

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 42/2021 OF 30TH MARCH 2021

BETWEEN

WINGUARD SERVICES LIMITED.....APPLICANT

AND

KENYATTA NATIONAL HOSPITAL.....1st RESPONDENT

**THE ACCOUNTING OFFICER,
KENYATTA NATIONAL HOSPITAL.....2nd RESPONDENT**

Review against the decision of the Accounting officer of Kenyatta National Hospital in respect of Tender No. KNH/T/101/2020-2021 for Procurement for Provision of Security Services.

BOARD MEMBERS:

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Qs. Hussein Were | -Member |
| 3. Mr. Alfred Keriolale | -Member |
| 4. Mr. Jackson Awele | -Member |
| 5. Ms. Isabella Juma, CPA | -Member |

IN ATTENDANCE:

- | | |
|------------------------|----------------------------------|
| 1. Mr. Philomen Kiprop | -Holding brief for the Secretary |
|------------------------|----------------------------------|

BACKGROUND TO THE DECISION

The Bidding Process

Kenyatta National Hospital (hereinafter referred to as "the Procuring Entity") invited sealed tenders for Tender No. KNH/T/101/2020-2021 for

Procurement for Provision of Security Services (hereinafter referred to as "the subject tender") through an advertisement published in MyGov Newspaper on 16th February 2021.

Bid submission deadline and opening of bids

The bids were opened on 9th March 2021 by a Tender Opening Committee in the presence of bidders' representatives. The same were recorded as follows: -

Bid No.	Bidder Name
1.	M/s Real Race Security Services Ltd
2.	M/s Alert Guard Services Ltd
3.	M/s Ismax Security Ltd
4.	M/s Bobby Guards Ltd
5.	M/s Tursec Security Ltd
6.	M/s Bedrock Security Services Ltd
7.	M/s Marshall Guards Limited
8.	M/s Inter Security Services Limited
9.	M/s Security 24 Limited
10.	M/s Flash com security ltd
11	M/s Anchor Security
12	M/s Secureman Services Ltd
13	M/s Kleen Homes Security Services ltd
14	M/s Ken Watch Security Services ltd
15	M/s Radar Limited
16	M/s Hatari Security quard limited
17	M/s Winguard Services Ltd
18	M/s Brink Security services ltd
19	M/s Gyto Security Services ltd
20	M/s Pelt Security services ltd
21	M/s Pride King Services ltd
22	M/s Lavington Security Ltd

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was undertaken in the following three stages: -

i. Mandatory Requirements/Preliminary Evaluation;

ii. Technical Evaluation; and

iii. Financial Evaluation.

1. Preliminary Evaluation

At this stage, the Evaluation Committee subjected the 22 bids received to the criteria outlined in Clause (A). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document. At the end of Preliminary Evaluation, the following four (4) bidders were found responsive and thus proceeded to Technical Evaluation: -

- Bidder 3, M/s Ismax Security Limited;
- Bidder 20, M/s Pelt Security Services Ltd;
- Bidder 21 M/s Pride Kings Services Ltd; and
- Bidder 22 M/s Lavington Security Ltd.

2. Technical Evaluation

At this stage, the Evaluation Committee subjected the remaining 4 bids to the criteria outlined in Clause (B). Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document which required bidders to achieve a minimum technical score of 75% to proceed to Financial Evaluation. At the end of Technical Evaluation, 3 bidders achieved the minimum technical score specified in the Tender Document and thus qualified for Financial Evaluation.

- Bidder 3, M/s Ismax Security Limited;

- Bidder 21, M/s Pride Kings Services Ltd; and
- Bidder 22, M/s Lavington Security Ltd

3. Financial Evaluation

At this stage, the Evaluation Committee subjected the remaining 3 bids to the criteria outlined in Clause (C). Financial Evaluation of the Appendix to Instructions to Tenderers of the Tender Document. Award of the subject tender would be recommended to the bidder who submitted the lowest evaluated price as stated in the Award Criteria specified in clause 2.24.3 the Appendix to Instructions to Tenderers of the Tender Document. The Evaluation Committee found that the price of Kshs. 66,502,800/- submitted by Bidder No. 3, M/s Ismax Security Limited was the lowest evaluated price.

