

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 111/2020 OF 30TH JULY 2020

BETWEEN

ZEPHANIA K. YEGO & HARRIS

A. AGINGA T/A Z.K. YEGO LAW OFFICES.....APPLICANT

AND

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....RESPONDENT

Review against the decision of the Independent Electoral and Boundaries Commission with respect to Tender No. IEBC/PRQ/01/2019-2020 for Pre-Qualification for Provision of Legal Services.

BOARD MEMBERS

- | | |
|----------------------------|------------------|
| 1. Arch. Steven Oundo, OGW | -Member Chairing |
| 2. Ms. Phyllis Chepkemboi | -Member |
| 3. Dr. Joseph Gitari | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Phillip Okumu | -Holding brief for Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

The Independent Electoral Commission (hereinafter referred to as “the Procuring Entity”) advertised Tender No. IEBC/PRQ/01/2019-2020 for Pre-Qualification for Provision of Legal Services (hereinafter referred to as “the subject tender”), in the Daily Nation Newspaper, Public Procurement Information Portal (PPIP) and the Procuring Entity’s website.

Bid Submission Deadline and Opening of bids

A total of one hundred and seventy-five (175) firms/bidders submitted pre-qualification bid documents and the same were opened on 12th May 2020 in the presence of bidders and their representatives who chose to attend.

Evaluation of Bids

The Evaluation Committee was appointed vide a memo dated 6th May 2020 and conducted evaluation of bids in the following two stages: -

- Preliminary Evaluation Stage;
- Technical Evaluation Stage.

1. Preliminary Evaluation Stage

At this stage of evaluation, bids were checked for responsiveness and completeness to determine whether they conform to all the eligibility

and mandatory requirements as stipulated in the prequalification document as shown in the table below:

No	Requirements
1.	Submission of one original and one copy of the Pre-Qualification application duly paginated and signed/initialed on every page.
2.	Duly completed and signed pre-qualification submission form.
3.	Duly completed and signed confidential pre-qualification business questionnaire.
4.	Firm profile, providing the following information: <ul style="list-style-type: none"> • Period during which the law firm has been in operation (Waived from Mandatory Requirement} • Number of partners and their standing in the bar in respect of disciplinary issues • Number of associates and their disciplinary standing in the bar in respect of disciplinary issues • Number of paralegal staff • Number of support staff • Type of cases handled by the firm.
5.	A Copy of Certificate of Registration of Practice.
6.	Copies of admission certificates and current practicing certificates of the proprietor, partners and associates
7.	Reference letters on client letterheads from five (5) major clients that the bidders are currently representing, and details of contact persons.
8.	Valid Tax Compliance Certificate.
9.	Submission of audited accounts for the last three (3) years
10.	Letter of good standing of the firm detailing all the Advocates in the firm from the Law Society of Kenya.
11.	Must Show Proof of Valid Indemnity Cover which shall be: <ol style="list-style-type: none"> a) Denomination in Kenya Shillings or in other freely convertible Currency. b) Issued by an insurance Company located in Kenya and registered by Insurance Regulatory Authority c) Valid at closing date of Tender d) Be updated and valid at all times for period of engagement and rendering of services to the Commission

No	Requirements
12.	A Duly Signed Declaration not to engage in corruption made pursuant to section 62 of the Public Procurement and Asset Disposal Act, 2015 indicating that the firm or any of its partners, associates and/or employees will not engage in any corrupt or fraudulent practice and declaration that the firm or any of its partners, associates and/or employees are not debarred from participating in Procurement Proceedings.

Upon completion of preliminary evaluation, one hundred and eight (108) bids were found to be non-responsive to the preliminary requirements hence did not qualify for Technical Evaluation.

Sixty-seven (67) bidders were found to be responsive and were recommended to proceed for Technical Evaluation.

