

**REPUBLIC OF KENYA  
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION No. 87/2017 OF 6<sup>TH</sup> OCTOBER, 2017**

**BETWEEN**

**BONARYS SECURITY SERVICES LIMITED ..... APPLICANT**

**AND**

**EGERTON UNIVERSITY..... PROCURING ENTITY**

Review against the decision of Egerton University in the Matter of Tender Number EU/ONT/34/2017-2019 for Provision of Security Services.

**BOARD MEMBERS PRESENT**

- |                              |                |
|------------------------------|----------------|
| 1. Mr. Hussein Were          | - In the Chair |
| 2. Mrs. Rosemary Gituma      | - Member       |
| 3. Eng. Weche Okubo, OGW     | - Member       |
| 4. Mr. Peter B. Ondieki, MBS | - Member       |
| 5. Mr. Paul Ngotho           | - Member       |

**IN ATTENDANCE**

- |                     |               |
|---------------------|---------------|
| 1. Philip Okumu     | - Secretariat |
| 2. Maureen Kinyundo | - Secretariat |

**PRESENT BY INVITATION**

**Applicant - BONARYS SECURITY SERVICES LIMITED**

1. Edwin Mwaita - Advocate, Mwaita & Co. Advocates
2. Elijah Waiyaki - Mwaita & Co. Advocates
3. Kiptoo Sum - Board, Mwaita & Co. Advocates
4. Zachary K. Chebii - Director, Bonarys Security

**Procuring Entity- Egerton University**

1. Janet Bii-Magata - Legal Officer, Egerton University
2. Dan Victor Ojwando - D.C.P.O.
3. Wycliff Nyariki - P.O.

**Interested Parties**

1. Dismas Wambola - Advocate, Onsongo & Co. Advocate
2. William Ololo - Director, Bedrock Holdings Ltd

**BOARD'S DECISION**

Upon hearing the representations of the parties and interested candidates before the Board and upon considering the information and all the documents before it, the Board decides as follows:

**BACKGROUND**

**TENDER INVITATION**

Egerton University (the "Procuring Entity" herein), by an advertisement in *My Gov* weekly review issue No. 0027 of 18<sup>th</sup> July, 2017, published a Tender Notice for Tender Number EU/ONT/34/2017-2019 for Provision of Security Services, as an Open National Tender.

The Procuring Entity organised for a pre-bid conference on 22<sup>nd</sup> August, 2017 which was attended by representatives from seventeen firms. The Procuring Entity later issued an addendum which it sent by email to all bidders/firms and uploaded on its website.

### **Closing/Opening of Bids**

The sealed bids were opened on 29<sup>th</sup> October, 2017 and Seventeen firms submitted their bids as follows:

<b>BID NO.</b>	<b>NAME OF COMPANY/FIRM</b>
1.	Cobra Security Company Limited
2.	Flashcom Security Limited
3.	Pridekings Services Limited
4.	Robinsons Investments Limited
5.	Vickers Security Services Limited
6.	Nine One One (911) Group Limited
7.	CASA Security
8.	Babs Security Services Limited
9.	Intercity Security Homes
10.	ISMAX Security Limited
11.	Marshalls Security
12.	Bedrock Security Services Limited
13.	Impressium International Limited
14.	Bonarys Security Services Limited
15.	Bedrock Holdings Limited
16.	Protective Custody Limited
17.	Lavington Security Limited

### **TENDER EVALUATION**

The Evaluation Committee undertook the evaluation in four stages namely:

- a) Preliminary
- b) Technical

- c) Post Qualification
- d) Financial Evaluation

### **Preliminary Evaluation**

Fifteen bidders were found to be non-responsive at the preliminary evaluation stage and disqualified from further evaluation. Bidder No. 14 - Bonarys Security Services Limited - ("the Applicant" herein) did not meet the preliminary eligibility requirements and was thus disqualified from further evaluation due to the following reasons:-

- The bidder did not provide a valid NSSF Compliance Certificate
- The bidder did not provide Organisation ISO Certification

Two Bidders - No. 7 (CASA Security) and No. 15 (Bedrock Holdings Limited) met the preliminary eligibility requirements and proceeded to technical evaluation stage.