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Ismax Security Limited at its tender price of Kshs. 66,502,800/- having determined the said bidder submitted the lowest evaluated tender price.

Professional Opinion

In a professional opinion dated 12th March 2021, the Procuring Entity's Chief Executive Officer reviewed the manner in which the subject procurement process was undertaken including evaluation of bids. He stated that he had considered the subject of procurement and it was his opinion that it satisfied the requirements of Article 227 (1) of the Constitution and the statutory requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020").

He endorsed the Evaluation Committee's recommendation of award of the subject tender to M/s Ismax Security Limited at its tender price of Kshs. 66, 502, 800/- for being the lowest evaluated bidder in price. The professional opinion was approved by the Procuring Entity's Chief Executive Officer on 12th March 2021.

Notification to Bidders

In letters dated 15th March 2021, the Chief Executive Officer notified all bidders of the outcome of their bids. Further to this, the Chief Executive officer informed bidders that the subject procurement tender had been awarded to M/s Ismax Security Limited.

THE REQUEST FOR REVIEW

M/s Winguard Services Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 30th March 2021 and filed on the same date together with a Statement sworn on 26th March 2021 and filed on 30th March 2021 through the firm of Mugendi Karigi & Co Advocates, seeking the following orders: -

- 1. An order declaring that the Respondents acted unreasonably and unfairly against the Applicant;***
- 2. An order quashing and annulling the decision of awarding the tender to Ismax Security Limited;***
- 3. An order directing the Respondents to award the tender to the Applicant;***
- 4. An order annulling the letter of regret issued to the Applicant dated 15th March 2021;***

- 5. Such and further orders as the Board may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of the Request for Review; and***
- 6. An order awarding costs of this Request for Review which was necessitated by the incompetence of the Procuring Entity.***

The Respondents lodged a Replying Affidavit sworn on 6th April 2021 and filed on 7th April 2021 together with a Preliminary Objection dated 6th April 2021 and filed on 7th April 2021 through the firm of Kiptinness & Odhiambo Associates LLP. The Respondents Preliminary Objection raised the following issues: -

- 1. That the Application is afoul of the requirements of section 170 of the Public Procurement and Asset Disposal Act for failure to enjoin the successful Tenderer to the Application.***
- 2. The Application is incompetent and defective since the Honourable Board cannot make any adverse orders against the successful tenderer where the same is not a party to the Review application.***
- 3. The failure to add the successful tenderer M/s Ismax Security Limited was egregious omission on the part of the Applicant which ousts the Honorable Board's jurisdiction to issue any adverse orders against a party not before it that will not have been heard***
- 4. The Application is time barred since it was filed outside the 14 days' window period prescribed for filing of Application for Review.***

5. The Application violates sections 5 & 8 of the Oaths & Statutory Declarations Act and Rule 9 of the Oaths & Statutory Declarations Rules by purporting that the Applicant's Statement was signed before a Commissioner for Oaths and whereas the same is not commissioned.

The Applicant further lodged an Amended Request for Review dated 1st April 2021 and filed on 7th April 2021 joining Ismax Security Limited as an Interested Party to the Review and thereafter lodged a Further Statement sworn on 8th April 2021 and filed on 12th April 2021. In response to this, the Respondents filed Grounds of Opposition to the Applicant's "Amended Request for Review" dated 9th April 2021 and filed on 12th April 2021.

The Interested Party lodged a Notice of Preliminary Objection dated and filed on 16th April 2021 together with a Replying Affidavit sworn and filed on even date through the firm of Sagana, Biriq & Company Advocates. The Interested Party's Preliminary Objection raised the following grounds: -

- (1) The Applicant was notified of its unsuccessful bid in the subject tender on 15th March 2021 yet the instant Request for Review was filed by the Applicant on the 30th of March 2021. The Application for Review was filed out of the 14-day timeline stipulated under section 167 (1) of the Public Procurement and Assets Disposal Act 2015 as read with Regulation 203 (2) (c) of the Public Procurement and Asset Disposal Regulations 2020.***

(2) The Amended Request for Review was filed by the Applicant on the 7th of April 2021 out of the 14-day timeline contrary to section 167 (1) of the Public Procurement and Asset Disposal Act 2015 as read with Regulations 203 (2) (c) of the Public Procurement and Asset Disposal Regulations of 2020 and without leave of the Board.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged Written Submissions to the Respondents' Grounds of Opposition dated 12th April 2021 and filed on even date and Written Submissions dated 9th April 2021 and filed on 12th April 2021. The Respondents and Interested Party did not lodge written submissions.