2. Technical Evaluation

At this stage of evaluation, bid documents were assessed in order to determine whether the firms were technically qualified by applying the technical evaluation criteria as indicated in the Pre-qualification document as follows: -

- a) Value of professional indemnity cover
- b) Capacity of the firm (Attach CVs of key personnel proposed for administration and execution of legal briefs).
- c) Briefs handled (indicate nature of briefs handled)
 - i. Employment and Labour Laws Act;
 - ii. Complex Constitutional Litigation;
 - iii. Administrative Law/Judicial Review

- iv. Civil Litigation
 - v. Procurement and Disposal Law related briefs
- d) Provide Reference Letters from six (6) clients for whom similar services are offered

Upon conclusion of Technical Evaluation, Bidder No.36, 108, 119 and 153 failed to meet the minimum required score of 75%. However, sixty-three (63) bidders were found to be technically responsive by attaining the required minimum scores of 75% and were recommended for pre-qualification.

Summary of the Evaluation Results: -

Total No. of responded bidders	Bids that failed at the Preliminary Evaluation stage	Bids that failed at the technical Evaluation stage	Technically qualified bids after technical evaluation
175	108	4	63

The Evaluation Committee’s Recommendation

In view of the evaluation process, the Evaluation Committee recommended that the sixty-three (63) bidders found to be technically responsive to be considered for pre-qualification in line with the criteria outlined in the pre-qualification document.

Professional Opinion

The Deputy Director, Supply Chain Management concurred with the recommendation of award made by the Evaluation Committee which was duly approved by the Accounting Officer on 4th May 2020.

REQUEST FOR REVIEW NO. 113 OF 2020

M/s Zephaniah K. Yego & Harris A. Ayinga T/A Z.K. Yego Law Offices (hereinafter referred to as "the Applicant"), acting in person, lodged a Request for Review dated 29th July 2020 and filed on 30th July 2020 (hereinafter referred to as "the Request for Review") together with a Statement sworn and filed on even date (hereinafter referred to as "the Applicant's Statement"). The Applicant further filed a Supplementary Affidavit dated 14th August 2020 and filed on 17th August 2020 (hereinafter referred to as "the Applicant's Affidavit").

On 18th August 2020, the Applicant filed a Notice of Motion Application together with a Supporting Affidavit both dated 17th August 2020 and further filed an Amended Request for Review Application dated 29th July 2020 on even date.

In response, the Procuring Entity, acting in person, lodged a Letter of Response to the Request for Review dated and filed on 4th August 2020 (hereinafter referred to as "the Procuring Entity's Response").

M/s MKJ Advocates LLP (hereinafter referred to as “the 1st Interested Party”), acting in person, lodged a Supporting Affidavit dated and filed on 14th August 2020.

M/s Morara Apiemi & Nyangito Advocates (hereinafter referred to as “the 2nd Interested Party”), acting in person, lodged a Response to the Request for Review dated and filed on 14th August 2020.

M/s CM Advocates LLP (hereinafter referred to as “the 3rd Interested Party”), acting in person, lodged a Notice of Preliminary Objection dated and filed on 14th August 2020.

M/s B.J. Sawe & Company Advocates (hereinafter referred to as “the 4th Interested Party”), acting in person, lodged a letter in response to the Request for Review dated and filed on 14th August 2020.

M/s James Ngochi Ngugi T/a Ngugi and Company Advocates (hereinafter referred to as “the 5th Interested Party”), acting in person, lodged a Response to the Request for Review dated and filed on 17th August 2020.

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

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- i. An order that the decision of the Respondent dated 25th June 2020 declaring the Applicant’s bid as unsuccessful***

- be set aside and substituted with an order declaring the said bid as successful;***
- ii. An order that the Applicant be pre-qualified for provision of legal services to the Respondent for the period ending June 2023;***
- iii. An order for costs of the review;***
- iv. Such other orders the Review Board may deem fit to issue.***

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").

The Request for Review was filed on 30th July 2020. The Procuring Entity was served with the Request for Review Application on 3rd August 2020.