### **Technical Evaluation**

The two bidders responsive at the preliminary evaluation stage were then to technical evaluation in line with the evaluation criteria as follows:

- Cut off points for technical evaluation was 73 points
- Bidders who score 70% of 73 points (=51.1 points) will proceed to stage 3

Bidder No. 7 (Casa Security) did not meet the minimum points for technical requirements thus disqualified from further evaluation. The Bidder scored 49.8 points which is below the minimum score of 51.1 points. Bidder No. 15 (Bedrock Holdings) scored 64.24 points (88.0%)

which was above the minimum score of 51.1 points (70%). The bidder met the minimum points for technical requirements and proceeded to the next stage of evaluation.

### **Post Qualification**

Bidder No. 15 (Bedrock Holdings) scored 28 out of 28 (100%) hence proceeded to the next stage of evaluation. The bidder met the minimum points for post qualification requirements and therefore proceeded to financial evaluation.

### **Financial Evaluation**

The Evaluation Committee observed that the rates provided by the only responsive bidder considered minimum wage requirements of Day Guard at Kshs 12,926.55 and Night Guard at Kshs. 14,420.90 per guard monthly as outlined in the Private Security Regulations Act No. 13 of 2016 and the Kenya Subsidiary Legislation, 2016.

### **Recommendation of the Evaluation Committee**

The Committee recommended that the Accounting Officer awards Bidder No. 15 (M/s Bedrock Holdings Limited) a two-year contract for provision of security services at Egerton University Njoro Main Campus, Nakuru Town Campus, Chemeron Research Centre, Kenyatta Campus and Nairobi Campus at a total cost of KES 61,957, 920 per annum VAT inclusive.

## **PROFESSIONAL OPINION**

The Professional Opinion was rendered by the Head of Procurement (Deputy Chief Procurement Officer) on 20<sup>th</sup> September, 2017, who concluded that the subject procurement had satisfied the constitutional requirements of Article 227(1) and statutory requirements of the Public Procurement and Asset Disposal Act, 2015 and the Public Procurement (Preference and Reservations) Regulations, 2011. The professional opinion also stated that the Evaluation Committee recommended the tender to be awarded to M/s Bedrock Holdings Limited at the annual tender sum of KES 61,957,920 per annum VAT inclusive, as indicated in the Form of Tender and read out during the tender opening.

**REQUEST FOR REVIEW No. 87/2017**

The Request for Review was lodged by M/s Bonarys Security Services Limited on 6<sup>th</sup> October, 2017 in the matter of Tender No: EU/ONT/34/2017-2019 for provision of security services.

The Applicant requested the Board for the following orders:

- 1. An Order annulling the Respondent's Procurement proceedings in the Tender No. EU/ONT/34/2017-2019 and anything the Respondent has done in the procurement of the aforementioned tender in its entirety;*
- 2. An Order directing the Respondent to bid a fresh the Tender Number EU/ONT/34/2017-2019 in line with the provisions of the Act;*
- 3. Costs of the Requests for Review be to the Applicant;*
- 4. Any other relief the Board may deem fit to grant.*

The Applicant raised three grounds in support of the request for review.

At the hearing of the Request for Review, the Applicant was represented by Mr. Edwin Mwaita, Advocate from the firm of Mwaita & Co. Advocates while the Procuring Entity was represented by Ms. Janet Bii-Magata, a Legal Officer at Egerton University. Mr Dismas Wambola, Advocate represented the Interested Party from the firm of Onsongo & Co. Advocates.

The Procuring Entity, in its response opposed the Request for Review and urged the Board to dismiss it with costs.

### **PRELIMINARY ISSUES**

The Interested Party herein, M/s Bedrock Holdings Limited, through its advocates, M/s Onsongo & Company Advocates submitted a Notice of Preliminary Point of Law (Preliminary Objection) on the following grounds:-

- 1) That the Request for Review was brought under a repealed Act being the Public Procurement and Disposal Act, 2010 which was repealed on 18<sup>th</sup> December, 2015.
- 2) That the Applicant's Request for Review contravenes Section 170 of the 2015 Act (Public Procurement & Asset Disposal Act - No. 33 of 2015).