BOARD'S DECISION

After careful consideration of the parties' pleadings, documents in support thereof and confidential documents supplied to the Board by the Procuring Entity pursuant to section 67 (3) (e) of the Act, the Board finds that the following issues crystallize for determination: -

I. Whether the Applicant's Amended Request for Review lodged on 7th April 2021 is properly filed before the Board to invoke the jurisdiction of the Board;

Depending on the outcome of the first issue: -

II. Whether the Applicant's Request for Review lodged on 30th March 2021 was filed within the statutory period specified in section 167 (1) of the Act to invoke the jurisdiction of the Board;

Depending on the outcome of the second issue:-

III. Whether the Request for Review is fatally defective for failure to join the successful bidder as a party to the Request for Review, thus divesting the Board of its jurisdiction;

Depending on the outcome of the third issue:-

IV. Whether the Applicant's bid was evaluated in accordance with the mandatory criteria set out in the tender document; and

V. What are the appropriate orders to grant in the circumstances?

Before the Board addresses the issues framed for determination, the Board would like to dispense with a preliminary issue raised by the Respondents in their Notice of Preliminary Objection filed on 7th April 2021.

At paragraph 5 of the Respondents' Notice of Preliminary Objection, they allege that: -

"The Application violates sections 5 & 8 of the Oaths & Statutory Declarations Act and Rule 9 of the Oaths & Statutory Declarations Rules by purporting that the Applicant's Statement was signed before a Commissioner for Oaths and whereas the same is not commissioned"

Sections 5 & 8 of the Oaths & Statutory Declarations Act states as follows:-

"5. Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made"

8. A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the schedule."

Rule 9 of the Oaths & Statutory Declarations Rules states that:-

"All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked the serial letters of identification."

The Applicant contends at paragraph 10 of its further statement that this ground as raised in the Respondents' Preliminary Objection is farfetched as all documents filed with the Board were duly commissioned and only those

documents sent to the Board on email via Microsoft Word were not commissioned.

The Board perused the Applicant's Statement sworn on 26th March 2021 and filed on 30th March 2021 and notes that the same is sworn by Patrick Mururu, the Applicant's Chief Executive Officer on 26th March 2021 and filed with the Board on 30th March 2021. Further, the Applicant's Statement is commissioned by Wachira J. Ichaura Advocate & Commissioner for Oaths, evidenced by a commissioner for oaths stamp affixed on the jurat (that is, the foot of the Applicant's Statement).

Having considered the above provision, the Board notes that the Applicant's Statement complied with the requirements of section ***5 & 8 of the Oaths & Statutory Declarations Act and Rule 9 of the Oaths & Statutory Declarations Rules.***

Accordingly, the Board finds that the Applicant's Request for Review Application does not violate sections 5 & 8 of the Oaths & Statutory Declarations Act and Rule 9 of the Oaths & Statutory Declarations Rules.

On the first issue framed for determination, the Board would like to point out that once a jurisdictional issue is raised before a court or a decision making body, it must be addressed at the earliest opportune moment. It therefore behooves upon this Board to determine whether it has the jurisdiction to entertain the Amended Request for Review filed by the Applicant.

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the celebrated case of **The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, Justice Nyarangi (as he then was), stated as follows:-

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

In the case of **Kakuta Maimai Hamisi v. 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. "

Similarly, in the case of **Samuel Macharia and Another v. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** the Supreme Court 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."

The jurisdiction of this Board flows from section 167 (1) of the Act which provides that:-

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

Further Regulation 203 of Regulations 2020 provides that:-

"(1)

(2) The request referred to in paragraph (1) shall:-

(a).....

(b).....

