

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 136/2019 OF 28TH NOVEMBER 2019

BETWEEN

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/10/2018-2019 for Sourcing of 4 Ton Steam Boiler on Leasing Agreement

BOARD MEMBERS

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

4. Ms Phyllis Chepkemboi -Member

IN ATTENDANCE

1. Mr. Philemon Kiprop -Holding brief for Secretary

2. Ms. Maryanne Karanja -Secretariat

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

INTERESTED PARTY**PHARMAKEN LIMITED**

1. Ms. Jane Mubangi

-Advocate, CM Advocates, LLP

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/10/2018-2019 for Sourcing of 4 Ton Steam Boiler on Leasing Agreement (hereinafter referred to as “the subject tender”) via an advertisement dated 30th April 2019. Bidders were instructed to download tender documents from the Procuring Entity’s website at www.mtrh.or.ke or at <https://suppler.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 11th June 2019 in the presence of bidders and their representatives and the following bidders submitted their bids:-

Bidder no.	Company Name
B1	M/s Rentco East Africa Limited
B2	M/s Lean Energy Solutions Limited
B3	M/s Pharmaken Limited

Evaluation of Bids

The evaluation process was held on 9th July 2019 and 30th July 2019 and was conducted as follows: -

1. Preliminary Evaluation
2. Competence Evaluation
3. Financial Evaluation

1. Preliminary Evaluation

At this stage of evaluation, bids were evaluated against the mandatory requirements as outlined in the Tender Document.

The results were as follows: -

- a) **Bidder No. 1** was declared responsive after having submitted all mandatory requirements
- b) **Bidder No. 2** was non-responsive as it provided a tender security bond from an insurance company contrary to the specifications provided in clause 1.7 of the tender document
- c) **Bidder No. 3** was responsive having submitted all the mandatory requirements

2. Competence Evaluation

At this stage of evaluation, bids were scored marks with respect to the following criteria:-

- a) Evidence of having performed similar leasing it at least two reputable organizations
- b) Capacity to install and sustain the boiler operation professionally; and
- c) Evidence of having capacity to procure the steam boiler and sustain it for at least one year

The threshold for passing the Competence Evaluation was 70 marks

The results were as follows: -

Bidder No. 1 scored 65% hence did not pass the pass mark of 70% therefore disqualified to proceed to the next stage.

Bidder No. 3 scored 80% above the 70% pass mark hence qualified for technical stage

4. Financial Evaluation

The Financial Proposals were opened on 10th July, 2019. All the three bids were opened and prices read out.

Bidder No. 3, that is, M/s Pharmaken Limited gave three modes of purchase i.e. leasing, instalment purchase and outright purchase.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended as follows: -

1. **Bidder No. 3**, that is, M/s Pharmaken Limited, be invited for negotiation.
2. The Legal Officer to be in attendance in the negotiation meeting to provide advice in legal matters in the proposal

Due Diligence and Negotiation

The Evaluation Committee carried out Due Diligence on Bidder No. 3 and prepared a report dated 7th November 2019 which recommended as follows:-

- It is the considered opinion of the Evaluation Committee that M/s Pharmaken Limited has no prior experience in Boiler Supplies. Further, it emerged that the company has no technical staff trained and experienced on steam boilers and will train them upon winning this tender.
- M/s Pharmaken Limited are authorized agents of Yuanda Boiler Corporation China and this gives them an edge in terms of competitive prices. Furthermore, they have committed to conduct the training from the manufacturer's premises for our Engineers and operators at their cost which in essence is superior to in-house training in terms of better understanding of Boiler functionality and maintenance.
- M/s Pharmaken Ltd deals and imports China manufactured Boilers only.
- It is our considered opinion that M/s Pharmaken Ltd has the will and power and financial capacity to deliver the project cognizant of their relationship with Yuanda Boilers Corporation China, Pharmaken Limited. Though M/s Pharmaken Limited has no past experience in supplies of steam boilers and technical support, first line training of

its 2 and 5 MTRH technical staff and stocking of 5 years consumable spares should be adequate technical back up to ensure trouble free operation and maintenance.