The Interested Party argued that the Board had no jurisdiction to hear the application that was based on no known law.

## **PROCEEDINGS**

In response to the Preliminary Objection, the Applicant filed a Replying Affidavit and an Application to amend its Request for Review, dated 23<sup>rd</sup> October, 2017.

A jurisdictional issue having been raised, the Board is duty bound to determine it first before taking any step to inquire into the merits of the request for review. If the Board finds that it has no jurisdiction in the matter it will down its tools and strike out the review. However due to limitation of time during which the Board has to hear and conclude the case, the Board decides that it will hear the preliminary objection together with the review but it will first dispense with the preliminary objection before going on to determine the request for review if it finds that it has jurisdiction to do so.

## **THE APPLICANT'S CASE**

The Applicant averred that it received Notification of Award of the tender on 23<sup>rd</sup> September 2017 by way of hand delivery although the letter was dated 21<sup>st</sup> September, 2017. It averred further that the Procuring Entity disqualified its bid on the ground of non-submission of the organisation's ISO certification and alleged failure by the Applicant to provide a valid N.S.S.F Compliance Certificate.

The Applicant termed the reasons given by the Procuring Entity for its ineligibility to the tender as fictitious and baseless stating that it provided a valid N.S.S.F. compliance certificate as required in the particulars of Appendix to Instructions to Tenderers. It stated further that the need to



provide a valid organisation ISO Certification was not a requirement in the instructions to tenderers of the tender document. It also stated that it had provided and attached a copy of valid NSSF certificate in its tender document and retained the original of the same.

The Applicant submitted that if the Procuring Entity had doubts about the certificate, it should have conducted due diligence on the same. However, on its own volition it wrote to the NSSF on 9<sup>th</sup> October, 2017 seeking confirmation of the authenticity of the certificate which was confirmed by the Branch Manager, Kabarnet, through letter dated 16<sup>th</sup> September, 2017. It submitted further that the requirement for ISO Certificate was not among the mandatory requirements in the evaluation of the tender neither was it among the thirteen requirements in the Appendix to Instructions to Tenderers. Instead it was inserted within the Evaluation Criteria section of the tender document.

The Applicant claimed that the Procuring Entity was in breach of the provisions of Section 31(4), 53(1) and (3) of the Public Procurement and Asset Disposal Act, 2010 for amending and/or failing to inform the tenderer of the changes in the tender document. It claimed further that the need to provide a valid organisation ISO certification was an amendment and/or introduction affecting the Appendix to the Instructions to Tenderers and thus ought not to be allowed to prevail. It continued to claim that all the stated actions of the Procuring Entity were therefore in violation of Section 59(3) of the above cited Act.

The Applicant contended in conclusion that its tender ought not to have been disqualified on an issue that was not mandatory and instead it should have proceeded to the technical evaluation stage.

Responding to the Preliminary Objection, Mr. Mwaita, counsel for the Applicant submitted that he made a mistake in basing the Request for Review on a **Public Procurement and Disposal Act 2010** that was non-existent in law. The advocate pleaded that his client was innocent and played no role in drawing up the Request for Review and therefore ought not to be made to suffer for a mistake that was not its own. Mr. Mwaita argued that the sections in the purported Act remained the same as in the current law.

Counsel submitted that he had on 23<sup>rd</sup> October, 2017, filed and served all parties with a draft amendment to the Request for Review and requested that the documents be allowed to form part of documents he would rely on in this case. He argued that his mistake was curable by the provisions of Article 159(2) (d) of the Constitution.

