

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 135/2019 OF 28<sup>TH</sup> NOVEMBER 2019**

**THE CONSORTIUM OF RENTCO EAST AFRICA  
LIMITED AND SPENOMATIC (K) LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,  
MOI TEACHING AND  
REFERRAL HOSPITAL.....PROCURING ENTITY**

**AND**

**PHARMAKEN LIMITED.....INTERESTED PARTY**

Review against the decision of Moi Teaching and Referral Hospital to Reject the Applicant's Bid for Tender No. MTRH/RFP/9/2018-2019 for Sourcing of Laundry Equipment on Leasing Agreement

**BOARD MEMBERS**

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

## **IN ATTENDANCE**

1. Mr. Stanley Miheso -Holding brief for the Secretary
2. Ms. Judy Maina -Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

### **-THE CONSORTIUM OF RENTCO EAST AFRICA LIMITED AND SPENOMATIC LIMITED**

1. Mr. Innocent Muganda -Advocate, Sagana, Biriq & Company  
Advocates
2. Mr. Dolphine Mahoi -Advocate, Sagana, Biriq & Company  
Advocates

### **PROCURING ENTITY**

### **-MOI TEACHING AND REFERRAL HOSPITAL**

1. Mr. Pkania Kiplagat -Advocate, Oundo, Muriuki & Company  
Advocates
2. Mr. Geoffrey Owino -Advocate, Oundo, Muriuki & Company  
Advocates

3. Mr. Boaz Onyango -Legal Intern, Oundo, Muriuki & Company Advocates

4. Mr. Emmanuel Ottaro -Legal Attache', Moi Teaching and Referral Hospital

## **INTERESTED PARTIES**

### **A. PHARMAKEN**

1. Mr. Wilfred Lusi -Advocate, CM Advocates, LLP

### **B. CAROL & KUSIMBA LAUNDRY**

1. Ms. Caroline Kusimba -Marketing Director

### **C. RENTEU**

1. Mr. Nixon K. Tonui -Consultant

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

Moi Teaching and Referral Hospital (hereinafter referred to as "the Procuring Entity") invited eligible bidders to submit proposals for Tender

No. MTRH/RFP/9/2018-2019 for Sourcing of Laundry Equipment on Leasing Agreement (hereinafter referred to as “the subject tender”) via an advertisement dated 30<sup>th</sup> April 2019. Bidders were instructed to download tender documents from the Procuring Entity’s website at [www.mtrh.or.ke](http://www.mtrh.or.ke) or at <https://supplier.treasury.go.ke> or alternatively purchase a complete set of the tender document at a non-refundable fee of Kshs 1000/- from the Procuring Entity’s offices.

### **Bid Submission and Opening of Bids**

Sealed bids were opened by the Procuring Entity’s Tender Opening Committee on 11<sup>th</sup> June 2019 in the presence of bidders and their representatives and the following bidders submitted their bids:-

<b>Bidder no.</b>	<b>Company Name</b>
<b>RFP 9 B1</b>	Rentco East Africa Limited
<b>RFP 9 B2</b>	Pharmaken Ltd,
<b>RFP 9 B3</b>	County chemicals limited
<b>RFP 9 B4</b>	Carol and Kusimda Laundry Mart Ltd

### **Evaluation of Bids**

The evaluation process commenced on 1<sup>st</sup> July 2019 and was conducted as follows: -

1. Preliminary Evaluation
2. Technical Evaluation
3. Financial Evaluation

## 1. Preliminary Evaluation

At this stage of evaluation, bids were evaluated on the basis of the following mandatory requirements: -

No.	Mandatory Requirements
1	Certificate of Incorporation or Registration.
2	Valid Tax Compliance Certificate
3	Valid Trade License or Single Business Permit or equivalent
4	Duly filled, signed and stamped form of tender
5	Completely filled, signed and stamped business questionnaire
6	Original bid bond of Kshs.100,000/-or 1,000 US Dollars. Tender Securing Declaration form for entities belonging to YWPDs shall be required.
7	Bidders must provide evidence of having carried out similar works by providing copies of orders or award letters from their clients
8	Submit either audited accounts for 2017 and 2018 or current bank statement for the last 6 month preceding tender opening date
9	A sworn statement or declaration stating that: -
	a) The firm has not been debarred from participating in any public procurement by PPRA
	b) No person related to the firm has any spouse or children working at M.T.R.H
	c) The firm has not been engaged in any unethical, corrupt, collusive or fraudulent activities in public procurement matters
	d) The firm has not been declared bankrupt, insolvent and or under receivership
	e) The firm is not guilty of any violation of fair employment law practices
	f) Declaration that the firm will not engage in any corrupt or fraudulent practice

Failure to provide any of the listed requirements would lead to disqualification of a bid.

The results were as follows: -

### B1

- Did not submit a duly filled, signed and stamped form of tender
- Submitted an expired tax compliance certificate with an acknowledgement of application from KRA for current certificate

- Submitted a letter explaining that during application of tax compliance certification, there systems were down

## **B2**

- Submitted all the mandatory requirements.

## **B3**

- Did not submit valid trade license or single business permit or equivalent, duly filled, signed and stamped form of tender, original bid bond or Tender Securing Declaration form for entities belonging to YWPDs shall be required, evidence of having carried out similar works by providing copies of orders or award letters from their clients and sworn statement or declaration.

## **B4**

- Did not submit a duly filled, signed and stamped form of tender and evidence of having carried out similar works by providing copies of orders or award letters from their clients. Provided payment receipt for business permit instead of valid trade license or single business permit.

## **B2**

- Qualified and recommended for Technical Evaluation

## 2. Technical Evaluation

At this stage of evaluation, bidders were required to provide all the information requested in the Request for Proposals. Bidders who passed this stage of evaluation, would have their financial proposals opened on a date to be communicated.

Only one bidder qualified for technical evaluation, that is, M/s Pharmaken Limited and was evaluated as follows: -

No.	Item	Results
1.	Washer Extractor 200kgs	100%
2.	Laundry Sluicing Machine/Barrier Washer (Asceptic) 100kg	95%
3.	Laundry Tumble Drier 200kgs	98%
4.	Commercial Air Compressor	100%

## 3. Financial Evaluation

B2, that is, M/s Pharmaken Limited qualified for financial evaluation and its financial envelope was opened.

The bidder gave three modes of purchase i.e. leasing, installment purchase and outright purchase as scheduled below:

Bidder No	Firms Name	Installment Purchase	Leasing	Outright Purchase
B2	Pharmaken Limited	Payment period :24 months	Duration: 5years	Payment terms:100%

<b>Bidder No</b>	<b>Firms Name</b>	<b>Installment Purchase</b>	<b>Leasing</b>	<b>Outright Purchase</b>
		Payment terms: Quarterly Quarterly Installment Price: <b>13,525,000</b> Total Installment Purchase Price: Ksh <b>108,200,000.00</b> Service & Maintenance Proposal and cost estimates <b>Ksh2,760,000.00</b> <b>Total installment price Ksh 108,200,000.00</b>	Lease Payments per month: <b>1,598,134.00/-</b> <b>Commitment fee : Deposit:23,972,000.00 /-</b> Late Payment Charges: 3% per month Total Lease Amount for 5 years plus commitment fee is <b>Ksh 95,888,040.00+23,972,000.00</b> <b>Total lease price Ksh 119,860,040.00</b>	Purchase Price:Kshs <b>96,650,000</b> Services &Maintenance Proposal and cost estimates <b>Ksh2,760,000.00</b> Warranty:3 years <b>Total outright purchase price Ksh 96,650,000.00</b>

### **The Evaluation Committee's Recommendation**

In view of the evaluation process, the Evaluation Committee noted that only one bidder, that is, M/s Pharmaken Limited passed the technical evaluation and at financial evaluation, offered the three modes of purchase as tabulated above.