- To ensure high steam boiler uptime, an article in the contract should capture amount of money that should be withheld in case of downtime above 5% and the amount chargeable should be prorated.
- Based on the legal compliance, financial capacity, and partnership with a company that has many years of experience in manufacturing and supply of steam boilers for many years, M/s Pharmaken Limited is in position to supply the steam boiler through one of the three available options preferably outright purchase since it's the lowest technically evaluated option. The supplier has committed to train the technical staff and this should be captured in the contract as a prerequisite to supply of the boiler.
- It is hereby recommended that the tender be awarded to M/s Pharmaken Ltd after establishing compliance of the company in the three parameters that were subjected to due diligence and agreeing on need to build technical capacity before supplying the boiler to the hospital.

Professional Opinion

Having reviewed the Evaluation Report and the subsequent due diligence and 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: -

No	Tender Description	Delivery Period	Warranty	Contract Sum	Awarded Bidder
1	Supply and Delivery of 4 Ton Steam Boiler on Outright Purchase Term	10 Weeks	3 Years	65,000,000.00	M/s Pharmaken Limited
2	Annual Service and Maintenance Cost for 5 years. Cost per Annum is Kshs 1,350,000.00			6,750,000.00	
Total Amount				71,750,000.00	

The Accounting Officer on 8th November 2019 approved the recommendation of award to M/s Pharmaken Limited at a total cost of Kshs 71,750,000 through outright purchase.

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 27th November 2019 and filed on 28th November 2019 together with a Statement in Support of the Request for Review sworn on 27th November 2019 and filed on 28th November 2019 (hereinafter referred

to as "the Applicant's Supporting Statement"). The Applicant further filed a Supplementary Affidavit dated and filed on 10th 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 14th November 2019 that the Applicant had not been successful in Tender No. MTRH/RFP/10/2018-2019;***
- 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 of Response dated 5th December 2019 and filed on 6th December 2019 (hereinafter referred to as "the Procuring Entity'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 Ms. Jane Mubangi holding brief for 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.

With respect to the validity of the subject tender, Mr Muganda requested the Board to adopt its submissions in Request for Review No. 135 of 2019.

Mr. Muganda submitted that the Procuring Entity failed to give proper consideration of the documents submitted by the Applicant as part of its bid and that the Applicant fully complied with the requirements in the Tender Document. Mr Muganda contended that the Procuring Entity failed to provide the basis against which a score of 65% was awarded to the Applicant at the competence evaluation stage and therefore the evaluation process failed to meet the threshold of section 3 of the Act and Article 27 and 227 (1) of the Constitution.

Mr Muganda submitted that in response to the first criteria that was applied at the Competence Evaluation stage, the Applicant provided five (5) applications of past experiences and therefore it was unfairly evaluated by the Procuring Entity.

Mr Muganda invited the Board to note that the documents submitted by the Applicant in response to the tender that is the subject of review proceedings in Request for Review Application No. 135 of 2019, were the same documents that the Applicant submitted in response to the subject tender. Under Request for Review Application No. 135 of 2019, the Procuring Entity disqualified the Applicant at Preliminary Evaluation Stage yet under the subject tender, the Procuring Entity disqualified the Applicant at Competence Evaluation Stage. In this regard therefore, Mr Muganda contended that there was inconsistency in the manner in which the Procuring Entity handled the two evaluation processes.

Mr Muganda submitted that the Procuring Entity had raised the issue of a valid tax compliance certificate in its response to the Request for Review and therefore requested the Board to admit its submissions from Request for Review Application No. 135 of 2019 on this issue.

On the issue of failure by the Applicant to plead the expiry of the tender validity period in its pleadings, Mr Muganda relied on the decision in *Judicial Review No. 59 of 2017*, where it was held that no court ought to enforce an illegal contract and therefore an illegality need not be pleaded for a court to address it as an issue for determination.