(c) Be made within fourteen days of –

(i) The occurrence of the breach complained of, where the request is made before the making of an award;

(ii) The notification under section 87 of the Act; or

(iii) The occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

Regulation 203 (2) (c) of Regulations 2020 expounds on the options available to a bidder as provided in section 167 (1) of the Act in filing a Request for Review by explaining that such a request for review must be filed within fourteen days of; (i) the occurrence of the breach complained of, where the request is made before the making of an award; (ii) the notification under section 87 of the Act; or (iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

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

The Procuring Entity invited interested and eligible tenderers to submit their bids with respect to the subject tender on 16th February 2021. By the tender closing date of 9th March 2021, the Procuring Entity received a total of

twenty-two (22) bids which were evaluated by the Procuring Entity's Evaluation Committee. Upon conclusion of the evaluation process, the Procuring Entity's Evaluation committee recommended award of the subject tender to the Interested Party herein. Upon perusing the professional opinion prepared by the Head of Procurement function, the Chief Executive Officer approved the recommendations made by the Evaluating Committee and awarded the subject tender to the Interested Party. All successful and unsuccessful bidders were duly notified of the outcome of their bids via letters dated 15th March 2021.

Aggrieved by the Procuring Entity's decision, the Applicant filed a Request for Review on 30th March 2021. Upon being served with the Request for Review, the Respondents allege in their Grounds of Opposition that they first sent their Notice of Preliminary Objection to the Applicant on 6th April 2021. The Applicant did not controvert having been served by the Respondent via email but merely clarified that physical service was done to it by the Board on 8th April 2021. From the Board's official email, the Board first received the Respondent's Notice of Preliminary Objection via email on 6th April 2021 as can be seen from the official emails received by the Board through "pparb@ppra.go.ke". Thereafter, the Respondents filed a hard copy of its Notice of Preliminary Objection on 7th April 2021. The Applicant lodged an Amended Request for Review joining M/s Ismax Security Limited as an Interested Party to the Request for Review on 7th April 2021.

The Board considered the decision of Honourable Justice Thande in **Judicial Review No.21 of 2019, Republic v. Public Procurement**

Administrative Review Board, 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 maybe 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, 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) (1987) 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. be 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 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."

From the above decision, the guiding principle in applications for leave to amend is that, all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder as the case may be, does not result in prejudice or injustice to the opposite 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 and in essence act to defeat the opposite party's defence.

In the instant case, the Board notes that, the Applicant filed an Amended Request for Review on 7th April 2020 without seeking leave from the Board to amend its pleadings. This is after the Respondents sent a Notice of Preliminary Objection to the Board and the Applicant on 6th April 2021 before filing the same on 7th April 2021. As already observed by the Board, the Applicant did not controvert the allegation of receiving an advance copy of the preliminary objection via email on 6th April 2021. In essence, the Applicant filed its Amended Request for Review on 7th April 2021 having received an email from the Respondents on 6th April 2021 intimating that, the Respondents would challenge the Applicant's Request for Review through a Preliminary Objection. In the Board's view, the Applicant's Amended Request for Review was clearly prompted by the Procuring Entity's Notice of Preliminary Objection dated 6th April 2021.

Vide and email dated 15th March 2021 and copied to several bidders' email addresses, the Respondents informed several bidders that the notification of intention to award in the subject tender was ready for collection and that

bidders would collect the same on 16th March 2021 from 08.00hrs and 17:00hrs. The said email reads as follows:-

"Good Afternoon,

The above matter refers.

This is to inform you that the notification of INTENTION TO AWARD for the above-named subject is ready for collection. Kindly send someone with a job ID, national Id from room no 6, Supply Chain department on 16/03/2021 between 8 am and 5 am.

Regards

CONTRACTS & RECORDS MANAGEMENT

KENYATTA NATIONAL HOSPITAL

EXT: 43242, 44199"

We however noted that the Respondents copied the Applicant's email as info@winguards.coke in the said email as opposed to info@winguards.co.ke as communicated by the Applicant in its Confidential Business Questionnaire found on pages 084 to 086 of the Applicant's original bid.

In the circumstances, the Respondents email of 15th March 2021 cannot by all means be said to be a notification to enter into a contract envisaged under section 87 of the Act. This leaves the Board with no option but to find

that the notification of intention to award letters dated 15th March 2021 were issued on 16th March 2021 and not 15th March 2021.