As a result, the Evaluation Committee was unable to make a financial comparison and therefore unable to recommend for award.



However, noting that the procurement proceedings were as a result of a Request for Proposal and pursuant to section 128 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"), authority to negotiate with the responsive tenderer was granted by the Accounting Officer on 25<sup>th</sup> September 2019.

### **Negotiation**

Negotiations for the subject tender were held on 18<sup>th</sup> October, 2019 with representatives from M/s Pharmaken Limited. The exercise was part of the evaluation process and being a Request for Proposal, negotiation was approved pursuant to section 128 of the Act.

At the conclusion of negotiations, the Evaluation committee recommended outright purchase as the most cost effective mode which will enable the Procuring Entity attain value for money at Kshs. 93,500,000/- inclusive of VAT for the Proposal for Sourcing of Laundry Equipment i.e.

- i. Purchase cost – Kshs.79,700,000.00
- ii. 5 year annual service and maintenance fee @ Kshs.2, 760,000.00 per annum.

### **Professional Opinion**

Having reviewed the Evaluation Report and the subsequent negotiations with respect to the subject tender, the Procuring Entity's Deputy Manager, Supply Chain, concurred with the recommendation of award to M/s Pharmaken Limited at the negotiated price indicated below: -

<b>No</b>	<b>Tender Description</b>	<b>List of Equipment</b>	<b>Delivery Period</b>	<b>Warranty</b>	<b>Contract Sum</b>	<b>Proposed Bidder</b>
1	Sourcing for Laundry Equipment on Outright Purchase Terms	1.Washer Extractor 200Kg -2 No. 2. Laundry Sluicing Machine/ Barrier Washer (Aseptic) 100Kgs – 1 No. 3.Laundry Tumbler Dryer Machine 200Kgs 2No. 4. Commercial Air Compressor- 1No.	10 weeks	3 years	79,700,000.00	B2- M/s Pharmaken Limited
2	Annual Service and Maintance Fee for 5 years cost per annum Ksh. 2,760,000/-				13,800,000.00 (Five years)	
					93,500,000.00	

## **THE REQUEST FOR REVIEW**

M/s The Consortium of Rentco East Africa Limited and Spenomatic (K) Limited (hereinafter referred to as “the Applicant”) lodged a Request for

Review dated 27<sup>th</sup> November 2019 and filed on 28<sup>th</sup> November 2019 together with a Statement in Support of the Request for Review sworn on 27<sup>th</sup> November 2019 and filed on 28<sup>th</sup> November 2019 (hereinafter referred to as "the Applicant's Supporting Statement"). The Applicant further filed a Supplementary Affidavit dated and filed on 10<sup>th</sup> December 2019.

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

- a) An order allowing the Request for Review;***
- b) An order annulling the decision of the Procuring Entity through its letter dated 14<sup>th</sup> November 2019 that the Applicant had not been successful in Tender No. MTRH/RFP/9/2018-2019;***
- c) In the alternative, a re-evaluation of the Applicant's tender by the Board and an order awarding the tender to the successful bidder;***
- d) An order directing costs of and/or incidental to this Review be borne by the Procuring Entity;***
- e) Any other orders that the Board may deem just and fit in the circumstances.***

In response, the Procuring Entity filed a Memorandum in Response dated 5<sup>th</sup> December 2019 and filed on 6<sup>th</sup> December 2019 (hereinafter referred to as "the Procuring Entity's Response") whereas M/s Pharmaken Limited (hereinafter referred to as "the Interested Party") also filed a Memorandum

of Response dated and filed on 11<sup>th</sup> December 2019 (hereinafter referred to as “the Interested Party’s Response”).

During the hearing, the Applicant was represented by Mr. Muganda on behalf of the firm of Sagana, Biriq & Company Advocates while the Procuring Entity was represented by Mr Kiplang’at on behalf of the firm of Oundo, Muriuki and Company Advocates. The Interested Party was represented by Mr Lusi on behalf of the firm of CM Advocates, LLP.

## **PARTIES SUBMISSIONS**

### **The Applicant’s Submissions**

In his submissions, Counsel for the Applicant, Mr. Muganda relied on the Request for Review, the Applicant’s Supporting Statement, the Applicant’s Supplementary Affidavit and supporting documentation thereto.

Mr. Muganda began his submissions by inviting the Board to consider the validity of the tender. He referred the Board to Clause 1.6 and 1.7 of the Tender Document which provided that the tender shall be valid for 150 days. Mr Muganda submitted that the Applicant received its letter of regret on 14<sup>th</sup> November 2019 and upon computation of the tender validity period, it was evident that the Applicant received its notification of regret outside the scope of the tender validity period. In view of its powers as provided under section 173 (e) of the Act, Mr. Muganda urged the Board to

annul the notification of regret issued to the Applicant and direct the Procuring Entity to re-advertise the subject tender.

Mr. Muganda referred the Board to the letter of regret the Applicant received from the Procuring Entity and submitted that the Procuring Entity highlighted two reasons why the Applicant's bid was unsuccessful, that is, the Applicant submitted an expired tax compliance certificate and that the Applicant failed to submit a duly filled, signed and stamped form of tender which contravened mandatory requirements under the subject tender.

Mr. Muganda submitted that in compliance with the requirement to submit a valid tax compliance certificate, the Applicant submitted its equivalent. For one, the Applicant submitted a letter of explanation addressed to the Procuring Entity dated 10<sup>th</sup> June 2019, which stated that the Applicant obtained an acknowledgement of its tax compliance request from the Procuring Entity. The letter went further to state that all efforts were made by the Applicant to acquire a tax compliance certificate but systems at the Kenya Revenue Authority were down. Mr. Muganda submitted that the Applicant also supplied the Procuring Entity with an expired tax compliance certificate, an acknowledgement of receipt of its tax compliance certificate and also a valid tax compliance certificate which it received from the Kenya Revenue Authority after the tender closing date. Mr. Muganda submitted that all the documents the Applicant submitted demonstrated compliance with the requirement to submit a valid tax compliance certificate.

Mr Muganda submitted that in view of the documents submitted by the Applicant, the Procuring Entity had powers under section 83 of the Act to do a confirmation and verification of the documents submitted by it. If the Procuring Entity had done so with respect to the Applicant, it would have addressed the tax compliance issue.

With respect to the second reason why the Applicant's bid was found unsuccessful, that is, failure to provide a duly filled, signed and stamped form of tender, Mr Muganda submitted that the Applicant submitted all the mandatory documents that were provided under the Tender Document but the form of tender was not provided for in the Tender Document.

