

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 106/2024 OF 17TH OCTOBER 2024

BETWEEN

HYPER ATLANTIC TRANSPORTER LIMITED.....APPLICANT
AND
THE KENYA PORTS AUTHORITY.....RESPONDENT

Review against the decision of the Accounting Officer, Kenya Ports Authority in respect of Tender No. KPA/284/2023-24/LP for Provision of Boat and Minibus (25- Seater) Transport Services for Port of Lamu.

BOARD MEMBERS PRESENT

1. Mr. Jackson Awele - Panel Chair
2. Dr. Susan Mambo Member
3. Eng. Lillian Ogombo - Member

IN ATTENDANCE

Ms. Sarah Ayoo - Secretariat
Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT**HYPER ATLANTIC TRANSPORTER LIMITED**

Mr. Willis Oluga Advocate, Oluga & Company
Advocates

RESPONDENT**THE KENYA PORTS AUTHORITY**

Mr. Alakonya

Advocate, Alakonya & Associates

Ms. Nyambura

Advocate, Alakonya & Associates

BACKGROUND OF THE DECISION**The Tendering Process**

1. Kenya Ports Authority, the Procuring Entity together with its Accounting Officer, vide an advert in the MyGov Publication, the Procuring Entity's website (www.kpa.co.ke) and the PPIP Portal (www.tenders.go.ke) invited interested suppliers to submit their bids in response to Tender No. KPA/284/2023-24/LP for Provision of Boat and Minibus (25- Seater) Transport Services for Port of Lamu through an Open Tender method. The tender submission deadline was set as 16th May 2024 at 10:00 a.m.

Submission of Bids and Tender Opening

2. According to the signed Tender Opening Minutes dated 16th May 2024 submitted under the Confidential File submitted by the Procuring Entity, the following ten (10) bidders were recorded as having submitted their bids in response to the subject tender by the tender submission deadline:

#	Name of Bidder
1.	Visual Company Limited

2.	Tawakal Airbus Limited
3.	Ertugrul Enterprise
4.	Sainaj Holdiing Ltd
5.	Ummu Aydarus Enterprise
6.	Gedlinks General Suppliers Company Limited
7.	Lamu Haki Limited
8.	Mwesusa Enterprise
9.	Hyper Atlantic Transporter
10.	Keller Kustoms Kenya Limited

Evaluation of Tenders

3. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received bids in the following 3 stages as captured in the Evaluation Report

- i. Preliminary Evaluation
- ii. Technical Evaluation
- iii. Financial Evaluation

Preliminary Evaluation

4. At this stage of the evaluation, the submitted bids were to be examined using the criteria set out as Clause 2 Preliminary examination for

Determination of Responsiveness under Section III-Evaluation and Qualification Criteria at the pages 33 to 35 of the Tender Document .

5. The evaluation was to be on a Meet/Not meet basis and bids that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
6. At the end of the evaluation at this stage, 4 bids including that of the Applicant were disqualified with only 6 bids qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

7. The Evaluation Committee was required at this stage to examine bids successful at the Preliminary Stage using the criteria set out as Part II- Technical Evaluation Criteria under Section III Evaluation and Qualification Criteria at page 35 of the Tender Document.
8. The bids were to be evaluated against 4 requirements at this Stage. In order for a bid to qualify for further evaluation at the Financial Evaluation Stage, they had to meet all the requirements at this Stage.
9. At the end of the evaluation at this stage, all the 4 bids evaluated at this Stage met the requirements under this stage and thus qualified for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

10. The Evaluation Committee was required at this stage to examine bids successful at the Technical Evaluation Stage using the criteria set out as

Clause 3 Tender Evaluation (ITT 35) under Section III-Evaluation and Qualification Criteria at page 35 of the Tender Document.

11. The evaluation was to be on the basis of a comparison of tender prices indicated in the bids at this stage. The award was to be made to 3 most responsive bidders for boat transport services and 2 most responsive bidders for mini bus services.
12. At the end of the evaluation at this stage, Lamu Haki Limited, Mwesusa Enterprise and Ummu Ayadarus were established as the lowest evaluated bidders with respect to boat transport services. Sainaj Holding Limited and Ertugul Enterprises were established as the lowest evaluated bidders with respect to Minibus (25-seater) transport services.

