurement on 28<sup>th</sup> November 2019.

The Board further notes from the Procuring Entity's original/confidential file that the Head of Procurement function prepared a professional opinion dated 5<sup>th</sup> December 2019 which was stamped received by the Office of the Managing Director on 6<sup>th</sup> December 2019.

Letters of notification of the outcome of evaluation were then prepared on 3<sup>rd</sup> January 2020.

Section 80 (6) of the Act states as follows:-

***"The evaluation shall be carried out within a maximum period of thirty days."***

The above provision does not state when the period of evaluation should start running but specifies that evaluation must be carried out within a maximum period of 30 days. Nevertheless, this provision is couched in mandatory terms and a procuring entity is not at liberty to extend the period within which it conducts an evaluation process.

In this regard, it is important to note that Regulation 15 of Public Procurement and Disposal (Amendment) Regulations, 2013 (Legal Notice No. 109 of 18<sup>th</sup> June 2013) (hereinafter referred to as "the Amendment Regulations") amends Regulation 46 of the 2006 Regulations, which provides that: -

***"Regulation 46 of the principal Regulations is amended by deleting and substituting thereof the following new paragraph:-***

***(1) a procuring entity shall, for purposes of section 66 (6) of the Act, evaluate the tenders within a period of fifteen days after the opening of the tender***

***(2) where a tender is complex, and/or has attracted a high number of tenderers, the accounting officer or head of procurement entity may extend the period for tender evaluation to a further period within the tender validity period but not exceeding thirty more days "***

These Amendment Regulations make reference to section 66 (6) of the repealed Act which read as follows: -

***"The evaluation shall be carried out within such period as may be prescribed."***

The repealed Act did not prescribe the period within which evaluation ought to be conducted but left the same to be specified in the Regulations. For this reason, the 2006 Regulations previously prescribed 15 days which could be extended to a further 30 days as contemplated

by the Amendment Regulations. Both the 2006 Regulations and its 2013 Amendment Regulations were enacted under the repealed Act, whereas the 2015 Act, prescribes a maximum period of 30 days.

Even if the provision of Regulation 15 of the Amendment Regulations is considered, the Board notes that the intention of Regulation 46 (1) of the Amendment Regulations is that evaluation commences after tender opening.

To buttress this point even further, section 176 (1) (c) of the Act states that ***"a person shall not delay without justifiable cause the opening or evaluation of tenders..."*** making it an offence to delay evaluation of tenders without justifiable cause.

The mischief that the legislature must have sought to address is instances where an evaluation process is delayed and the tender validity period lapses thereby denying the public the right to benefit from a procurement process. The public procurement principle of transparency as espoused under Article 227 (1) of the Constitution and the integrity of a procurement process cannot be maintained when tenders are opened on one day and the evaluation process delayed even after an accounting officer has already taken reasonable steps to appoint an Evaluation Committee before the date of opening of tenders.

In this instance, Clause 2.22.5 of Section II Instructions to Tenderers on page 17 of the Tender Document expressly provides as follows: -

***"The tender evaluation committee shall evaluate the tender within 30 days from the date of opening the tender" [Emphasis by the Board]***

This means that the evaluation of tenders by the tender evaluation committee shall be carried out within 30 days from the tender opening date.

Technical evaluation commenced on 30<sup>th</sup> October 2019, that is, fifteen (15) days after the tender opening date and it is not clear when it was finalized. Financial bids were then opened on 22<sup>nd</sup> November 2019, and although it is not clear when financial evaluation was concluded, the financial evaluation report was received by the Procuring Entity's Head of Procurement on 28<sup>th</sup> November 2019. From this narrative of events, it is clear that evaluation of bids took close to a total of forty four (44) days from the tender opening date.

In accordance with section 80 (6) of the Act and Clause 2.22.5 of Section II Instructions to Tenderers on page 17 of the Tender Document, the Board notes that the Procuring Entity ought to have completed evaluation by 14<sup>th</sup> November 2019, that is thirty days from the tender opening date.

The Procuring Entity, through its Counsel, submitted that the reason why evaluation commenced fifteen days after the tender opening date was to allow the Procuring Entity to mobilize the appointed members of the evaluation committee and for all the said members to agree on a

date for evaluation which further delayed the evaluation process due to the exigencies of work at the Procuring Entity's offices.