In the absence of proof from the Respondents that the Applicant received its letter of notification on 15th March 2021, the Board finds that the decision to award the subject tender became known to the Applicant when it received its letter of notification of unsuccessful bid on 16th March 2021 as alleged by the Applicant and as can be seen from the receiving stamp of 16th March 2021 affixed on the face of the Applicant's letter of notification.

Section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya states that-

"57. In computing time for the purposes of a written law, unless the contrary intention appears-

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;"

A Request for Review ought to be filed within 14 days from notification of the award.

Given that the Amended Request for Review was filed on 7th April 2021, which was twenty-one days after the date the Applicant received its letter of notification of the outcome of its bid from the Procuring Entity, and that the Amended Request for review raises a cause of action against the

Successful Bidder twenty-one days after the date the Applicant had knowledge of who was the Successful Bidder, the Board finds that the Amended Request for Review was filed outside the statutory period under section 167 (1) of the Act.

It is also worth noting that, in an attempt to defeat the Respondents' preliminary objection, the Applicant merely joined the successful bidder as a party (without leave of the Board) but did not attempt to respond to the Respondents' Preliminary Objection.

Having established the Respondents' Preliminary Objection was not controverted, the Amended Request for Review was filed out of time and with the sole aim to defeat the Respondents' accrued defence to the Request for Review as raised in the Respondents' preliminary objection, the Board finds that the Amended Request for Review is not properly filed before it thus, lacks jurisdiction to entertain the Amended Request for Review filed on 7th April 2021. Accordingly, the Amended Request for Review filed by the Applicant on 7th April 2021 is hereby struck out for want of jurisdiction.

The question whether or not the Applicant's Request for Review filed on 30th March 2021 was filed within the statutory period of 14 days under section 167 (1) of the Act will be addressed at this juncture.

The Board has already found that the Respondents' email of 15th March 2021 requesting several bidders to collect their notification letters on 16th March 2021 was not a notification to enter into a contract envisaged under section 87 of the Act and that the Applicant received its letter of notification on 16th March 2021 and not 15th March 2021.

Taking the date of 16th March 2021 into consideration, applying section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya, the fourteen-day period for filing the Applicant's Request for Review started running on 17th March 2021 (since 16th March 2021 is an exclusive day) and the Applicant had up to 30th March 2021 to file its Request for Review. Given that the Applicant filed its Request for Review on 30th March 2021, the Board finds that the same was filed within the statutory period of 14 days specified in section 167 (1) of the Act.

Accordingly, the Board finds that it has the jurisdiction to entertain the Request for Review filed on 30th March 2021 and now proceeds to determine the third issue framed for determination.

A determination of the third issue falls squarely on interpretation of section 170 of the Act which states as follows: -

"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 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 while interpreting section 96 (c) of the Public Procurement Assets and Disposal Act, 2006 (hereinafter the repealed Act) [now section 170 (c) of the Act] 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 [i.e. the Applicant] and the procuring entity. Clearly therefore, the Request fell afoul 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 [i.e. successful bidders] parties to the Request for Review as mandated under the law does not render those proceedings fatally incompetent. "

However, the import of section 170 (c) of the Act was the subject of interpretation by the High Court 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") where it was 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 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...

In the circumstances, the Court is satisfied that the Respondent acted ultra vires the jurisdiction conferred upon it by the Act"

The two cases cited above were both entertained by the High Court. It is evident that the High Court in JR. Miscellaneous Application No. 356 & 362

(Consolidated) of 2015 and in JR No. 21/2019 took different positions regarding joinder of parties in a Request for Review.

Notably, 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."

From the above finding in Petition No. 288 of 2015, and noting the different decisions by the High Court in JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015 and JR No. 21/2019, it is the Board's considered view there is need for the board to consider the circumstances in the instant review in order to make a determination whether or not to strike out the Request for Review for failure to join the Successful Bidder.