Evaluation Committee's Recommendation

13. The Evaluation Report dated 20th June 2024 indicates that Evaluation Committee recommended the award of the subject tender to the above successful bidders at their respective tender prices subject to negotiation.

Market Survey

14. The Evaluation Committee carried out market survey and prepared a Market Survey Report dated 16th July 2024 and which forms part of the Confidential File. The report made recommendations on the various rates that were applicable in the circumstance.

Further Evaluation

15. In a Reviewed Evaluation Report dated 4th September 2024 the Evaluation Committee recommended the award of the subject tender to Lamu Haki

Limited, Mwesusa Enterprise and Ummu Ayadarus with respect to boat transport services and Sainaj Holding Limited and Ertugul Enterprises with respect to Minibus (25-seater) transport services.

Professional Opinion

16. In a Professional Opinion dated 8th August 2024 (hereinafter referred to as the " Professional Opinion") the Procuring Entity's General Manager Supply Chain Management , Ms. Eveline I. Shigholi reviewed the manner in which the subject procurement process was undertaken including the evaluation of bids and recommended the award of the subject tender to the successful bidders as proposed by the Evaluation Committee.
17. Subsequently on 9th August 2024, the Accounting Officer, concurred with the Professional Opinion.

Notification to Bidders

18. Accordingly, the bidders were notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 3rd October 2024.

REQUEST FOR REVIEW

19. On 17th October 2024, the Applicant through the firm of Oluga & Company Advocates filed a Request for Review dated 16th October 2024 supported by Statement sworn on 16th October 2024 by Rashid M Said a Director at the Applicant, seeking the following orders from the Board in verbatim:

a) Pending hearing and determination of this Request for Review, there be and is hereby issued an order compelling the accounting officer of the Respondent supply the Applicant with the following documents within two (2)

days of this order:

- i. Tender Opening Register***
- ii. Tender Opening Minutes***
- iii. Letter/ minutes appointing the Tender Opening Committee and the Tender Evaluation Committee***

b) Upon being supplied with the said documents, the Applicant be and is hereby granted leave to amend its Request for Review

c) The procurement proceedings undertaken by the Respondent and/or its accounting officer relating to Tender No. KPA/284/2023-24/LP-Provision of Boat and Minibus (25-Seater) Transport Services for Port of Lamu be and are hereby nullified forthwith

d) Any and all actions done by the Respondent's accounting officer including the notifications of award given or made by the Respondent to any tenderer who participated in Tender No. KPA/284/2023-24/LP-Provision of Boat and Minibus (25-Seater) Transport Services for Port of Lamu be and is hereby annulled, cancelled and set aside;

e) The Respondent and/or its accounting officer be and is hereby ordered to commence and undertake a fresh/new procurement process for Tender No. KPA/284/2023-24/LP-Provision of Boat and Minibus (25-Seater) Transport Services for Port of Lamu by making it clear whether the procurement is for both boat and minibus transport services jointly or for each service separately;

f) Costs of these proceedings be paid to the Applicant by the

Respondent;

g) Any other order the Board may deem just to grant.

20. In a Notification of Appeal and a letter dated 17th October 2024, Mr. James Kilaka, the Ag. Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondent were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 17th October 2024.
21. Vide letters dated 23rd October 2024, the Acting Board Secretary notified all bidders in the subject tender via email, of the existence of the subject Request for Review while forwarding to all bidders a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 23rd October 2024.
22. On 24th October 2024, the Ag. Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 28th October 2024 at 2:30 p.m. through the link availed in the said Hearing Notice.