In conclusion, the Applicant urged the Board to allow the Request for Review and order for a re-tender in view of the Board's powers under section 173 of the Act.

### **The Procuring Entity's Submissions**

In his submissions, Counsel for the Procuring Entity, Mr. Kiplang'at relied on the Procuring Entity's Response and supporting documentation thereto.

With respect to the validity of the subject tender, Mr. Kiplang'at submitted that it was the Procuring Entity's submission that the tender was opened on 11<sup>th</sup> June 2019 and was valid for 120 days, which lapsed on 11<sup>th</sup> October 2019 but was extended for 30 days to the 11<sup>th</sup> of November 2019. Mr. Kiplang'at submitted that the Board had previously pronounced itself on matters where the tender validity period had lapsed and specifically in the case of *PPARB Application No. 2 of 2010*, the Board stated that once a tender validity period had lapsed, the tender dies a natural death.

Mr. Kiplang'at submitted that once a tender is dead, there was no need to terminate it as there would be nothing to terminate and therefore the prayers sought by the Applicant had been overtaken by events. Counsel therefore urged the Board to dismiss the Request for Review on this basis.

On the reasons for rejection of the Applicant's bid by the Procuring Entity, Counsel submitted that the Applicant submitted an expired tax compliance certificate and failed to provide a duly filled, signed and stamped form of tender. On the issue of tax compliance, Counsel submitted that provision of a valid tax compliance certificate or its equivalent was a mandatory requirement under the Tender Document. Mr. Kiplang'at submitted that the Applicant had admitted that it submitted an expired tax compliance certificate and therefore the contention that remained was whether the Applicant had submitted the equivalent of this requirement.

Mr. Kiplang'at submitted that the subject tender was an international tender and therefore the explanation of the equivalent of this requirement was that in a scenario where the tenderer was not resident in Kenya, the Procuring Entity would consider the equivalent of a tax compliance certificate from the jurisdiction of the residence of the tenderer.

Mr Kiplang'at contended that the documents submitted by the Applicant in its bid were therefore not the equivalent of a valid tax compliance certificate. He referred the Board to the official website of the Kenya Revenue Authority which defined a tax compliance certificate as proof of having filed and paid all your taxes.

Mr Kiplang'at submitted that the Board should also take note that the Kenya Revenue Authority had a procedure for issuance of tax compliance certificates upon request by a bidder, with respect to tender applications. Mr Kiplang'at invited the Board to note that the Applicant did not make use of this procedure.

With respect to the second issue why the Applicant's bid was disqualified by the Procuring Entity, Mr Kiplang'at submitted that the Applicant failed to provide a form of tender which was a mandatory requirement under the Tender Document.



In response to an enquiry from the Board, Mr Owino, the Procuring Entity's Legal Officer, submitted that the Procuring Entity, in development of the subject Tender Document, relied on the template provided by the Public Procurement and Regulatory Authority but was unable to point out the form of tender in the Tender Document.

Finally, Mr Kiplang'at urged the Board to dismiss the Request for Review with costs to the Procuring Entity.

### **The Interested Party's Submissions**

In his submissions, Counsel for the Procuring Entity, Mr Lusi, relied on the Interested Party's Memorandum of Response and supporting documentation thereto.

On the issue of the tender validity period, Mr Lusi submitted that this issue was foreign to the Request for Review which was also not pleaded by the Applicant in its supplementary affidavit. Mr Lusi submitted that parties should be bound by their pleadings and therefore this issue should not form part of issues for determination by the Board.

That notwithstanding, Mr Lusi submitted that the expiry period of the tender was 11<sup>th</sup> October 2019, after which it was extended for thirty days to 11<sup>th</sup> November 2019. Relying on section 57 (a) and (b) of the

Interpretation and General Provisions Act, Chapter 2, Laws of Kenya, in computation of the time within which that extension ought to be interpreted, Mr Lusi submitted that the starting date of the extension should be excluded which took the validity period to 14<sup>th</sup> November, being the date on the notification letters to the bidders.

In response to an enquiry from the Board, Mr Lusi submitted that once notification letters have been issued by a procuring entity, time would stop running, the date the award was issued.

On the issue of the Applicant's failure to provide a valid tax compliance certificate, Mr Lusi submitted that section 55 (1) (f) of the Act made it mandatory for a bidder to be tax compliant. Noting that the subject tender was an international tender, Mr Lusi submitted that the burden of proof fell on the Applicant who had failed to demonstrate compliance with this mandatory requirement in the Tender Document. Mr Lusi contended that the Applicant submitted a tax compliance certificate that expired in May 2019 in response to a tender that closed on 11<sup>th</sup> June 2019. He submitted that in a period of one month, no attempt was made by the Applicant to modify its tender for submission to the Procuring Entity in order to comply with this mandatory requirement.

With respect to the failure by the Applicant to submit a duly filled in form of tender, Mr Lusi submitted that the Interested Party would rely on the

Procuring Entity's submissions on this issue to the extent that there could have been a general inadvertence arising from the adoption of a standard form. Mr Lusi relied on the decision in *Miscellaneous Application No. 122 of 2018*, to the extent that if there is a minor deviation that did not affect the substance of the tender, that minor deviation cannot be relied upon to overturn a decision made by the Procuring Entity.

Mr Lusi contended that there was no legitimate cause of action to warrant the Board to allow the Request for Review and therefore the review application was frivolous and ought to be dismissed by the Board with costs to the Interested Party.

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

In a rejoinder, Mr Muganda submitted that in view of the Procuring Entity's admission that the Tender Document did not have a form of tender, the Procuring Entity was bound by its own document and therefore the Procuring Entity erred in its evaluation of the Applicant's bid on this issue.

In response to an enquiry from the Board as to how the Applicant demonstrated it had fulfilled its tax compliance obligations, Mr Muganda submitted that the acknowledgment of receipt was not a regret and therefore sufficed as a demonstration of compliance.

Mr Muganda argued that the fact that the Procuring Entity had not recalled the letters sent to unsuccessful bidders was a show of bad faith on the part of the Procuring Entity.

In response to the issue that the expiry of the tender validity had not been raised in the Applicant's pleadings, Mr Muganda submitted that a point of law can be raised at any time before the Board as jurisdiction anchors everything.

In conclusion, Mr Muganda urged the Board to grant the Applicant costs of the Request for Review and further order for a re-tender.

### **BOARD'S DECISION**

The Board has considered each of the parties' submissions, the documents filed before it, including confidential documents submitted pursuant to section 67 (3) (e) of the Act and the oral submissions by all parties to the Request for Review.

The issues for determination are as follows:-

- I. Whether the Procuring Entity evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with***

***section 80 (2) of the Act as read together with Article 227 (1) of the Constitution of Kenya 2010 with respect to the following mandatory requirements in the Tender Document:***

*a) "Mandatory Requirement No. 4: Duly filled, signed and stamped form of tender".*

*b) "Mandatory Requirement No. 2: Valid Tax Compliance Certificate or Equivalent";*

**II. Whether the tender validity period of the subject tender is still valid.**

The Board now proceeds to address the above issues as follows:-

A brief background to the Request for Review is that the Procuring Entity advertised the subject tender by way of a Request for Proposals, on 30<sup>th</sup> April 2019 and the Applicant duly submitted its bid in response to the same.