The Board observes that the one hundred and seventy-five (175) bidders who participated in the subject tender, including the sixty-three (63) successful bidders who qualified for pre-qualification under the subject tender were duly notified via email of the Request for Review Application on 12th August 2020.

Accordingly, the Applicant filed written submissions dated 14th August 2020 on 17th August 2020. The Procuring Entity including all the successful bidders did not file any written submissions.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act,

2015 (hereinafter referred to as "the Act") including the Applicant's written submissions.

The issues that arise for determination are as follows: -

- I. Whether the Amended Request for Review filed by the Applicant on 18th August 2020 was lodged outside the statutory period under section 167 (1) of the Act thus ousting the jurisdiction of this Board;**

Depending on the outcome of the first issue: -

- II. Whether the Request for Review filed by the Applicant on 30th July 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 successful tenderers as parties to the Request for Review

Depending on the outcome of the second issue: -

- III. Whether the Procuring Entity's Response lodged on 4th August 2020 was filed outside the statutory period under Regulation 205 (3) of the Public Procurement and Asset Disposal Regulations, 2020;**

Depending on the outcome of the third issue: -

IV. Whether the Procuring Entity evaluated the Applicant's bid at Preliminary Evaluation Stage in accordance with section 80 (2) of the Act read together with Article 227 (1) of the Constitution with respect to the following mandatory criteria: -

a) MR 1: Submission of one original and one copy of the pre-qualification application duly paginated and signed/initialed on every page

V. Whether the Procuring Entity discriminated against bidders practicing outside Nairobi in the award of the subject tender contrary to Article 227 (1) of the Constitution;

VI. Whether the Procuring Entity has withheld information relevant to the subject tender;

VII. Whether the Applicant is entitled to be furnished with the original and copy of its bid document in respect of the subject tender

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 Amended Request for Review Application.

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 as follows: -

"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 Board notes that in order to determine the time when the Applicant ought to have filed its Amended Request for Review Application, we find it necessary to give a brief background as follows: -

The Applicant filed its Request for Review Application on 30th July 2020. Upon being served with the Request for Review Application on 3rd August 2020, the Procuring Entity filed a Letter of Response on 4th August 2020. The Board observes that one hundred and seventy-five (175) bidders participated in the subject tender and were duly notified via email of the Request for Review Application on 12th August 2020.

On 14th August 2020, the 3rd Interested Party filed its Notice of Preliminary Objection challenging the Board's jurisdiction to hear the

Request for Review Application on the basis that the said application was incompetent by virtue of section 170 (b) & (c) of the Act read together with section 167 (1) of the Act for the Applicant's failure to enjoin mandatory parties.

Thereafter, on 18th August 2020, the Applicant filed a Notice of Motion Application seeking leave to enjoin the Accounting Officer of the Procuring Entity and the sixty-three (63) successful pre-qualified tenderers with respect to the subject tender. It further attached to its Notice of Motion Application an Amended Request for Review filed on 18th August 2020.

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 Honourable 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 18th August 2020, after its initial Request for Review filed on 30th July 2020 was challenged by the 3rd Interested Party, through its Preliminary Objection which it filed on 14th August 2020.

In the Board’s view, this Amended Request for Review was clearly prompted by the 3rd Interested Party’s Notice of Preliminary Objection filed on 14th August 2020 and in essence deprived the 3rd Interested Party of a defence that had accrued to it by the time it filed its preliminary objection. The 3rd Interested Party was further deprived the opportunity to respond to the Amended Request for Review as filed by

the Applicant on 18th August 2020 noting that the Board is required by law to make its determination within 21 days of filing of a Request for Review in accordance with section 171 (1) of the Act and which 21 days in the instant review lapses on the 20th day of August 2020.