23. On the same day, 24th October, 2024, the Respondent filed a Notice of Preliminary Objection and a List of Authorities, both dated 23rd October 2024. The said Respondent equally forwarded to the Board the Confidential Documents under Section 67(3) of the Act.
24. On 25th October 2024, the Applicant filed a Reply to the Preliminary Objection and Written Submissions of even date.
25. On 28th October 2024 the Respondent filed Written Submissions dated 24th October 2024
26. On the same day, 28th October 2024, the Applicant filed another set of Written Submissions dated 28th October 2024.
27. On 28th October 2024 at 2:30 p.m., when the Board convened for the online hearing, all parties were present and represented by their respective Advocates. The Board read through a list of the documents filed in the matter and asked parties to confirm having filed and been served the said documents, to which Counsel responded in the affirmative.
28. The Board proceeded to give the order of the address and hearing directions as follows:
 - i. The Respondent's Preliminary Objection shall be heard as part of the Request for Review in line with Regulation 209 of the Regulations 2020.
 - ii. Request for Review No. 102 and 106 of 2024 shall be considered alongside each other.

- iii. The Applicant would start by addressing the Board on both the Request for Review and the Interested Party's Preliminary Objection in 20 minutes.
- iv. Thereafter the Respondent would address both the Request for Review and the Interested Party's Preliminary Objection in 20 minutes.
- v. The Interested Party would then urge its Preliminary Objection in 10 minutes
- vi. The Applicant would offer a rejoinder to the Request for Review in 15 minutes.
- vii. The Respondent and the Interested Party would subsequently close with a rejoinder on the Preliminary Objection in 3 minutes each.

29. Below is a summary of the parties cases as urged by their respective Counsel.

PARTIES SUBMISSIONS

Applicant's Submissions on both the Request for Review and Interested Party's Preliminary Objection

30. Counsel for the Applicant, Mr. Oluga, argued that Section 170 of the Act does not state that a Request for Review is to be lodged against an Accounting Officer but only mentions the parties entitled to participate in the proceedings where a Request for Review is filed. In any event these are parties the Board Secretary is required under the Act to invite to participate in the proceedings. He urged that the manner of filing a Request for Review is to be found at Section 167 of the Act which is to

be in such manner as prescribed. Counsel argues that the prescribed manner is Regulation 203 which requires a Request for Review to be in the form under the Fourteenth Schedule.

31. Mr. Oluga submitted that the said Form identifies the Procuring Entity as the Respondent, which is exactly how the Applicant has framed the instant Request for Review by naming Kenya Ports Authority as the Respondent herein. According to Counsel if it was intended that the Accounting Officer was to be made a Respondent nothing would have been easier than for the Form under the Fourteenth Schedule to indicate the Accounting Officer as a Respondent.
32. Relying on ***PPARB Application No. 42 of 2021; Wingard Services Limited v Kenyatta National Hospital***, Counsel argued that the same way the Board has been excusing Applicant from failing to include successful candidates as parties to proceedings is the same way, they too should be excused from failing to include the Accounting Officer as a party.
33. Mr. Oluga acknowledged that this Board has in numerous decisions been relying on the decisions in ***Mombasa High Court Judicial Review No. 21 of 2019; Republic v PPARB Ex parte Managing Director, Kenya Ports Authority & anor; Jalaram Industrial Suppliers Limited (Interested Party) [2019] eKLR*** and ***Mombasa Court of Appeal Civil Appeal No. 131 of 2018; James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** to strike out Requests for Review that have not included Accounting Officers as parties but urged the Board to find the decisions distinguishable. According to Counsel, the said decisions were made in

the year 2019 before the formulation of the Regulations 2020. Therefore with the coming to force of the Regulations 2020, it was no longer a mandatory requirement that an Accounting officer of a Procuring Entity should be included as a party in a Request for Review.

34. On the merits of the Request for Review, Counsel argued that the Respondent floated a tender on boat and minibus travel services without offering a distinction in the requirements for both services. According to Counsel there ought to have been distinction in respect of the evaluation criteria for bidders wishing to participate in either of the services.
35. Mr. Oluga equally lamented that there were bidders who only placed bids in respect of either services and were allowed to participate in the subject tender with the result that there was differential treatment of the bidders who participated in the subject tender. He further pointed out that Notification Letters were issued to bidders who did not participate in the tender, with some of the successful bidders being entities that were not registered.
36. Counsel argued that the Respondent had breached the Applicant's right to information as the Applicant had sought information that was not supplied.