By the bid submission deadline of 11<sup>th</sup> June 2019, the Procuring Entity received a total of four (4) bids which were opened in the presence of bidders and their representatives.

Evaluation of bids commenced on 1<sup>st</sup> July 2019 and at the conclusion of the evaluation process, the Procuring Entity's Evaluation Committee recommended award of the tender to M/s Pharmaken Limited for having the highest combined score. The Accounting Officer approved the recommendation made by the Evaluation Committee, having been reviewed by the Head of Procurement function. The successful bidder including all unsuccessful bidders were duly notified of the outcome of their bids.

The Applicant's notification of unsuccessful bid from the Procuring Entity dated 14<sup>th</sup> November 2019 stated as follows: -

***"We refer to your tender which was opened on 11<sup>th</sup> June 2019. We regret to inform you that the tender was not successful because you submitted expired tax compliance certificate, failed to provide duly filled, signed and stamped form of tender which contravened mandatory requirements.***

***M/s Pharmaken Limited submitted a successful tender and notice of intention to enter into a contractual relationship pursuant to provision of section 87 of the Public Procurement and Asset Disposal Act, 2015 has been communicated to them.***

***We thank you for showing interest to transact business with the Hospital and wish you luck in subsequent tenders.”***

Aggrieved by the decision of the Procuring Entity, the Applicant moved the Board through this Request for Review.

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

**Sub-Issue (a)**

**Whether the Applicant submitted a duly filled, signed and stamped form of tender in accordance with Mandatory Requirement No. 4 of the Evaluation Criteria on page 18 of the Tender Document**

Mandatory Requirement No. 4 of the Evaluation Criteria on page 18 of the Tender Document provides as follows: -

**"Stage One: Mandatory Requirements**

***The under-listed documents must be submitted in the following order:-***

- 1. ....;***
- 2. ....;***
- 3. ....;***
- 4. Duly filled, signed and stamped form of tender;***
- 5. ....;***
- 6. ....;***
- 7. ....;***
- 8. ....;***
- 9. ....;***

***Note: 100% compliance by the tenderers shall be required to proceed to the next evaluation stage***

***Failure to provide any of the listed requirements shall lead to disqualification”***

According to this criterion, bidders were required to submit a duly filled, signed and stamped form of tender and failure to do so would lead to disqualification from further evaluation.

In its submissions, the Applicant argued that the Procuring Entity did not provide a form of tender in the blank Tender Document to be submitted by



all bidders under the subject tender. It was therefore the Applicant's contention that the Procuring Entity failed to demonstrate how this requirement was to be met by bidders.

In response, the Procuring Entity submitted that the form of tender was not submitted by the Applicant as part of its bid, and therefore the Applicant had failed to comply with Mandatory Requirement No. 4 on page 18 of the Tender Document, which resulted in disqualification of its bid at the preliminary evaluation stage.

In its determination of this issue, the Board shall first address its mind to the meaning of a tender.

The Act defines a "tender" under section 2 of the Act in the following terms: -

***"tender" means an offer in writing by a candidate to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an invitation to tender, request for quotation or proposal by a procuring entity.***

Accordingly, in a procurement process, bidders submit a tender, that is an offer in writing to supply goods, services or works at a price pursuant to an invitation to tender, by a procuring entity.

From the above provision, the Board notes that in that offer, bidders propose the terms including the price at which they undertake to execute or implement the tender if found successful. A bidder therefore presents these details in writing in a document known as a form of tender.

The Board studied section 70 of the Act which provides as follows: -

***(1) The Authority shall issue standard procurement and asset disposal documents and formats as prescribed for use by procuring entities.***

***(2) A procuring entity shall use standard procurement and asset disposal documents prescribed under subsection (1), in all procurement and asset disposal proceedings.***

***(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders.***

***(4) .....***

***(5) .....***

***(6) The tender documents shall set out the following—***

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

***(b).....;***

***(c) .....***

***(d) .....***

***(e) instructions for the preparation and submission of tenders including—***

***(i) the forms for tenders;***

***(ii) .....;"***

According to the above provision, a procuring entity's tender document must set out the instructions for the preparation and submission of tenders including the forms for tenders. Therefore, a procuring entity should include a form of tender as one of the forms that a bidder ought to submit as part of its original bid.

Further, a procuring entity is required to use the standard tender documents as provided by the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") in all procurement and asset disposal proceedings.

This requirement is further reiterated under section 58 of the Act which provides as follows: -

***"(1) An accounting officer of a procuring entity shall use standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.***

***(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."***

Accordingly, a procuring entity is required to use the standard tender documents as provided for by the Authority which shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness, and competition among bidders.

The Board perused the Authority's website on <http://www.ppra.go.ke> and observes that standard procurement and asset disposal documents are available and can be downloaded by procuring entities for their use and to modify the standard tender document to suit their needs. Pursuant to the requirement under section 70 (6) (i) of the Act, the Authority's standard tender document duly provides for a form of tender which must be included by a procuring entity even after modification.

The Board studied the contents of the Procuring Entity's Tender Document and notes that no form of tender was provided therein.

The Board then examined the Applicant's original bid document and observes that the Applicant did not submit a form of tender as part of its bid to the Procuring Entity.

Upon examination of the Procuring Entity's Evaluation Report signed on 14<sup>th</sup> August 2019, the Board notes that at the conclusion of Preliminary Evaluation, the Evaluation Committee disqualified the Applicant's bid and made the following comments as captured on page 3 of the report: -

***"B1 (M/s Rentco East Africa Limited) – Did not submit a duly filled, signed and stamped form of tender....."***

In view of the foregoing, the Board notes that although the Applicant did not submit a form of tender as required under Mandatory Requirement No. 4 on page 18 of the Tender Document, the Procuring Entity, in its Tender Document failed to provide a form of tender and therefore failed to demonstrate how bidders were required to satisfy this mandatory requirement in the submission of their bids.

In the Board's view, the Procuring Entity failed to utilize the standard tender documents as provided for by the Authority in accordance with section 58 and 70 of the Act, which the Board established clearly provide a form of tender within its contents.

In this regard therefore, the Procuring Entity is *estopped* from disqualifying a bidder based on a requirement whose form is not provided for under the Tender Document.

In view of the foregoing, the Board finds that the Procuring Entity unfairly evaluated the Applicant's bid with respect to the requirement to submit a dully filled, signed and stamped form of tender, noting the Procuring Entity's failure to provide a sample form of tender in its Tender Document that bidders would have duly completed in response to this requirement.

**Sub-Issue (b)**

**Whether the Applicant submitted a valid tax compliance certificate or its equivalent in accordance with Mandatory Requirement No. 2 of the Evaluation Criteria on page 18 of the Tender Document**

Mandatory Requirement No. 2 of the Evaluation Criteria on page 18 of the Tender Document provides as follows: -

**"Stage One: Mandatory Requirements**

***The under-listed documents must be submitted in the following order:-***

- 1. ....***

**2. Valid Tax Compliance Certificate or equivalent**

**3. ....**

**4. ....**

**5. ....**

**6. ....**

**7. ....**

**8. ....**

**9. ....**

***Note: 100% compliance by the tenderers shall be required to proceed to the next evaluation stage***

***Failure to provide any of the listed requirements shall lead to disqualification”***

According to this criterion, bidders were required to submit a valid tax compliance certificate or its equivalent and failure to do so would lead to disqualification from further evaluation.