Nevertheless, the Board examined the Request for Review filed on 30th July 2020 and notes that the cause of action therein is between two parties, that is,

**"ZEPHANIA K. YEGO & HARRIS
A. AGINGA T/A YEGO LAW OFFICES.....APPLICANT
And
INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION.....RESPONDENT"**

The Board further examined the Amended Request for Review filed on 18th August 2020 and notes that the cause of action therein is between the following parties, that is: -

**"ZEPHANIA K. YEGO & HARRIS
A. AGINGA T/A YEGO LAW OFFICES.....APPLICANT
AND
INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION.....1st RESPONDENT
AND
THE ACCOUNTING OFFICER,**

INDEPENDENT ELECTORAL

**AND BOUNDARIES COMMISSION.....2ND
RESPONDENT**

AND

**CM ADVOCATES LLP.....1ST INTERESTED PARTY
MORARA, APIEMI &**

**NYANGITO ADVOCATES.....2ND INTERESTED PARTY
.....”**

From the foregoing, it is evident that the cause of action between the parties in the Amended Request for Review filed on 18th August 2020 are different from the parties in the initial Request for Review filed on 30th July 2020.

In this regard therefore, the Amended Request for Review filed on 18th August 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 30th July 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 25th June 2020.

By its own admission as captured on paragraph 5 of its Request for Review application, this decision became known to the Applicant when it received its letter of notification of unsuccessful bid on 17th July 2020. This therefore means that an alleged breach of duty could only occur as at this date when the Applicant was notified that its tender was not successful, thereby necessitating the Applicant to lodge its Request for Review within fourteen (14) days from notification of award.

Given that the Amended Request for Review was filed on 18th August 2020, which was thirty-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 18th August 2020.

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."

The Board observes that the 3rd Interested Party lodged a Notice of Preliminary Objection dated and filed on 14th August 2020 alleging as follows: -

"1. The proceedings before the Review Board are incompetent and have been commenced in violation of sections 170 (b) & (c) as read with section 167 (1) of the Public Procurement and Asset Disposal Act, 2015 and Article 24 (1), 47, 50 (2) and 227 of the Constitution for failure to enjoin mandatory parties.

2. The subject Request for Review is fatally and incurably defective and should therefore be dismissed in limine with costs."

Having considered parties' submissions, the Board will now address the second issue for determination as follows: -

The Board notes a determination on this issue falls squarely on an 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 provision 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 Honourable 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 5th 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 5th Respondent. The failure to do so meant that the 5th Respondent could not entertain the proceedings before it. The 5th 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 Betoyo 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 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** (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 foregoing decisions that an accounting officer of a procuring entity is a necessary party to a request for review application 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 Honourable 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.

Turning to the circumstances of the case, the Board observes that the parties to the Request for Review Application filed by the Applicant on 30th July 2020 are as follows: -

"ZEPHANIA K. YEGO & HARRIS

A. AGINGA T/A YEGO LAW OFFICES.....APPLICANT

And

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....RESPONDENT”

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

In view of the foregoing, it is the Board’s considered view that the Accounting Officer must be joined as a party to a request for 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 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 a necessary party to a request for review application.

It is therefore the finding of this Board that the Request for Review Application filed by the Applicant on 30th July 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.

Notably, the Honourable Justice Mativo in **Miscellaneous Civil Application No. 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University Science**

and Technology; M/s Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR opined as follows: -

"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."

Accordingly, once the Board finds that a request for review application is incompetent, it would be committing an illegality to entertain the substantive issues raised in the request for review.

Having established that the Request for Review filed on 30th July 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.

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: -

- 1. The Amended Request for Review filed by the Applicant on 18th August 2020 with respect to Tender No. IEBC/PRQ/01/2019-2020 for Pre-Qualification for Provision of Legal Services be and is hereby struck out.**

- 2. The Request for Review filed by the Applicant on 30th July 2020 with respect to Tender No. IEBC/PRQ/01/2019-2020 for Pre-Qualification for Provision of Legal Services be and is hereby struck out.**

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

Dated at Nairobi, this 19th Day of August, 2020

CHAIRPERSON

SECRETARY

PPARB

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