Respondent's Submissions

37. Counsel for the Respondent, Ms. Nyambura submitted that the Form in the Fourteenth Schedule had a blank space which suggests that it was contemplated that the parties named under Section 170 of the Act would be indicated.

38. Relying on ***Mombasa High Court Judicial Review No. 21 of 2019; Republic v PPARB Ex parte Managing Director, Kenya Ports Authority & anor; Jalaram Industrial Suppliers Limited (Interested Party) [2019]eKLR*** Counsel argued that under Section 170 of the Act, an Accounting Officer is a necessary party to a Request for Review and that the failure to include them rendered a Request for Review as fatally defective.
39. Ms. Nyambura further contended that subsidiary legislation in the form of Regulations 2020 could not be elevated above the express provisions of the Act.
40. Mr. Alakonya, equally appearing for the Respondent submitted on the merits of the Request for Review urging that a public procurement process ought to be predictable, fair, equitable and transparent and that is why Section 70 of the Act required the Public Procurement Regulatory Authority to issue Standard Tender Documents for customization by Procuring Entities.
41. Counsel for the Respondent, Mr. Alakonya contended that the Applicant's bid was disqualified from the subject tender after failing to meet multiple mandatory requirements under the Tender Document and the Applicant had not disputed being non-responsive to the requirements identified in the Notification Letter sent to it. He submitted that non-compliance with mandatory requirements was inexcusable and could not constitute a minor deviation.

42. He urged that the Applicant appears to have misapprehended the requirements in the Tender Document but it failed to seek clarification as provided for in the Tender Document. Counsel invited the Board to look at the requirements under the Tender Document to establish on its own that there were different requirements for boat and minibus travel services.
43. On the Applicant's request for information, Mr. Alakonya submitted that though a request for information was received the same could not be complied with as the information being sought constituted confidential information under Section 67 of the Act.

Interested Party's Submissions on its Preliminary Objection

44. Counsel for the Interested Party, Mr. Okiror, relied on ***PPARB Application 115 of 2023 Kikosi Limited v Kenya Institute for Public Policy Research and Analysis*** for the proposition that failure to include the Accounting Officer as Respondent to a Request for Review renders the Request for Review fatally defective. According to Counsel, Section 170 of the Act is couched in mandatory terms.
45. Counsel drew a distinction between the current procurement Act and its predecessor noting that whereas the latter required the Procuring Entity to be sued, the former requires the Accounting Officer to be sued. He therefore contended the present Request for Review was defective for failing to include the Accounting Officer as a party.

Applicant's Rejoinder on the Request for Review

46. In his rejoinder, Counsel for the Applicant, reiterated that Section 170 does not require an Applicant to sue an Accounting Officer but rather it identifies the parties to participate in a Request for Review once filed. According to him, the Accounting Officer had knowledge of the present proceedings as they were served with the Request for Review by the Board Secretary.
47. He maintained that the decisions in ***Mombasa High Court Judicial Review No. 21 of 2019; Republic v PPARB Ex parte Managing Director, Kenya Ports Authority & anor; Jalaram Industrial Suppliers Limited (Interested Party) [2019]eKLR*** and ***Mombasa Court of Appeal Civil Appeal No. 131 of 2018; James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** were good law prior to the coming to force of the Regulations 2020.
48. Further that there was no conflict between section 170 of the Act and Regulation 203.
49. Counsel maintained that the Applicant submitted a bid responsive to all the requirements under the Tender Document save for the requirement on stamping of documents.
50. Mr. Oluga maintained that the defects in the subject tender were incapable of being cured through clarifications. He further added that the information that the Applicant sought was information that the law permits to be disclosed to bidders.

Respondent's Rejoinder on the Preliminary Objection

51. Counsel for the Respondent, Ms. Nyambura, submitted that Section 170 as interpreted when the decisions in ***Mombasa High Court Judicial Review No. 21 of 2019; Republic v PPARB Ex parte Managing Director, Kenya Ports Authority & anor; Jalaram Industrial Suppliers Limited (Interested Party) [2019]eKLR and Mombasa Court of Appeal Civil Appeal No. 131 of 2018;James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** were rendered still remains unamended to date.