In that regard, the Board studied the decisions of the High Court in JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015 and JR No. 21/2019 in comparison with the circumstances of the instant review application and proceeds to make the following observations:-

In JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015, firstly, the Court noted that the successful bidder had been notified by the Board of the existence of the Request for Review. Secondly, that the successful bidder was present on the hearing date, but contended that other pleadings attached to the Request for Review had not been furnished to it. Thirdly, the Court noted that the successful bidder sought an adjournment in order to study the pleadings filed by the applicant in that case and considered that the successful bidder intimated it was ready to proceed with the hearing thus did not suffer prejudice by the applicant's failure to strictly comply with section 96 (c) of the repealed Act [which is now section 170 (c)] of the Act.

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

The Court in JR No. 21/2019 found 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.

The Board would like to note that the mischief that section 170 (c) of the Act intends to cure is to avoid 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 filing and hearing thereof. Later on, the successful bidder learns that a decision was made by the Board, which decision may have adversely affected the award made to the successful bidder.

In those instances, the failure by an aggrieved Applicant to join a successful bidder, or the failure to notify the successful bidder of the hearing interferes with the successful bidder's right to a fair hearing who later 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."

Further, Article 47 of the Constitution which deals with fair administrative action provides the following: -

"47. (1) every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the

right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration”

The successful bidder’s right to a fair hearing (under Article 50) and right to fair administrative action (under Article 47) has not been affected in the instant Request for Review, noting that the purpose of section 170 (c) of the Act has been achieved as evidenced by the successful bidder’s participation in this Request for Review through filing of its pleadings, that is; (a) Notice of Appointment dated 16th April 2021; (b) Notice of Preliminary Objection dated 16th April 2021 and (c) Replying Affidavit dated 16th April 2021.

Accordingly, 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 where the successful bidder has actively participated in these review proceedings, thereby exercising its right to fair administrative action and right to a fair hearing under Article 47 and 50 of the Constitution, respectively. Consequently, the Board has jurisdiction to determine the substantive issues framed for determination.

The Board observes the Procuring Entity’s reason for determining the Applicant’s bid unsuccessful as contained in the Applicant’s letter of notification dated 15th March 2021 is as follows:-: -

"We refer to the above Tender for which you participated and regret to inform you that following preliminary evaluation, your bid was not successful for the following reasons:

1. Page 654-655 repeated serialization

- ***The successful bidder was:***
- ***M/s Ismax Security Limited at Kshs 66,502.800.00 per annum***

You are advised to collect your bid bond (if any) for cancellation, fourteen (14) days from the date of receipt of this notification, at the Supply Chain Department- Room NO.6 during normal working hours.

Notwithstanding the above, we take this early opportunity to thank you for the interest shown in participating in this tender."

The Tender Document provided the criteria under consideration in Clause 2.22 (xvi) of the Appendix to Instructions to Tenderers of the Tender Document and is indicated as follows: -

"A. Preliminary Evaluation Criteria

Tenderers shall be evaluated based on the mandatory requirements indicated below. Bids that are non-responsive to any of the mandatory requirements shall be eliminated from the entire evaluation process and shall not be considered for further evaluation.

(xvi) Original and copy of tender document duly paginated on every page"

It is evident from the above clause that pagination of every page in a bid document was a mandatory requirement at the Preliminary Evaluation Stage.

Under section 74 (1) of the Act, it states:-

"The accounting officer shall ensure the preparation of an invitation to tender that sets out the following:-

- (a).....;***
- (b).....;***
- (c).....;***
- (d).....;***
- (e).....;***
- (f).....;***
- (g).....;***
- (h).....;***
- (i) Requirement of serialization of pages by the bidder for each submitted; and***
- (j).....***

Further, Section 79 (1) of the Act states as follows:-

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

It is worth noting that whereas the Tender Document uses the word "pagination" in describing the criterion under consideration, section 74 (1) (i) of the Act uses the word "serialization" of pages in a bid as part of the

invitation to tender prepared by an accounting officer. This therefore leads the Board to establish whether or not the two terms have the same meaning.