The Applicant filed and sought to rely on six authorities thus,

1. **John Michael Wanjau -vs - Municipal Council of Eldoret (2013) eKLR**  
(Can the court grant leave to leave to amend an application founded on a Repealed Act)
2. **Tana and Athi Rivers Development Authority - vs- Jeremiah Kihugho Mwakio & 3 others (2015) eKLR**

(Counsel brought request under a Repealed Act, can it be cured by an amendment)

**3. Zephir Holdings Limited - vs - Mimosa Plantations Limited & 2 others (2014) eKLR**

(Interested parties must seek leave to be enjoined in a suit)

**4. Republic - vs - Public Procurement Administrative Review Board ex-parte Syner-Chemie Limited (2016) eKLR**

(A mistake admitted by a counsel should not be visited on his Client)

**5. Republic - vs - Kenya Revenue Authority Ex-parte Webb fontaine Group Fz-lla & 3 others (2015) eKLR**

**6. Republic - vs - Public Procurement Administrative Review Board & 2 others Masinde Muliro University of Science and Technology (2016) eKLR**

The Applicant prayed for the Request for Review to be allowed.

**PROCURING ENTITY'S RESPONSE**

The Procuring Entity, in response, submitted that it restricted itself to the provisions in the Tender Document and the Evaluation Criteria from beginning to the award of the tender and that at no stage did it introduce any new mandatory requirements during the process. It submitted further that the requirement that a tenderer provides organization ISO

Certification applied to all bidders and was not discriminatory and that the Applicant was disqualified at the Preliminary evaluation stage for not providing the certification as a requirement of the Evaluation Criteria. It also submitted that the Applicant uttered a copy of NSSF compliance certificate that, on face value, had two signatories who had appended their signatures, one on 25<sup>th</sup> August, 2017 and the other on 28<sup>th</sup> August, 2017 and therefore it was difficult to tell which date to go by.

The Procuring Entity averred that it was not the mandate of the Applicant to seek authentication of its certificate from NSSF arguing that the mandate lay with the Procuring Entity as regards due diligence. It averred further that letters of notification were sent to all bidders on 21<sup>st</sup> September, 2017 by email and therefore the Applicant ought to have received theirs on the same date. On enquiry from the Board for evidence of the email notification, the Procuring Entity accessed its email communications in the presence of the Applicant and confirmed that the emails were sent on 22<sup>nd</sup> September, 2017. It also averred that on 6<sup>th</sup> October, 2017 it signed a contract with the successful bidder (Interested Party). It was however unable to provide a copy of the signed contract stating that the contract had not been fully executed because the Vice-Chancellor who was the accounting officer of the Procuring Entity had not signed it although the contractor had already signed on its part.

#### **INTERESTED PARTY'S RESPONSE**

The Interested Party submitted that the Request for Review was premised on a repealed Act thus rendering the Review fatally incompetent and the same ought to be dismissed with costs to the Interested Party. It submitted further that the Applicant had cited Act 2010 that was non-

existent in law and therefore the Applicant's case was not anchored on any existing Act. The Interested Party therefore contended that the Board had no jurisdiction to hear an application that was based on no known law.

The Interested Party averred that the Applicant violated Section 170 of the 2015 Act by failing to enjoin the Interested Party to the proceedings. It averred further that the issues complained of by the Applicant were strictly provided for in the 2015 Act as follows:-

- Services violation of fair employment laws which include NSSF and NHIF is provided under Section 41 (1) (i) of the Act;
- ISO certification is covered under Section 60 (3) (b) of the Act.

The Interested Party argued that the Request for Review was frivolous and vexatious as it was based on a non-existent law by dint of Section 172 of the Act. It went on to argue that a party cannot seek to amend its pleadings after the Preliminary objection has been filed for to do so amounts to defeating the Preliminary Objection. If allowed then there would never be admission of Preliminary Objections. It stated that amendments can only be allowed in circumstances where Preliminary Objection has not been raised. Making reference to Article 159 of the Constitution, the Interested Party submitted that this can be invoked when issues for consideration are either of procedural or technical nature but that the Preliminary Objection was on the issue of law which cannot be cured under the said article of the Constitution.