Interested Party's Rejoinder on the Preliminary Objection

52. Counsel for the Interested Party, Mr. Okiror, associated himself with the submissions made by in rejoinder by Ms. Nyambura.

CLARIFICATIONS

53. The Board sought clarification from the Applicant on the specific breaches that the Respondent had committed in the subject tender. Counsel for the Applicant, Mr. Oluga indicated that they were quite a number of breaches including the award of the subject tender to entities that were not registered and did not participate in the tender. Further that there were bidders who were allowed to singly bid for one of the services under the subject tender.
54. The Board also sought to know from the Applicant whether its bid conformed to all the requirements under the Tender Document. Counsel for the Applicant, Mr. Oluga responded in the affirmative but also pointed out that the Procuring Entity does not have a free hand in dictating the requirements as the requirements must be in compliance with the law.

55. The Board asked the Respondent of what it considered a minor deviation in the subject tender. Counsel for the Respondent, Mr. Alakonya indicated that non-compliance with a mandatory requirement in the subject tender could not constitute a minor deviation.
56. The Board asked the Applicant to confirm if Section 170 had been changed since the decisions ***Mombasa High Court Judicial Review No. 21 of 2019; Republic v PPARB Ex parte Managing Director, Kenya Ports Authority & anor; Jalaram Industrial Suppliers Limited (Interested Party) [2019]eKLR and Mombasa Court of Appeal Civil Appeal No. 131 of 2018;James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** to which Counsel for the Applicant, Mr. Oluga answered in the negative. Counsel went on to indicate that at the time of the said decisions the Regulations 2020 were not in not in force.
57. The Board inquired from the Applicant on the use of the words “as prescribed” under Section 167 of the Act was limited in application to the Regulations 2020 or the rest of the provisions of the Act. Counsel for the Applicant, Mr. Oluga contended that Section 170 of the Act does not prescribe how a Request for Review ought to be filed.
58. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 17th October 2024 had to be determined by 7th November 2024. Therefore, the Board would communicate its decision on or before 7th November 2024 to all parties via email

BOARD'S DECISION

59. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

I. ***Whether the Board has jurisdiction to hear and determine the instant Request for Review?***

In determining this issue, the Board will look into:

- a) Whether the failure to enjoin the Accounting Officer of the Procuring Entity rendered the instant Request for Review fatally defective

Depending on the Board's finding on Issue (I) above:

II. ***Whether the Respondents properly disqualified the Applicant's bid from the subject tender in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document?***

III. ***What orders should the Board issue in the circumstance?***

Whether the Board has jurisdiction to hear and determine the instant Request for Review?

60. Following the filing of the present Request for Review, the Respondent filed a Notice of Preliminary Objection dated 23rd October 2024 assailing the competency of the Request for Review for offending Section 170 of the Act.

61. Counsel for the Interested Party, Mr. Okiror, submitted that failure to include the Accounting Officer as a party to a Request for Review renders the Request for Review fatally defective. According to Counsel, Section

170 is couched in mandatory terms that an Accounting Officer of a Procuring Entity should be made a party to a Request for Review. He drew a distinction between the current procurement Act and its predecessor noting that whereas the latter required the Procuring Entity to be sued, the former requires the Accounting Officer to be sued. He therefore contended the present Request for Review was defective for failing to include the Accounting Officer as a party.

62. The Respondent supported the Preliminary Objection. Counsel for the Respondent, Ms. Nyambura submitted that the Form in the Fourteenth Schedule had a blank space which suggests that it was contemplated that the parties named under Section 170 of the Act would be indicated. She was emphatic that the failure to include an Accounting Officer rendered a Request for Review as fatally defective. Additionally, that subsidiary legislation in the form of Regulations 2020 could not be elevated above the express provisions of the Act.
63. On the flip side, the Applicant maintained that it had filed a competent Request for Review. Counsel for the Applicant, Mr. Oluga, argued that Section 170 of the Act does not state that a Request for Review is to be lodged against an Accounting Officer but only mentions the parties entitled to participate in the proceedings where a Request for Review is filed. In any event these are parties the Board Secretary is required under the Act to invite the parties under Section 170 to participate in the proceedings. According to him the manner of filing a Request for Review is to be found at Section 167, Regulation 203 and the Form under the Fourteenth Schedule.