In its submissions, the Applicant contended that it satisfied this requirement in the following ways. For one, it provided a copy of a tax compliance certificate set to expire on 9<sup>th</sup> May 2019. Secondly, it submitted a copy of an acknowledgment receipt dated 2<sup>nd</sup> May 2019 from the Kenya

Revenue Authority as proof of its intention to renew its tax compliance certificate. The Applicant further submitted a letter dated 10<sup>th</sup> June 2019 explaining the reasons why it could not procure a current tax compliance certificate prior to the closing of tenders, due to the ongoing investigations at the Kenya Revenue Authority which had resulted in the temporary suspension of its services.

It was therefore the Applicant's submission that once it submitted the aforementioned documentation, the burden of proof shifted to the Procuring Entity to verify the authenticity of the same through a due diligence exercise in accordance with section 83 of the Act. The Applicant further confirmed that it received its tax compliance certificate on 16<sup>th</sup> July 2019, after services at the Kenya Revenue Authority had been restored.

In response, the Procuring Entity contended that the submission of an acknowledgement letter from the Kenya Revenue Authority was not the equivalent of a valid tax compliance certificate. The Procuring Entity argued that a mere application for a tax compliance certificate and its acknowledgment from the Kenya Revenue Authority was not proof of having paid all taxes and was not a guarantee that a tax compliance certificate would be issued to the Applicant.

Since the subject tender was an international tender, the Procuring Entity submitted that the requirement for a '*valid tax compliance certificate or its*



*equivalent*, was intended to cater for prospective tenderers not resident in Kenya who would be required to submit the equivalent of a tax compliance certificate from their respective jurisdictions as proof of having fulfilled their tax obligations.

In its determination of this issue, the Board first addressed the question, what is a valid tax compliance certificate?

The interpretation section of the Tax Procedures Act, No. 29 of 2015, Laws of Kenya (hereinafter referred to as "the Tax Procedures Act"), defines a tax compliance certificate as follows: -

***"Tax Compliance Certificate means a certificate issued by the Commissioner if satisfied that the person has complied with the tax law in respect of filing returns and has paid all the tax due based on self-assessment or has made an arrangement with the Commissioner to pay any tax due;***

Just as the name suggests, a tax compliance certificate is a certificate that is only issued by the Commissioner General of the Kenya Revenue Authority if a person has complied with the applicable tax law and has paid all tax dues and filed returns.

Further, section 72 of the Tax Procedures Act provides as follows: -

***"(1) Any person may apply to the Commissioner for a Tax Compliance Certificate***

***(2) The Commissioner may issue a Tax Compliance Certificate, which shall be valid for the period specified in the certificate, upon the applicant fulfilling conditions that the Commissioner may impose"***

Accordingly, a tax compliance certificate shall only be valid for the period specified in the certificate and upon the applicant fulfilling the conditions imposed by the Kenya Revenue Authority.

According to the official website of the Kenya Revenue Authority (<http://www.kra.go.ke>) a tax compliance or tax clearance certificate is,

***"....an official document issued by the Kenya Revenue Authority, as proof of having filed and paid all your taxes"***

The Kenya Revenue Authority's website further provides that a tax compliance certificate is valid for only twelve months. It stipulates that an application for a tax compliance certificate should be done through the iTax platform, and the certificate once issued is sent to the applicant's email address.

The Board studied the Applicant's original bid document and observes on page 14 of its bid that the Applicant submitted a letter dated 10<sup>th</sup> June

2019 addressed to the Procuring Entity's Chief Executive Officer which read as follows: -

**"RE: TAX COMPLIANCE CERTIFICATE APPLICATION – RENTCO E.A. LIMITED**

***.....Part of the documentation required for this tender is the Company's Tax Compliance Certificate. We wish to bring to your attention that we lodged our renewal application with Kenya Revenue Authority on the 2<sup>nd</sup> May 2019 and got an acknowledgement No. KRA20190499607. However, due to the ongoing investigations at the Authority, we are yet to receive the certificate since this service at the Authority was temporarily suspended.***

***For purposes of the tender exercise, we have enclosed together with this letter a copy of the expired certificate and the acknowledgement receipt for your review and verification. We hope that this is sufficient proof of compliance..... "***

According to the contents of the above letter, the Applicant lodged an application with the Kenya Revenue Authority on 2<sup>nd</sup> May 2019 to renew its tax compliance certificate and received an acknowledgment of the same. However, the Applicant was yet to receive a tax compliance certificate,

which it attributed to ongoing investigations at the Kenya Revenue Authority leading to the temporary suspension of its services.

As indicated in the contents of the abovementioned letter, the Board confirmed that the Applicant attached a copy of the acknowledgment of its application for a tax compliance certificate from the Kenya Revenue Authority on page 15 of its original bid and further a copy of its expired tax compliance certificate on page 16 of its original bid.

Having established that a tax compliance certificate is proof of having filed and paid taxes, it is evident that the Applicant's copy of an expired tax compliance certificate, the acknowledgment of its application for a tax compliance certificate and its letter explaining the reasons why it did not attach a tax compliance certificate, could not be construed to be sufficient proof of the Applicant having filed and paid its taxes.

The question that now arises is whether the three documents as submitted by the Applicant in its original bid, can be construed to be the equivalent of a valid tax compliance certificate as stipulated under Mandatory Requirement No. 2 of the Evaluation Criteria on page 18 of the Tender Document.

The Board considered the use of the word 'equivalent' and notes that the Cambridge English Dictionary defines the term 'equivalent' as follows:

**“equal to or having the same effect as something else”**

Applying the foregoing interpretation, the Board notes that the equivalent of a valid tax compliance certificate ought to have an equal or similar effect to that of a valid tax compliance certificate. This means that the document submitted as an equivalent to a valid tax compliance certificate, ought to demonstrate that an applicant has fulfilled its tax obligations by paying its tax dues and filing its returns.

The Board notes that the aforementioned documents as submitted by the Applicant in its bid, do not demonstrate that the Applicant had fulfilled its tax obligations or that the Applicant had paid its tax dues or filed its returns.

Further, the Board observes on page 1 of the Tender Document and further on the Invitation to Tender that the subject tender was an international tender. Using the aforementioned interpretation of the equivalent of a valid tax compliance certificate and having heard submissions from the Procuring Entity, it is clear that the equivalent of a tax compliance certificate could only be considered with respect to tenderers resident outside Kenya, who in compliance with this criterion,

would submit the 'equivalent' of a valid tax compliance certificate, demonstrating their fulfillment of their tax obligations within their respective jurisdictions.