On the issue of time, the Interested Party submitted that the date of notification remains 21<sup>st</sup> September, 2017 unless the Applicant proved that it received the notification on 23<sup>rd</sup> September, 2017. Consequently the Request for Review was filed out of time in violation of Section 167 of Public Procurement and Disposal Act 2015 (hereinafter "the Act") as the last day for filing was 5<sup>th</sup> October, 2017, argued the Interested Party.

The Interested Party concluded by submitting that the contract between it and the Procuring Entity was executed on 6<sup>th</sup> October, 2017 and performance bond issued in that respect and as such could be subject to the Review of procurement proceedings under Section 167(4) (c) of the Act, and that the Interested Party had started mobilizing personnel and equipment ready to commence the service on 31<sup>st</sup> October, 2017. It prayed that the Request for Review should not be allowed as it would suffer great loss since it had mobilised after signing the contract with the Procuring Entity.

#### **THE BOARD'S DECISION**

The Board, having considered the submissions made by the parties and examined all the documents that were submitted to it, identified four issues for determination in this Request for Review:

- 1. Whether the Request for Review was filed out of time contrary to the provisions of Section 167 (1) of the Act and thereby deprived the Board of jurisdiction.*

2. *Whether the Board is deprived of jurisdiction in the Request for Review pursuant to the provisions of Section 167 (4) (c) of the Act following the signing of the contract for the tender subject of the review.*
3. *Whether the Request for Review as filed is incompetent the same having been filed based on a non-existent law.*
4. *Whether the Procuring Entity unfairly disqualified the Applicant in breach of the provisions of Section 80 (1) and (2) of the Public Procurement and Disposal Act, 2015 as read together with Regulation 49 (1) of the Public Procurement and Disposal Regulations, 2006 and Clause 5.8 of the Tender Document.*

The Board, in compliance with Regulation No 77 of Public Procurement and Asset disposal Regulations 2006 now proceeds to first determine issues pleaded through the Preliminary Objection.

1. **As to whether the Request for Review was filed out of time contrary to the provisions of Section 167 (1) of the Act and thereby deprived the Board of jurisdiction**

The Board notes that the tender subject of this review was evaluated by the Procuring Entity's evaluation committee through the stages of preliminary evaluation, technical evaluation, post-technical evaluation and financial evaluation. The said tender was awarded to the successful bidder and notifications issued to the unsuccessful bidders *vide* letters

dated 21<sup>st</sup> September 2017. It is further noted that the Applicant filed this request for review on 6<sup>th</sup> October 2017. The Board has heard submissions by the Interested Party that the request for review filed on 6<sup>th</sup> October 2017 was filed out of time and that the Board lacks jurisdiction to entertain it. In determining this issue the Board relies on the relevant provisions of the Act at Section 167 (1) which states as follows:

**Section 167 (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.”*

In the instant case, Section 167 (1) of the Act requires the Applicant to seek administrative review within fourteen days of notification of award. The Board has perused the letter of notification and notes that although the letter was dated 21<sup>st</sup> September 2017, the same was emailed to the Applicant on 22<sup>nd</sup> September, 2017. It is the view of the Board that the 14 day period therefore started running on 23<sup>rd</sup> September, 2017 and ended on 6<sup>th</sup> October, 2017. It is the further view of the Board that since the Applicant filed its Request for Review on 6<sup>th</sup> October, 2017, the request was filed within time. The Board therefore finds that the Applicant complied with the provisions of Section 167(1) of the Act in terms of the



time of filing the request for review. Accordingly, this ground of preliminary objection fails and is disallowed.

The Board having found that the application was filed within time holds that it is not deprived of jurisdiction in this matter on account of the same having been filed out of time.