64. Mr. Oluga submitted that the Form under the Fourteenth Schedule of the Regulations 2020 identifies the Procuring Entity as the Respondent, which is exactly how the Applicant has framed the instant Request for Review by naming Kenya Ports Authority as the Respondent herein. According to Counsel if it was intended that the Accounting Officer was to be made a Respondent nothing would have been easier than for the Form under the Fourteenth Schedule to indicate the Accounting Officer as a Respondent.
65. Mr. Oluga acknowledged that this Board has in numerous decisions been relying on the decisions in ***Mombasa High Court Judicial Review No. 21 of 2019; Republic v PPARB Ex parte Managing Director, Kenya Ports Authority & anor; Jalaram Industrial Suppliers Limited (Interested Party) [2019]eKLR*** and ***Mombasa Court of Appeal Civil Appeal No. 131 of 2018;James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** to strike out Requests for Review that have not included Accounting Officers as parties but urged the Board to find the decisions distinguishable. According to Counsel, the said decisions were made in the year 2019 before the formulation of the Regulations 2020. Therefore with the coming to force of the Regulations 2020, in the year 2020, it was no longer a mandatory requirement that an Accounting Officer of a Procuring Entity should be included as a party in a Request for Review.
66. Drawing from the above rival positions on the competency of the Request for Review as filed the Board is invited to determine whether the Applicant's failure to name the Accounting Officer of Kenya Ports Authority as a party to the Request for Review renders it defective.

67. For starters, Section 170(b) of the Act enlists the Accounting Officer of a Procuring Entity as a party to a Request for Review in the following words:

"170. 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."

68. From Section 170 above, the necessary parties to a Request for Review are (i) the Applicant; (ii) the Accounting Officer of the concerned Procuring Entity; (iii) the successful tenderer under the subject tender; and (iv) any other party that the Board may determine.
69. The failure to include an Accounting Officer of a Procuring Entity as a party to a Request for Review has been the subject of litigation in multiple cases before superior courts in this country:
70. In ***Mombasa High Court Judicial Review No. 21 of 2019; Republic v PPARB Ex parte Managing Director, Kenya Ports Authority & anor; Jalaram Industrial Suppliers Limited (Interested Party) [2019]eKLR*** the High Court had occasion to pronounce itself on an issue whether a Request for Review that failed to name the Accounting Officer of the concerned Procuring Entity as a party could be cured by way of an application for amendment. In answering this in the negative, the Court

was emphatic that a such a Request for Review was defective and incapable of curing by way of amendment:

"16. 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.

20. 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:

99. 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."

71. Further in ***Mombasa Court of Appeal Civil Appeal No. 131 of 2018; James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** the Court of Appeal rendered itself on an appeal which was predicated on various grounds of appeal including the failure to include an Accounting Officer as a party to Request for Review. In giving the history of Kenya's public procurement statute on necessary parties to a Request for Review, the Court affirmed that failure to include an Accounting Officer of a Procuring Entity and the successful tenderer rendered a Request for Review incompetent:

"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. We think, with respect, that the learned Judge was fully entitled to, and did address his mind correctly to the law when he followed the binding decision of the Supreme Court in NICHOLAS ARAP KORIR SALAT vs. IEBC [2014] eKLR when it stated, adopting with approval the judgment of Kiage, JA; "I am not in the least persuaded that Article 159 and Oxygen principles which both commands courts to seek substantial justice in an efficient and proportionate and cost effective manner to eschew defeatist technicalities were ever meant to aid in overthrow of rules of procedure and create anarchical tree for all in administration of justice. This Court, indeed all Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines are to serve the process of judicial adjudication and determine fair, just certain and even handed courts cannot aid in bending or circumventing of rules and a shifting of goal posts for while it may seem to aid one side, it unfairly harms

the innocent party who strives to abide by the rules.” We have no difficulty holding, on that score, that the proceedings before the Board were incompetent and a nullity, which the learned Judge properly quashed by way of certiorari.”