In conclusion, Mr Muganda urged the Board to consider the prayers sought in the Request for Review and in view of its powers under section 173 of the Act, cancel the letter of regret issued to the Applicant, terminate the tender with costs to the Applicant and make any other order that it may deem fit.

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 requested the Board to adopt its submissions in Request for Review No. 135 of 2019. On the basis that the tender validity period had expired, Mr Kiplang'at urged the Board to strike out the Request for Review and referred the Board to the decision in *Request for Review Application No. 166 of 2018*.

In response to the Request for Review, Mr Kiplang'at submitted that the Applicant ought not to have qualified for competence evaluation for the reason that the Applicant did not submit a valid tax compliance certificate. This confusion was occasioned by the fact that there was evidence of tax compliance by Spenomatic Limited (the other member of the consortium) and not Rentco. It was therefore the Procuring Entity's submission that all parties to a consortium are required to be tax compliant and therefore the Applicant's bid ought to have been found non-responsive at the Preliminary Evaluation Stage.

In support of his submissions, Mr. Kiplang'at relied on the decision in *Judicial Review No. 85 of 2018* and urged the Board to strike out or dismiss the Request for Review.

The Interested Party's Submissions

In her submissions, Counsel for the Interested Party, Ms Mubangi requested the Board to adopt its submissions in Request for Review No. 135 of 2019, with respect to the validity of the subject tender. Ms Mubangi further reiterated that the tender validity period had expired.

Ms. Mubangi submitted that the Interested Party associated itself with the Procuring Entity's submissions with respect to the merits of the evaluation process and submitted that the Procuring Entity adhered to the evaluation

criteria as outlined in the Tender Document and complied with the provisions of the Act

It was the Interested Party's submission that its bid was properly evaluated by the Procuring Entity and hence declared successful. Ms. Mubangi therefore urged the Board to uphold the decision of the Procuring Entity in the event that it finds that the tender validity period did not affect the evaluation process and proceed to dismiss the Request for Review.

The Applicant's Rejoinder

In a rejoinder, Mr Muganda submitted that the Board should take note that the Procuring Entity failed to lodge a Replying Affidavit in defiance of the rules of procedure.

Mr Muganda argued that the Procuring Entity, in its submissions, did not address the reasons for disqualification of the Applicant's bid as raised in its letter of regret.

In response to the Procuring Entity's assertions that only one member of the Applicant's consortium was tax compliant, Mr. Muganda submitted that the Applicant had provided a letter of association which defined the roles of each party in a consortium and once the Board perused the Applicant's bid,

it would confirm that the Applicant provided all the documents for all the members of the consortium.

Finally, Mr. Muganda urged the Board to consider prayers (a) to (f) in its Request for Review and further issue any other orders that the Board may deem fit under section 173 of the Act.

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 in accordance with section 80 (2) of the Act as read together with Article 227 (1) of the Constitution of Kenya 2010;***
- II. Whether the tender validity period of the subject tender is still valid.***

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 30th April 2019 and the Applicant duly submitted its bid in response to the same.

By the bid submission deadline of 11th June 2019, the Procuring Entity received a total of three (3) bids which were opened in the presence of bidders and their representatives.

Evaluation of bids was conducted on 9th July 2019 and 30th 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 bidders, 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 14th November 2019 stated as follows: -

"We refer to your tender which was opened on 11th June 2019. We regret to inform you that the tender was not

successful because you scored 65% on technical aspects which was below the pass mark of 70%.

M/s Pharmaken Limited submitted a successful tender and notice of intention to enter into a contractual relationship pursuant to 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 with the decision of the Procuring Entity, the Applicant moved the Board through this Request for Review.

It was the Applicant's contention that the Procuring Entity failed to give proper consideration to the documents it submitted as part of its bid. The Applicant submitted that the Procuring Entity awarded the Applicant's bid a score of 65% at the Competence Evaluation Stage and failed to demonstrate how this score was awarded to the Applicant.

The Applicant submitted that the Procuring Entity's contention that the Applicant failed to provide *'evidence of having performed similar leasing in*

at least two organizations' was unfounded. The Applicant contended that it provided evidence of at least six (6) letters of boiler supply contracts for the Procuring Entity's consideration in its bid document.