2. **As to whether the Board is deprived of jurisdiction in the Request for Review pursuant to the provisions of Section 167 (4) (c) of the Act following the signing of the contract for the tender subject of the review**

The Board has heard submissions from the Interested Party that it signed a contract with the Procuring Entity on 6<sup>th</sup> October 2017 and that the Board has no jurisdiction to inquire into a tender whose contract has already been signed. The Interested Party relied in its argument on the provisions of Section 135(1) (2) (3) of the Act, which states as follows:

(1) *"The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer."*

(2) *"An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful*

*tender based on the tender documents and any clarifications that emanate from the procurement proceedings."*

*(3) "The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period."*

*(4) "No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties."*

Further, Section 167 (4) (c) of the Act states as follows:

**Section 167 (4)** *"The following matters shall not be subject to the review of procurement proceedings under subsection (1)*

*-*

- (a) The choice of a procurement method;*
- (b) .....; and*
- (c) Where a contract is signed in accordance with section 135 of this Act."*

On this limb of preliminary objection, the Board notes that the Interested Party's case was premised on the submission that a contract was procured between it and the Procuring Entity in accordance with the provisions of Section 135 of the Act. Upon inquiry from the Board it was stated by the

Procuring Entity that the contract documents had been drawn but had only been signed by the successful bidder with the Procuring Entity yet to sign. Section 135 (1) of the Act enjoins the accounting officer, or an authorised officer of the procuring entity, and the successful tenderer to sign for a contract to be valid. A contract signed by only one party cannot be said to be properly executed. The Board therefore finds that no valid contract exists in the disputed tender. Accordingly this limb of the preliminary objection fails and is disallowed.

The Board having found that no valid contract exists determines that it is not estopped from hearing and deciding this request for review on account of a signed contract.

**3. As to whether the Request for Review as filed is incompetent the same having been filed based on a non-existent law**

The Board notes that on 6<sup>th</sup> October, 2017 the Applicant filed this Request for Review. At the scheduled hearing on 17<sup>th</sup> October 2017 the Board sitting in Eldoret town was requested by the Applicant for adjournment because the Applicant was engaged elsewhere. The request for adjournment was granted and, taking into consideration the strict timelines of 21 days for adjudicating on the matter, a new hearing date was set for 19<sup>th</sup> October 2017 in Eldoret.

It is further noted that at the hearing on 19<sup>th</sup> October, 2017 the Applicant's advocate sought a further adjournment to seek fresh instructions from his client in the light of the Preliminary Objection filed by the Interested Party on 19<sup>th</sup> October 2017. The Board, even in the constraints of time it faced,

granted the Applicant's second request for adjournment and ordered a hearing on 23<sup>rd</sup> October 2017 in Nairobi. During the hearing on 23<sup>rd</sup> October 2017, the Applicant sought leave of the Board to file authorities and an amendment to its Request for Review and specifically, the law upon which its request for review was premised.

The Board takes cognisance of the various authorities filed by the Applicant in support of its application for leave to amend the Request for Review and its argument that an advocate's mistake should not be visited upon his client. The Board hereby admits the authorities filed by the Applicant on 23<sup>rd</sup> October 2017 into the record and orders that the same may be relied upon in the arguments and counter-arguments in this request for review. For greater certainty, admission of the documents into the record is not tantamount to granting of leave to amend the request for review. Granting of leave to amend is subject to determination by the Board after hearing the parties on the request sought.

The Board has heard the opposing views by the Procuring Entity and the Interested Party to attempts by the Applicant to amend the Request for Review. The two parties argued that a party cannot seek to amend its pleadings after the Preliminary Objection in order to beat the same Preliminary Objection. The Board has also heard the Interested Party's arguments that if the amendment were to be allowed then there would never be admission of Preliminary Objections in tribulations.

The issue which has arisen is whether a party is allowed to amend its pleadings after a preliminary objection has been filed.

To determine this ground of preliminary objection, the Board has looked at the Request for Review filed by the Applicant on 6<sup>th</sup> October, 2017. The application was based on three grounds, namely;

1. *The Respondent is in breach of Section 31(4), 53(1) and (3) of the Public Procurement and Disposal Act 2010 for amending and/or failing to inform the tenderer the changes in the tender document.*
2. *The procuring of the tender by the Respondent is in breach of Section 59(3) of the Act (the Public Procurement and Disposal Act 2010).*
3. *The reasons given to the tenderer for its ineligibility to the tender are fictitious and baseless.*