The Oxford Dictionary of English, 9th Edition, defines the term **“serialization”** as: -

“To arrange or publish in serial form”

On the other hand, the word **“serial”** is defined in the same dictionary as:

-

“Consisting of, forming part of, or taking place in a series”

The Board further considered the ordinary meaning of the word **“series”** which we note is also explained in the Oxford Dictionary of English as follows: -

“A series of things or events is a number of them that come one after the other”

The word **“sequence”** is explained in the same dictionary as follows: -

“A series of related things or events, or the order in which things or events follow each other

A Sequence is a list of things (usually numbers) that are in order.”

From the above definitions, the Board observes the word **“sequence”** and **“series”** may be used synonymously in relation to the order in which things or events and in this case, numbers following each other in a given document. Therefore, when a document attached to a bid is numbered page “1”, it would be expected that the next document of that bid would be allocated page “2”, then “3” until the end, thus forming a sequence/series, without omitting some numbers so that a proper sequence or series is

created. Thus, the action of allocating page numbers to a document in order to form a sequence/series is called **serialization**. In doing so, the maker of the document must be careful not to omit/skip some numbers because the moment any of the numbers are omitted, then there would be no proper sequence or series. Subsequently, there would be no proper serialization. As a result, it is expected that if the maker of a document chooses numerical series where figures are used, the author of the document would begin serialization as "1", then continue serialization of the document as "2", "3", "4" up to the end of the document, without omitting some numbers and without changing the manner of serialization.

According to the Oxford Learners Dictionary, 7th Edition, pagination is defined as follows: -

"To give a number to each page of a book, piece of writing, Etc."

The Board notes that the criteria as specified in the Tender Document did not direct bidders to repeatedly paginate their bids. To create a series, it is the Board's considered view that bidders were required to choose one form of pagination and use it throughout their bids without repetition or changing the manner of pagination chosen.

Having considered the manner in which the Applicant paginated its bid on pages "654" (with "006") and "655" (with "007"), it is the Board's considered view that the Applicant's manner of pagination of these two pages does not meet the threshold of Clause (xvi) of the Appendix to Instructions to

Tenderers of the Tender Document read together with section 74 (i) of the Act.

Upon inspection of the Applicant's original bid submitted to the Board, on the specific pages, it is clear that the page paginated as "654" is also paginated as "006". The pagination of "006" was already used earlier in the Applicant's bid. Further, there is a page paginated as "655" and the same is also paginated as "007". The pagination of "007" was already used in the preceding pages at the beginning of the Applicant's bid. The Applicant interfered with the method/manner of pagination on page 654 and 655 by introducing "006" and "007", respectively yet "006" and "007" were already used to paginate the preceding pages of its bid.

It is the Board's considered finding that this manner of pagination does not meet the threshold set in Clause 2.22 (xvi) of the Appendix to Instructions to Tenderers of the Tender Document read together with section 74 (1) (i) of the Act.

The Board makes an observation that from the confidential file, the Director-Supply Chain Management (Head of Procurement function) raised the following issues regarding the Applicant's bid in an Internal Memo dated 11th March 2021:-

"We acknowledge receipt of your tender report on the above subject matter and we have noted the contents therein.

This is to inform you that after review of the tender I noted the following:

- 1. Bidder No. 17- confidential Business Questionnaire part 3(a) and 3(b) was not duly signed**
- 2. Page 030-031 was not sequentially serialized**

This is therefore to request you to review the above tender and consider the issues highlighted and forward the report to facilitate award.

Subsequently, Evaluation Committee in an internal memo dated 11th March 2021 stated as follows:-

"The above matter refers,

The evaluation committee after review of the above mentioned tender found that:

- 1. Bidder No. 17 M/s Winguard Services Limited's Confidential Business Questionnaire part 3 (a) and 3 (b) was not duly signed.***
- 2. Bidder No. 17 Winguard Services Limited did not sequentially serialize page 030-031***
- 3. Documentation between pages 604-605 for bidder No. 17 Winguard Services Limited was not serialized."***

The letter from the Procuring Entity to the Applicant dated 15th March 2021 did not capture the reasons for the Applicant's disqualification indicated in the Evaluation Committee's internal memo dated 11th March 2021.

The Board notes that; (i) the Applicant was informed of only one reason why its bid was non-responsive and (ii) other reasons for the Applicant's bid being

found non-responsive raised by the Director-Supply Chain Management and agreed upon by the Evaluation Committee were not furnished to the Applicant.