The Board studied the Procuring Entity's Tender Document and observes that the Competence Evaluation Criteria was provided for on page 18 and 19 of the Tender Document as follows: -

"Bidders are required to provide documentary evidence to below required information.

<i>No.</i>	<i>Requirement</i>		<i>Marks</i>
<i>1</i>	<i>Evidence of having performed similar leasing in at least two reputable organizations (attached an leasing evidence document)</i>	<i>2 and below institutions</i>	<i>25</i>
		<i>3-5 Institutions</i>	<i>30</i>
		<i>5 and above institutions</i>	<i>35</i>
<i>2.</i>	<i>Capacity to install and sustain the boiler operation professionally (attach cv for your technical personnel)</i>	<i>Certificate</i>	<i>20</i>
		<i>Diploma</i>	<i>25</i>
		<i>Degree</i>	<i>30</i>
<i>3</i>	<i>Evidence of having capacity to procure the steam boiler and sustain it for at least one year (show</i>	<i>1 year and below</i>	<i>25</i>
		<i>More than 1 year to 2 years</i>	<i>30</i>
		<i>More than 2 years and above</i>	<i>35</i>

Candidates that shall have passed competence evaluation with 70 marks and above will proceed to technical evaluation.”

The Board examined the Procuring Entity’s Evaluation Report dated 30th July 2019 and notes that two bidders, including the Applicant herein, qualified for the competence evaluation stage. The Board observes on page 3 of the report that the Applicant was awarded the following scores with respect to the competence evaluation criteria outlined hereinabove as follows: -

No.	Requirement		Marks	B1 (Applicant)
1	Evidence of having performed similar leasing in at least two reputable organizations (attached an leasing evidence document)	2 and below institutions	25	0
		3-5 Institutions	30	
		5 and above institutions	35	
2.	Capacity to install and sustain the boiler operation professionally (attach cv for your technical personnel)	Certificate	20	30
		Diploma	25	
		Degree	30	
3	Evidence of having capacity to procure the steam boiler and sustain it for at least one year (show	1 year and below	25	35
		More than 1 year to 2 years	30	
		More than 2	35	

		<i>years and above</i>		
				65%

The Evaluation Committee then made the following remarks at the conclusion of the competence evaluation stage: -

"B 1 – scored 65% hence did not attain the pass mark of 70% therefore disqualified to proceed to the next stage"

From the above excerpt, the Board notes that it is not clear how marks were awarded to the Applicant's bid at the competence evaluation stage. For one, the Board notes that with respect to Criterion No. 2, that is, *'Capacity to install and sustain the boiler operation professionally (attach cv for your technical personnel)'* the Applicant was given a score of thirty (30) marks. From this score of thirty marks, the Procuring Entity did not clearly outline whether the Applicant was awarded a score of 30 marks for providing a degree certificate or whether the Applicant was awarded the said score for submitting a certificate and/or a diploma certificate.

Even if the Board were to consider Criteria No. 3 outlined hereinabove, it is worth noting that the Procuring Entity failed to specify whether the award of 35 marks to the Applicant's bid in respect of this criterion relates to the Applicant having submitted evidence of capacity to procure a steam boiler

and sustain it for at least one year and below, more than one year to two years or more than two years and above.

Moreover, the Board examined the letter of notification of unsuccessful bid issued to the Applicant by the Procuring Entity and notes that the Procuring Entity, failed to outline the specific reasons why the Applicant's bid was not successful.

The obligation by a procuring entity to outline the reasons why a bidder's bid was unsuccessful is provided for under section 87 (3) of the Act which provides as follows: -

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

These reasons ought to be specific and not general, such that if a bidder is found non-responsive at the Competence Evaluation Stage, the letter of notification ought to specifically state:-

- a. Whether there was a failure by the bidder to achieve the minimum technical score;
- b. Whether there was a failure to submit documents evidencing compliance to technical specifications and the specific documents in question that the bidder failed to attach in order to meet the requisite experience.