Although the Applicant annexed an explanation of the circumstances that led to its failure to acquire a valid tax compliance certificate, the Board notes that the Applicant failed to provide any evidence demonstrating that indeed the services of the Kenya Revenue Authority had been suspended due to ongoing investigations at the Authority. In the absence of evidence in support of its submissions, the Board cannot rely on its submission in order to ascertain whether the Applicant was indeed unable to obtain a tax compliance certificate prior to the closing of the subject tender.

In any event, the Board notes that an acknowledgement that the Kenya Revenue Authority had received the Applicant's application for a tax compliance certificate was not a guarantee that the Kenya Revenue Authority would grant the Applicant a tax compliance certificate. In the Board's view, the acknowledgment as received from the Kenya Revenue Authority was not a demonstration of compliance with the requirement to submit a valid tax compliance certificate, but merely an indication that the Applicant had applied for a tax compliance certificate from the Kenya Revenue Authority and that its application was under consideration.

In view of the foregoing, the Board finds that the Applicant failed to satisfy Mandatory Requirement No. 2 on page 18 of the Tender Document and that the Procuring Entity fairly evaluated the Applicant's bid with respect to this criterion.

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

***III. Whether the tender validity period for the subject tender is still valid***

In its oral submissions, the Applicant contended that the tender validity period of the subject tender had lapsed by the time the Procuring Entity issued a letter of notification of unsuccessful bid to the Applicant on 14<sup>th</sup> November 2019.

According to the Applicant, Clause 1.7 of the Tender Document provided for a tender validity period of 150 days after the date of the tender opening. In the Applicant's view, the tender validity period lapsed on the 8<sup>th</sup> of November 2019 after which the Procuring Entity issued a letter of notification of unsuccessful bid to the Applicant, outside the scope of the tender validity period. As such the Applicant urged the Board to annul the Procuring Entity's Letter of Notification of Unsuccessful Bid addressed to the Applicant dated 14<sup>th</sup> November 2019 and direct the Procuring Entity to re-advertise the subject tender.

In response, the Procuring Entity relied on Clause 1.6 of the Tender Document and submitted that the tender validity period of the subject tender was for a period of 120 days from the closing date of the tender. The Procuring Entity submitted that the tender validity period was to lapse on 11<sup>th</sup> October 2019, but was extended for a period of thirty (30) days up to 11<sup>th</sup> November 2019. It was therefore the Procuring Entity's submission that the tender validity period lapsed on 11<sup>th</sup> November 2019.

According to the Procuring Entity, a tender dies a 'natural death' once the tender validity period lapses and therefore documents issued past the life of a tender were of no legal effect and were therefore *void ab initio*. It was therefore the Procuring Entity's submission that the Board could not purport to cancel the letter of notification of unsuccessful bid addressed to the Applicant as it had no effect and had been overtaken by events.

On its part, the Interested Party submitted that the tender validity period of the subject tender was to lapse on 11<sup>th</sup> October 2019, but was extended by the Procuring Entity for a period of thirty (30) days up to 11<sup>th</sup> November 2019. Pursuant to section 57 (a) and (b) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya, the Interested Party submitted that the starting date of the extension period should be excluded in the computation of time, which would take the tender validity period to 14<sup>th</sup> November 2019, being the date of award under the subject tender.



According to the Interested Party, once an award was made by the Procuring Entity, time stopped running due to a statutory bar that stops parties from entering into a contract immediately after award of a tender.

The Board observes that this issue for determination was canvassed by the Applicant in its oral submissions but was not raised by the Applicant in its pleadings filed before the Board. On its part, the Interested Party in its oral submissions argued that parties are bound by their pleadings and therefore this issue should not form part of the determination of this Request for Review.

The Board notes that the High Court addressed this concern in **Judicial Review Application No. 106 of 2014 Republic v Public Procurement Administrative Review Board & 3 Others Ex-parte Olive Telecommunication PVT Limited [2014] eKLR** where it held as follows: -

***"..The concern of this Court is whether these issues were pleaded or arose in the course of proceedings and were responded to by the ex-parte applicant and the 1<sup>st</sup> Interested Party.***

***.....we conclude the issues complained of were pleaded by the parties and were responded to by the Ex Parte***

***Applicant as well as the Procuring Entity. ....if the issues had not been specifically pleaded they arose in the course of proceedings and were canvassed by parties. They were therefore properly before the Board for determination..."***

The court in the above case held that, if the issues specifically not pleaded arose in the course of proceedings and were canvassed by parties, then the said issues are properly before the Board for determination.

Turning to the circumstances of the instant case, the Board notes that all parties to the review application were afforded an opportunity to be heard on the question whether the tender validity period of the subject tender is still valid.

Moreover, the Board notes that the Applicant in its submissions alleged that the Procuring Entity awarded the subject tender and notified bidders of the outcome of their bids, outside the scope of the tender validity period. The High Court in **Judicial Review No. 59 of 2017 Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Higawa Enterprises Limited [2017] eKLR** while determining whether it was properly within its mandate to make a determination with respect to the tender validity period, held as follows: -

***"The omission of the tender validity period in the tender document resulted in a failure to "achieve a certain measure of precision" in the tender and left the important matter of***

***the tender validity period for speculation and conjecture. This omission also opened the door for the Interested Parties to arbitrarily extend the same as nothing in the tender document would afford any party an opportunity to accuse the Interested Parties of extending the Tender out of time. Further upon the award of the Tender, in the absence of a tender validity period, the Interested Parties could not be challenged for doing so out of the stipulated time. This is a further open door for arbitrary action and indeed corruption. Any arbitrary action in the tendering process suggests unfairness and opacity which militate against a system that is fair and transparent and corruption-free. A tender award is vitiated by a process that is not fair and transparent. It was therefore illegal for the Respondent to uphold a tender award done in such an opaque manner without a tender validity period when the law requires that the same be specified.***

***For the foregoing reasons, this Court cannot disregard a decision that is irrational, illogical or fraught with procedural impropriety and allow the same to stand just because the decision-making process cannot be faulted. I therefore find that this Court is properly within its mandate to make a determination on the decision made by the Respondent based on the 3 I's. Further, the illegality of the Tender has***

***been brought to the attention of the Court. This Court should not enforce an illegal tender contract, or allow itself to be made an instrument of enforcing the illegal tender. I conclude by borrowing the words of the Court in Olive Telecommunication PVT Limited case (supra). By allowing the award of the Tender to stand "this Court would have abetted an illegality. This Court cannot countenance illegalities under any guise since the High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role to do so."***

The High Court, in the aforementioned matter was of the view that the award of tender outside the tender validity period points to an illegality which a court or any other adjudicating body ought not to disregard in so far as the illegality has been brought to its attention at any point in time during its proceedings in a matter. According to the High Court, failure to address the same would amount to the court or adjudicating body abetting or enforcing such illegality.

In this regard therefore, it is the Board's considered view that an issue pertaining to award of a tender outside the tender validity period, whether pleaded or not, may be raised at any point of time in proceedings before it and ought to be heard and determined by the Board.

Further, as the issue for determination is on a point of law the Board is guided by the decision of the Court of Appeal in **Civil Appeal No. 4 of 2011 in Emmanuel Mwakisha Mjawasi ad 748 Others v Attorney General of the Republic of Kenya [2012] eKLR** where the Court held as follows: -

***"It is recognized, in our jurisprudence that for the attainment of substantive justice, a point of law can and should be raised at any time during the course of the proceedings, preferably at the earliest available opportunity."*** [Emphasis by the Board

The Board therefore finds that the issue for determination is properly before this Board.