Section 87 (3) of the Act states that:-

"when a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof."

Bidders are entitled to the specific reasons why their bids were non-responsive. They are supposed to be furnished with all reasons in order to make an informed decision on whether or not to challenge such reasons.

Regulation 82 of Regulations 2020 states as follows:-

"82. (1) the notification to the unsuccessful bidder under section 87 (3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

(2) for greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

(3) the notification in this regulation shall include the name of the successful bidder, the tender price and

the reason why the bid was successful in accordance with section 86 (1) of the Act”

The Applicant in its Request for Review stated that the subject tender was awarded to an entity that is not authorized to offer Private Security Services contrary to the strict requirements under section 6 of the Private Security Regulations Act No. 13 of 2016 which states as follows:-

“Any person or firm offering private security services shall be registered by the Authority [Private Security Regulatory Authority established by section 7(1) of the Private Security Regulations Act No. 13 of 2016] in accordance with this Act.”

[Emphasis by the Board]

The award criteria as specified in the original Tender documents states the following:-

“Award Criteria

2.24.3. Subject to paragraph 2.29 the Procuring Entity will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily.

2.24.4. The Procuring Entity reserves the right to accept or reject any tender and to annul the tendering process and reject all tenders at any time prior to contract award, without thereby incurring any

liability to the affected tenderer or tenderers or any obligation to inform the affected tenderer or tenderers of the grounds for the procuring entity's action. If the procuring entity determines that none of the tenderers is responsive; the procuring entity shall notify each tenderer who submitted a tender.

2.24.5. *A tenderer who gives false information in the tender documents about its qualification or who refuses to enter into a contract after notification of contract award shall be considered for debarment from participating in future public procurement."*

According to section 80 (2) of the Act

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulations of fees chargeable for services rendered."

The Board has perused the tender document and has not found any criteria for evaluation requiring a successful bidder to be registered by **Private Security Regulatory Authority** under section 6 of the Private Security Regulations Act neither has the Applicant pointed out to the Board such a requirement in the tender document. In the absence of proof that the requirement of a successful bidder to be registered by **Private Security Regulatory Authority** was a criterion for evaluation and/or award of the

subject tender, the Board finds that such a requirement was not a requirement for an award of tender in the subject tender. Section 80 (2) of the Act affirms the position that an evaluation committee ought to stick to the procedures and criteria for evaluation.

Having perused the Evaluation Report furnished by the Procuring Entity, the Board observes that the Interested Party was evaluated and recommended for award based on the criteria set out in the Tender Document read together with section 86 (1) (a) of the Act, without introduction of any extraneous criteria.

Section 86 (1) of the Act states:-

"The successful tender shall be the one who meets any of the following as specified in the tender document-

(a) The tender with the lowest evaluated price;

(b) the responsive proposals with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

(c) The tender with the lowest evaluated total cost of ownership; or

(d) The tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by the Act of Parliament which provides guidelines for arriving at applicable professional charges."

Having found that the Applicant was not given all the reasons why its bid was not successful, the Board deems it fit to cancel the award in the subject tender and direct the Accounting Officer of the Procuring Entity to issue the Applicant with all the reasons why the Applicant's bid was not successful in the subject tender in accordance with section 87 (3) of the Act read together with regulation 82 (3) of Regulation 2020. In totality, the Board issues the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board issues the following orders in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Letters of Notification of unsuccessful bid in Tender No. KNH/T/101/2020-2021 for Procurement for Provision of Security Services dated 15th March 2021 addressed to the Applicant and all other unsuccessful bidders be and is hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. KNH/T/101/2020-2021 for Procurement for Provision of Security Services dated 15th March 2021 addressed to the Interested Party be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby directed to issue the Applicant, all other unsuccessful bidders and the Interested Party with a letter of notification in**

accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020, within seven (7) days from the date of this decision taking into consideration the Board's findings in this Review.

- 4. Given that the subject procurement proceedings have not been concluded, each party shall bear its own costs in this Request for Review.**

Dated at Nairobi this 19th day of April 2021

**CHAIRPERSON
PPARB**

**SECRETARY
PPARB**