72. From the above decisions, which are binding on this Board, it is apparent that (i) Section 170 of the Act enlists the parties to a Request for Review in mandatory terms (ii) Omitting to name the parties listed under Section 170 of the Act as parties to Request for Review renders a Request for Review incompetent; and (iii) An incompetent Request for Review is for striking out and is incapable of being cured by an amendment.

73. Turning to the instant Request for Review, the Applicant admittedly did not include the Accounting Officer of Kenya Ports Authority as a party to the Request for Review. However, it was argued on its behalf that the format under which the Request for Review was brought was in consonance with Form contemplated under Regulation 203 and the Fourteenth Schedule of the Regulations 2020.

74. Section 167(1) of the Act provides for the right of a candidate or bidder to file a Request for Review in the following terms:

167. Request for a review

(1) 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.

75. On its part Regulation 203(1) of the Regulations 2020 prescribes the Form that a Request for Review should take in the following terms:

203. Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

76. For completeness of the record and for ease of reference the Form referred to under Regulation 203(1) as being under the Fourteenth Schedule is hereinafter reproduced:

FORM OF REVIEW

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.....OF20.....

BETWEEN

.....APPLICANT (Review Board)

AND

.....RESPONDENT (Procuring Entity)

Request for Review of the decision ...

77. From the Form above it would appear that the Applicant in a Request for Review would be this Board. It would equally appear that the Respondent would be the Procuring Entity. These representations are set out in the

Form under the Fourteenth Schedule are at variance with Section 170 of the Act in at least 3 material regards:

- i. Whereas Section 170 of the Act contemplates the Applicant to a Request for Review to be the person filing the Request for Review, the Form under the Fourteenth Schedule of the Regulations 2020 designates the Board as the Applicant to a Request for Review.
- ii. Whereas Section 170 of the Act contemplates that an Accounting Officer of a Procuring Entity should be a party to a Request for Review, the Form the Fourteenth Schedule of the Regulations 2020 designates the Procuring Entity itself as the Respondent to a Request for Review.
- iii. Whereas Section 170 of the Act contemplates that a successful bidder should be a party to a Request for Review, the Form the Fourteenth Schedule of the Regulations 2020 does not make provision for a successful bidder as a party a Request for Review.

78. Confronted with the above conflict, the Board draws guidance from Section 31(b) of the Interpretation and General Provisions Act:

31. General provisions with respect to power to make subsidiary legislation

Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—

(a) ...

(b) no subsidiary legislation shall be inconsistent with the provisions of an Act;

79. Superior courts in this country have equally held that subsidiary legislation cannot override statute. In ***Republic v Kenya School of Law & another Ex Parte Kithinji Maseka Semo & another [2019] eKLR*** the High Court stated:

78. By subjecting the ex parte applicant to the requirements under the Regulations as opposed to the category expressly provided under section 1(a) of the second schedule under which their qualifications fall, the Respondents not only ignored the express provisions of section 16, but also elevated the Regulations above the provisions of the act. As was held in Republic vs Kenya School of Law & Council of Legal Education ex parte Daniel Mwaura Marai,[63]the provisions of a subsidiary legislation can under no circumstances override or be inconsistent with any act of Parliament be it the one under which they are made or otherwise. A similar position was held in Republic v Council of Legal Education & another Ex parte Sabiha Kassamia & another[64] and Republic v Council of Legal Education & another Ex-Parte Mount Kenya University.[65] Also relevant is Section 31 (b) of the Interpretation and General Provisions Act,[66]which provides that no subsidiary legislation shall be inconsistent with the provisions of an Act of Parliament.

79. Borrowing from the jurisprudence discussed above, I find no difficulty concluding that the provisions of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 cannot override the express provisions of section 16 of the KSL Act, which prescribe the admissions requirements to

the ATP as those stipulated in the Second Schedule to the Act. Specifically, the Regulations cannot override the provisions of section 1(a) of the second Schedule. Had Parliament desired any other qualifications to apply over and above the qualifications held by the ex parte applicants, it would have expressly provided so.