The Board shall now determine whether the Procuring Entity provided a tender validity period in its Tender Document and if it did, what is the period within which the tender would remain valid?

The Board studied the provisions of the Tender Document and observes that Clause 1.6 of Section I of the Tender Document provides as follows: -

***"Prices quoted shall be net inclusive of all taxes and delivery must be in Kenya Shillings and shall remain valid for 120 days from the closing date of the tender"***

Further, Clause 2.4.4 of Section II Information to Consultants of the Tender Document reads as follows: -

***"The financial proposal must remain valid for 120 days after the submission date. During this period, firm is expected to keep available at its own cost any staff proposed for the assignment"***

The Board observes that the two provisions mentioned hereinabove are with respect to the price validity period which was to run for 120 days from the closing date of the tender.

The Board further notes that Clause 1.7 of Section I of the Tender Document provides as follows: -

***"All tenders must be accompanied by a tender security of Kshs 100,000/- or 1000 US Dollars in form of a bank guarantee, banker's cheque, guarantee(s) from deposit taking micro finance institutions, youth or women development enterprises or sacco approved by PPRA, valid for at least 150 days after the date of tender opening. Entities belonging to Youth, Women and Persons with Disabilities (YWPDSO will not be required to provide tender***

***security on condition that they provide valid National Treasury's or County's AGPO Registration Certificate"***

Accordingly, the abovementioned clause specifies that all tenders submitted by bidders must be accompanied by a tender security valid for at least 150 days from the date of tender opening except if a bidder is an entity belonging to Youth, Women or Persons with Disabilities.

From the abovementioned provisions, the Board notes that Clause 1.6 of the Tender Document provides for the period within which prices quoted by a bidder shall remain valid, that is the price validity period whereas Clause 1.7 of the Tender Document provides for the period within which a tender security shall remain valid, that is the tender security validity period.

Having studied the abovementioned provisions, the Board deems it necessary to distinguish between a price validity period and a tender validity period which it addressed in its previous decision in **Review Application No. 131 of 2019 Limah E.A Limited v The Accounting Officer Mathari National Teaching and Referral Hospital and Super Broom Services Limited** as follows: -

***"Section 88 (1) of the Act only provides a discretion to the Procuring Entity to extend the tender validity period. From this provision, it can be said the tender validity period is the***

**period within which tenders shall remain valid or alive, that is to say, a procuring entity may specify a period within which the life of a tender runs.**

**A procuring entity is required to extend the period during which tenders may remain valid, that is the tender validity period, before the period expires. Notice of this extension shall be made in writing to each bidder who submitted a tender and may only be done once and for a period of not more than thirty days.**

**Having found that a procuring entity is the one who may extend the tender validity period, an interpretation of what a bid price validity means can be made by determining the person that extends a bid price validity period. The Board observes that when a bidder quotes a price as part of its tender, it may provide a period within which that price shall remain valid. Therefore, a bidder may extend its bid price validity period, thereby extending the period under which it undertakes to be bound by the price it had quoted in its Form of Tender.**

**The difference between a tender validity period and a bid price validity period can also be determined by interrogating**



***the purpose of each of the two. The purpose of a tender validity period is to ensure that a procurement process is concluded and an award made when the life of the tender is still existing. This explains why the Act gives a procuring entity the discretion to extend that period for a further 30 days to ensure that award of the tender is made and a contract is signed when the tender is still existing. Failure to award a tender and sign a contract within the tender validity period, the tender will be deemed to have died a 'natural death'.***

***On the other hand, the purpose of a bid price validity period is to ensure that a bidder is bound by the price at which it offered to supply goods or services as the case may be within the period the bidder specified as its bid price validity period. This means, in the event there is price fluctuation of materials to be procured to execute the tender, the bidder will not have the option to alter its bid price which remains binding to the bidder during the bid price validity period***

From the above decision it is clear that a tender validity period is the period within which tenders shall remain valid or alive, and is set to show the lifespan of a tender within which a procuring entity ought to conduct its entire procurement processes. This period may be extended by a procuring

entity in the first instance in accordance with section 88 of the Act, for a period of thirty days.

Further, it is clear that a price validity period is the period within which a bidder shall be bound by the price it submitted in its bid. However, any extension of a bidder's price validity period must be acceptable to the respective bidder in order to confirm whether the said bidder is capable of performing the tender during the period that is proposed for extension, if found to be the successful bidder.

The Board studied the Procuring Entity's Tender Document and notes that there is no express provision therein for the tender validity period of the subject tender, having determined that the price validity period is different from the tender validity period.

In essence, the Procuring Entity made provision for the price validity period but failed to specify the tender validity period of the subject tender.

The Board studied **Judicial Review 59 of 2017 Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Higawa Enterprises Limited [2017] eKLR** to establish the effect of a Procuring Entity's failure to specify a tender validity period in its Tender Document which stated as follows: -

***"The tender validity period goes to the root of the award of the tender. This period is a critical factor in determining whether a tender is validly awarded or not. Failure by a procuring entity to state the tender validity period in any tender in my view would render any award therein a nullity. The tender validity period further determines by what date if it is found necessary, a tender validity period may be extended under Section 88(1) of the Act. In the present case, the tender validity period not being indicated in the tender document was unknown or indeterminate. The indeterminate tender validity period was purportedly extended on 11.7.17 for a period of 30 days to 16.8.17. No one is able to tell whether this purported extension was within the tender validity period and therefore within the law."***

The High Court further stated as follows: -

***".....The foregoing provision permits the extension of the tender validity period but that extension must be made before the expiry of the already stipulated tender validity period. The Concise Oxford English Dictionary eleventh Edition defines extension inter alia as:***

***"An additional period of time given to someone to hold office or to fulfil an obligation."***

***Extension presupposes a period specified. It is not disputed that the tender document herein did not contain the tender validity period. The Interested Parties' letter of 11.7.17 stated that the tender validity period is extended by a further 30 days. From when? On what basis therefore was a nonexistent or indeterminate tender validity period extended by the Interested Parties?"***

The Board, having considered the circumstances of the above decision in comparison with the circumstances of the instant request for review, observes that just like in the instant case, the Procuring Entity in the abovementioned High Court decision failed to provide for a tender validity period and purported to extend a non-existent tender validity period.

In the alternative, the Board studied the tender security form at page 25 of the Tender Document and notes the following provision: -

***"This tender guarantee will remain in force up to and including thirty (30) days after the period of tender validity and any demand in respect thereof should reach the Bank not later than the above date"***

In its interpretation of the aforementioned provision, the Board first addressed its mind to the meaning of a 'tender guarantee'.