However, the Board observes that the Procuring Entity's Head of Procurement appointed the Tender Evaluation Committee via a memo dated 26<sup>th</sup> September 2019. Going by this date, the Board notes that the Tender Evaluation Committee was appointed eighteen (18) days prior to the tender opening date. The Board is therefore not persuaded by the Procuring Entity's submissions of what transpired between 15<sup>th</sup> October 2019, being the tender opening date and 30<sup>th</sup> October 2019 to justify why the Procuring Entity took fifteen days to commence evaluation.

The Board notes with great concern that this is not the first instance where the Procuring Entity has delayed commencement of evaluation after the tender opening date. In **PPARB Application No. 75 of 2019 Konecranes Lift trucks AB v Kenya Ports Authority, PPARB Application No. 105 of 2019 Med Marine Kilavuzluk Ve Romorkor Hizmetleri v Kenya Ports Authority** and **PPARB Application No. 133 of 2019 Med Marine Kilavuzluk Ve Romorkor Hizmetleri v Kenya Ports Authority**, we have noted that the Procuring Entity is in the habit of not dating Evaluation Reports and delaying the commencement of the evaluation process.

The Board makes an observation that in **PPARB Application No. 105 of 2019 Med Marine Kilavuzluk Ve Romorkor Hizmetleri v Kenya Ports Authority** we cautioned the same Procuring Entity as follows: -

***"The practice of issuing Evaluation Reports which are not dated must be stopped and procuring entities must sign and date their documents since it is a well-known principle that the authenticity of an undated document becomes doubtful to the reader of the document, and further creates doubt as to the transparency of a procurement process evidenced by the undated Evaluation Reports adduced herein.***

***To demonstrate transparency and accountability, it is the Board's considered view that the Act, the Regulations and the Constitution require the Procuring Entity to begin evaluation immediately after the date of opening of tenders and to issue evaluation reports that indicate clear dates when evaluation commenced and when the same was concluded. "***

The Board observes that despite this caution, the Procuring Entity has yet again failed to date its evaluation reports and in this instance delayed the commencement of the evaluation process.

The Board notes that section 80 (6) cited hereinabove is couched in mandatory terms and it therefore follows that any evaluation conducted beyond the period stipulated under this provision would be rendered null and void.

In view of the foregoing, the Board finds that the Procuring Entity failed to evaluate the bids received in the subject tender within 30 days after the tender opening date contrary to section 80 (6) of the Act and Clause 2.22.5 of Section II Instructions to Tenderers on page 17 of the Tender Document, rendering the evaluation conducted in the subject tender null and void.

The Board now proceeds to the final issue for determination: -

***V. Whether the Applicant is entitled to the orders as sought in the Request for Review***

The Applicant herein urged the Board to direct the Procuring Entity to tender afresh for provision of internet and MPLS services and in the alternative, direct the Procuring Entity to re-evaluate all bids in accordance with the law.

The Board takes cognizance of section 173 (b) of the Act, which states that:-

***“Upon completing a review, the Review Board may do any one or more of the following-***

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

***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings...”***

As earlier observed, section 80 (6) of the Act is couched in mandatory terms and a procuring entity is not at liberty to extend the period within which it conducts an evaluation process beyond a maximum period of thirty days. Hence any evaluation conducted outside the maximum period under the Act is a nullity and amounts to nothing.

In the circumstances therefore, the Board finds that the most appropriate order is to direct the Procuring Entity to re-tender for ‘*Provision of Internet and MPLS Services for Kenya Ports Authority*’.

In totality, the Board holds that the Request for Review succeeds only with respect to the following specific 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 Procuring Entity is hereby directed to re-tender for Provision of Internet and MPLS Services within fourteen (14) days from the date of this decision.**

**2. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi, this 5<sup>th</sup> Day of February 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**

**Delivered in the presence of: -**

- i.** Mr. Kiarie Mungai for the Applicant;
- ii.** Mr. Macharia holding brief for Mr Cheruiyot for the Respondent;
- iii.** Mr. John Kirungu for the successful bidder;