See also ***Republic V Kenya School Of Law & Another Ex Parte Otene Richard Akomo & 41 Others; Council Of Legal Education (Interested Party) [2020] eKLR Judicial Review Application No. 20 of 2020 Consolidate with Misc Civil App No. 26 Of 2020***

80. Drawing guidance from the above pronouncements, which are binding on this Board, we cannot purport to elevate the Form under the Fourteenth Schedule of the Regulations 2020 above the express provisions of Section 170 of the Act on parties to a Request for Review. Accordingly, the provisions of the Section 170 of the Act takes precedence over the Regulations 2020. In the present case, we hold that failure to include an Accounting Officer of a Procuring Entity renders a Request for Review defective as was held in the ***Jalaram Industrial Suppliers Limited Case and James Oyondi t/a Betoyo Contractors & another Cases*** above.

81. The Board found great difficulty in following the argument made on behalf of the Applicant that the ***Jalaram Industrial Suppliers Limited Case and James Oyondi t/a Betoyo Contractors & another Cases*** were inapplicable in view of the fact that at the time of the decisions, the Regulations 2020 had not been passed. We say so for at least 2 reasons:

- i. The Regulations 2020 being subsidiary legislation cannot purport to override the express provisions of the Section 170 of the Act as interpreted by both the High Court and Court of Appeal in the above decisions.
- ii. Section 170 of the Act which was the subject of interpretation by the High Court and Court of Appeal in the above decisions remains unamended and thus still good law. Therefore Section 170 of the Act carries with it the interpretation that failure to include the parties listed under the section renders a Request for Review fatally incompetent.

82. The Board is aware that there are a number of decisions where it has in the past held that failure to include a successful bidder as a party to a Request for Review is not fatal. However, noting that the Court of Appeal ***James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** was emphatic that the parties under Section 170 of the Act are expressed to be parties in mandatory terms, the Board is prepared to follow this noting that the decision of the Court of Appeal is binding on this Board:

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.

83. Flowing from above we hold that the parties listed under Section 170 of the Act should as far as is possible be made parties to a Request for Review lest the Request for Review be established as incompetent.

84. We say as far as is possible because the Board is also mindful of the fact that there are instances when it may not be possible for an Applicant to indicate the successful bidder as a party to a Request for Review. These include instances when a procurement process has been terminated and there is therefore no successful bidder and in instances where the Procuring Entity has sent a Notification Letter which does not disclose the identity of the successful bidder. In such exceptional cases, it is permissible for a Request for Review to be held as competent notwithstanding the fact that the successful bidder has not been named as a party in the Request for Review. In such instances the Board may pursuant to Section 170(c) of the Act cure the non-joinder using the information supplied to it under Section 63(1)(e) of the Act. Conversely, every candidate or bidder in a procurement process is presumed to know that every Procuring Entity has an Accounting Officer and that he/she can be joined to proceedings as such.

85. In view of the foregoing, we find that the failure to enjoin the Accounting Officer of the Procuring Entity rendered the instant Request for Review fatally defective and thus this Board lacks jurisdiction to hear and determine the Request for Review. Accordingly, the Board downs its tools and shall not proceed to offer an analysis on the rest of the issues it had formulated in the matter.

What orders the Board should grant in the circumstances?

86. The Board has found that it lacks the jurisdiction to hear and determine the Request for Review.

87. The upshot of our finding is that the Request for Review dated 16th October 2024 in respect of Tender No. KPA/284/2023-24/LP for Provision of Boat and Minibus (25- Seater) Transport Services for Port of Lamu fails in the following specific terms:

FINAL ORDERS

88. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 16th October 2024:

- 1. The Respondent's Notice of Preliminary Objection dated 23rd October 2024 be and is hereby upheld.**
- 2. The Request for Review dated 11th October 2024 be and is hereby struck out.**
- 3. The Tender No. KPA/284/2023-24/LP for Provision of Boat and Minibus (25- Seater) Transport Services for Port of Lamu be and is hereby allowed to proceed to its logical and lawful conclusion.**
- 4. Each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI, this 4th Day of November 2024.

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PANEL CHAIRPERSON

PPARB

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SECRETARY

PPARB