A 'tender guarantee' or 'tender security' is defined under the interpretation section of the Act as follows: -

***"...a guarantee required from tenderers by the procuring entity and provided to the procuring entity to secure the fulfillment of any obligation in the tender process and includes such arrangements as bank or insurance guarantees, surety bonds, standby letters of credit, cheques for which a bank is primarily liable, cash deposits, promissory notes and bills of exchange tender securing declaration, or other guarantees from institutions as may be prescribed"***

A tender security is therefore a guarantee required from tenderers by a procuring entity to secure fulfillment of a bidder's obligations in a tender process. A tender security may include bank or insurance guarantees, surety bonds, standby letters of credit, cheques for which a bank is primarily liable, cash deposits, promissory notes, bills of exchange, tender securing declaration, or other guarantees from institutions.

Section 61 of the Act further provides that: -

***"An accounting officer of a procuring entity may require that tender security be provided with tenders, subject to such requirements or limits as may be prescribed." [Emphasis by the Board]***

The purpose of a tender security was explained in the case of **Petition No. 255 of 2016 Okiya Omtatah Okoiti & Another v National Transport and Safety Authority & 2 others [2017] eKLR** where the Honourable Justice Odunga held as follows: -

***"In my view the performance bond or tender security is meant to ensure that in the event that the successful tenderer fails to perform the contract the procuring entity would be in a position to secure itself without the necessity of having to institute legal proceedings against an entity that may not be in a position to compensate the public for the loss. This must necessarily be in tandem with Article 227(1) of the Constitution which decrees that a State organ or any other public entity, when it contracts for goods or services, shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Cost effectiveness in my view requires that as much as possible the procuring entity secures the public funds against any foreseeable risk of loss hence the need for financial security."***

Accordingly, a tender security serves to protect a procuring entity in the event a successful tenderer fails to perform or execute the said tender. It further secures public funds in the event of any foreseeable risk or loss in

accordance with the principle of cost-effectiveness as espoused under Article 227 (1) of the Constitution.

Having established the meaning and purpose of a tender security, the Board considered the provision on the tender security form at page 25 of the Tender Document as cited hereinabove and makes the following observations: -

The provision on the tender security form on page 25 of the Tender Document stipulated that a tender security shall be valid *“upto and including 30 days after the period of tender validity”*.

This is in line with Regulation 41 (4) of the Public Procurement and Disposal Regulations (2006) which states as follows: -

***“No tender security shall be accepted under the Act unless such security is valid for a period of at least thirty days after the expiry of the tender validity period.”***

The Board further notes that Clause 1.7 of Section I of the Tender Document, cited hereinabove, specifies that all tenders submitted by bidders must be accompanied by a tender security valid for at least 150 days from the date of tender opening except if a bidder is an entity belonging to Youth, Women or Persons with Disabilities.

From a reading of the above two provisions, an inference can be made that the tender validity period of the subject tender was 120 days from the date of tender opening given that ordinarily, a procuring entity directs bidders to ensure that their tender securities are at least thirty days more than the tender validity period and in this case, the tender securities required were to be valid for 150 days.

Since Clause 1.7 of Section I Invitation to Tender of the Tender Document specified that the tender security submitted by bidders would be valid for 150 days from the date of tender opening, then it goes without saying that an assumption can be made that the tender validity period of the subject tender was 120 days from the date of tender opening.

If this assumption is taken into account, it means that from 11<sup>th</sup> June 2019, being the tender opening date, the tender validity period of the subject tender would remain valid for 120 days and lapse on 11<sup>th</sup> October 2019.

The Board observes that the Procuring Entity considered the tender validity period of the subject tender to be 120 days from the date of tender opening and extended such period for a further 30 days but failed to specify from what date such extension was to take effect.



Even if the Board was to add an additional 30 days to the 120 days considered by the Procuring Entity, the Board finds that the tender validity period of the subject tender lapsed on 11<sup>th</sup> November 2019.

In both scenarios, the Board finds that the tender validity period of the subject tender does not exist and the subject tender is dead.

The Board is now left with the question as to what are the appropriate reliefs to grant in the circumstances.

Section 87 (1) of the Act states as follows:-

***"Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted"***

Section 135 (3) of the Act further provides that:-

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

The above provisions specify that award of a tender and signing of a contract must be made within the tender validity period, that is, within the lifespan of a tender.

The effect of awarding a tender outside the scope of a tender validity period was explained in the case of **Judicial Review No. 59 of 2017 Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Higawa Enterprises Limited [2017] eKLR** where the Honourable Justice Thande stated as follows: -

***"Upon expiry of the tender validity period, there was no tender in existence capable of being awarded. It is therefore manifest that the Tender award having been done after expiry of the extended tender validity period was illegal and therefore null and void."***

This means that an award of tender or any action taken by a Procuring Entity, outside the scope of a tender validity period, was illegal and therefore null and void as there is no tender in existence.

The Board takes note that the Applicant's prayer No. (b) of its Request for Review requests for orders from this Board that *"the decision of the Procuring Entity through its letter dated 14<sup>th</sup> November 2019 that the*

*Applicant had not been successful in Tender No. MTRH/RFP/10/2018-2019 be annulled”.*

It is trite law that a decision making body should not issue orders in vain. The Court in **Judicial Review Case No. 2 of 2019, John Kipkore Komen v Chief Magistrates Court Kitale & 2 others [2019] eKLR** while considering whether or not to grant an order for injunction held as follows:-

***“...Even if this application were to be considered as a proper application for injunction, it cannot see the light of day for two reasons: The first reason is that there is no existing suit upon which the application is anchored, and secondly, the applicant has not met the conditions for the granting of interlocutory injunctions as set out in the *Giella versus Cassman Brown Case* (above). Further, the subject matter which the applicant seeks to conserve is admittedly not there, and it being accepted that courts do not issue orders in vain, an order of injunction would serve no purpose in this case.”***

Having found that the tender validity period does not exist and that the subject tender is dead, it is the Board’s view that an order directing the Procuring Entity to nullify the letter of notification to the Applicant which notification was issued after expiry of tender validity thus null and void would be issued in vain, as any action done outside the scope of a tender

validity period is null and void. Simply put, as the subject tender is dead, there is no tender in existence and therefore there is nothing to nullify.

Finally, the Board would like to reiterate that all procuring entities are mandated to use the standard tender documents in all procurement and asset disposal proceedings as provided by the Authority in accordance with section 58 and 70 of the Act. This ensures that the subject tender document consists of sufficient information to allow for fairness, equitability, transparency, cost effectiveness and competition among bidders in line with Article 227 (1) of the Constitution.

In view of the Procuring Entity's failure to utilize the standard tender documents as provided for by the Authority with respect to the subject procurement process, the Board hereby directs the Procuring Entity to seek assistance from the Authority and utilize the standard tender documents in all its procurement and asset disposal proceedings in accordance with section 58 and 70 of the Act.

In totality, the Board holds that the Request for Review partially succeeds in terms of the following specific orders: -

**FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

- 1. The Procuring Entity is hereby directed to re-tender for Sourcing of Laundry Equipment on Leasing Agreement.**
- 2. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi, this 19<sup>th</sup> day of December, 2019**

.....

**CHAIRPERSON**

**PPARB**

.....

**SECRETARY**

**PPARB**

**Delivered in the presence of: -**

- i.** Mr. Muganda on behalf of the Applicant;
- ii.** Mr. Kiplang'at holding brief for the Procuring Entity;
- iii.** Mr Kiplang'at holding brief for Mr Lusi for the Interested Party.