The Board notes that the process of filing a request for review is outlined at sections 2 and 167 of the Act. Section 2 of the Act requires that a request for administrative review or complaint filed with the Public Procurement Administrative Review Board be filed pursuant to Section 167 of the Act and Regulations. The said Section 167 (1) of the Act states that:

**Section 167 (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....”*

It is clear from the foregoing provisions of Section 167 (1) that a party to the review can only be heard if the party demonstrates how the breach of duty imposed on the Procuring Entity violated the provisions of the Public Procurement and Disposal Act, 2015. The Board observes that no law other than the Public Procurement and Disposal Act, 2015 imposes a duty on the Procuring Entity, which duty, if violated, brings a right to the candidate or tenderer to seek administrative review. The Board notes that the Applicant brought this request for review under the **Public Procurement and Disposal Act 2010**, which does not exist. The request for review as filed is clearly not supported by Section 167 (1) of the Public Procurement and Disposal Act, 2015.

The Applicant had an opportunity to amend the request for review from 6<sup>th</sup> October 2017 to 19<sup>th</sup> October 2017 when the Interested Party filed a preliminary objection but it did not do so. The filing of the preliminary objection appears to have jolted the Applicant into action. The behaviour of the Applicant makes it appear as if it was waiting for the Interested Party for it to make a move to amend a mistake occasioned by counsel. In the case CA No. 41 of 2014 - Tana and Athi Rivers Development Authority - vs- Jeremiah Kihugho Mwakio & 3 others (2015) eKLR the Court of Appeal stated thus,

*“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justifiable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client,*

*it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side....thus there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client. This is to be found in the case of Ketterman & Others v. Hansel Properties Ltd (1998) 1 All ER 38, in which an application was brought for belated amendment of the defence; an amendment which had been necessitated by mistake of counsel. In his judgment, Lord Griffith stated that,*

*“Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings.”*

The authority cited by the Applicant of *John Michael Wanjau -vs - Municipal Council of Eldoret (2013) eKLR* does not aid the case of the Applicant either as it provides that a court may at any stage of the proceedings, allow any party to amend his pleadings....*in the circumstances mentioned:*

- a) To correct the name of a party*
- b) to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim)*
- c) to add or substitute a new cause of action if the new cause of action arises out of the same facts as a cause of action in respect of which*

*relief has already been claimed in the suit by the party applying for leave to make the amendment.*

The Board notes that the circumstances in the instant case are very different from the circumstances mentioned in the Municipal Council of Eldoret case.

The Board is persuaded by the arguments of the Procuring Entity and the Interested Party that the Applicant's application to amend its pleadings after the Preliminary Objection had been filed was meant to defeat the very object of the Preliminary Objection. The Board therefore declines to grant the leave filed by the Applicant on 23<sup>rd</sup> October 2017 to amend the request for review dated and filed on 6<sup>th</sup> October, 2017. Consequently, it is the Board's finding that the Request for Review filed by the Applicant on 6<sup>th</sup> October, 2017 is based on a non-existent law and, as such, is incompetent. Sadly to the Applicant, the instant request for review is destined for one inescapable fate, and that is dismissal.

The Board finds that it lacks jurisdiction to hear and determine the merits of the request and will therefore not indulge in the fourth issue framed for determination. The Board downs its tools on this request for review for want of jurisdiction and proceeds to strike it out in the terms of the final orders herein. This limb of preliminary objection is upheld and allowed.



**FINAL ORDERS**

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015 the Board makes the following orders on this Request for Review:

- (a) The Applicant's Request for Review dated 6<sup>th</sup> October, 2017 against the decision of the Procuring Entity in the Matter of Tender No. EU/ONT/34/2017-2019 for provision of Security Services for Egerton University is struck out and hereby dismissed.
  
- (b) The Procuring Entity is at liberty to proceed with the procurement process for the tender subject of this review to its logical conclusion.
  
- (c) Each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 27<sup>th</sup> day of October, 2017

  
.....

**CHAIRMAN**

**PPARB**

  
.....

**SECRETARY**

**PPARB**