The Board is cognisant that providing a bidder with reasons why its bid was found unsuccessful is an issue that goes to the root of the rules of natural justice, one of them being, "the right to a fair hearing" including the right to have adequate time and facilities to prepare a defence as stated under Article 50 (c) of the Constitution. A bidder cannot adequately exercise this right when specific reasons are not afforded to it by a procuring entity.

However, during the hearing of the Request for Review, the Board heard submissions from the Procuring Entity that it erred during evaluation of the Applicant's bid by allowing the Applicant's bid to proceed to the competence evaluation stage.

It was the Procuring Entity's submission that the Applicant did not provide a valid tax compliance certificate and therefore failed to comply with a mandatory requirement under the subject tender. The Procuring Entity submitted that this error was occasioned by the fact that although the

Applicant did not have a valid tax compliance certificate, the other entity in the consortium, that is, M/s Spenomatic (K) Limited submitted a valid tax compliance certificate thus creating the impression that the Applicant was tax compliant.

The Board notes from the Procuring Entity's confidential file that the Procuring Entity advertised for the subject tender and Tender No. MTRH/RFP/9/2018-2019 for Sourcing of Laundry Equipment on Leasing Agreement, which is the subject of review proceedings before this Board in Request for Review No. 135 of 2019, on the same date, that is, 30th April 2019.

The Board observes that the Applicant submitted bids in response to the abovementioned tenders and upon examination of the Applicant's original bids, the Board notes that the Applicant submitted similar documents for the Procuring Entity's consideration in both tenders.

The Board compared the Procuring Entity's Evaluation Report in the subject tender which is dated 14th August 2019 with the Evaluation Report in Tender No. MTRH/RFP/9/2018-2019 for Sourcing of Laundry Equipment on Leasing Agreement also dated 30th July 2019.

The Board notes that the Procuring Entity's Evaluation Committee in Tender No. MTRH/RFP/9/2018-2019 for Sourcing of Laundry Equipment on Leasing Agreement disqualified the Applicant's bid at the Preliminary Evaluation Stage for failure to comply with two mandatory requirements whereas the Procuring Entity's Evaluation Committee in the subject tender disqualified the Applicant's bid for failure to attain the pass mark of 70% at the Competence Evaluation Stage.

In the Board's view, there appears to be an inconsistency in manner in which the Procuring Entity handled the evaluation process, noting that the Applicant submitted similar documents in both procurement processes.

Nevertheless, the Board notes that as parties to the instant Request for Review have adopted submissions made in Request for Review No. 135 of 2019, and noting the Procuring Entity's submission that the Applicant ought to have been disqualified at the Preliminary Evaluation Stage with respect to the subject tender, the Board will proceed to determine whether the Applicant complied with the mandatory requirement to provide a valid tax compliance certificate.

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 9th May 2019. Secondly, it submitted a copy of an acknowledgment receipt dated 2nd 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 10th 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 16th 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 10th 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 2nd 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 2nd 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 Procuring Entity wrongfully proceeded to evaluate the Applicant's bid at Competence Evaluation instead of having found the Applicant unresponsive at the Preliminary Evaluation Stage.

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 14th 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 8th of November 2019 and 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 14th 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 11th October 2019, but was extended for a period of thirty (30) days up to 11th November 2019. It was therefore the Procuring Entity's submission that the tender validity period lapsed on 11th 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 11th October 2019, but was extended by the Procuring Entity for a period of thirty (30) days up to 11th 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 14th 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. However, the Interested Party conceded during its oral submissions that the tender validity period had since lapsed.

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 1st 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's 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 aforementioned 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 11th June 2019, being the tender opening date, the tender validity period of the subject tender would remain valid for 120 days and lapse on 11th 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 11th 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 14th 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.

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 4 Ton Steam Boiler on Leasing Agreement**

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

Dated at Nairobi, this 19th day of December, 2019

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CHAIRPERSON

PPARB

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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 Ogato holding brief for Mr Lusi for the Interested Party.