

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NUMBER 146 OF 2019**

**BETWEEN**

**AUTOXPRESS LIMITED.....APPLICANT**

**AND**

**MANAGING DIRECTOR,  
KENYA POWER & LIGHTING COMPANY  
LIMITED.....RESPONDENT**

**AND**

**TREADSETTERS TYRES LIMITED.....1<sup>ST</sup> INTERESTED  
PARTY**

**AND**

**SAMEER AFRICA PLC.....2<sup>ND</sup> INTERESTED PARTY**

Review against the decision of the Managing Director of Kenya Power and Lighting Company Limited in respect of Tender No. KP3/9A/OT/01/19-20 for the Supply of New Tyres & Tubes for Motor Vehicles, Motor Cycles, Light & Heavy Trucks, Teleloggers, Forklifts and Tractors.

**BOARD MEMBERS**

- |                          |              |
|--------------------------|--------------|
| 1. Ms. Faith Waigwa      | -Chairperson |
| 2. Ms. Phylis Chepkemboi | -Member      |

3. Mr. Nicholas Mruttu -Member
4. Dr. Joseph Gitari -Member

### **IN ATTENDANCE**

1. Mr. Stanley Miheso -Holding brief for Secretary
2. Ms. Maryanne Karanja -Secretariat

### **PRESENY BY INVITATION**

#### **APPLICANT**

1. Mr. Mwaniki Gachuba
2. Mr. Mathew Maina
3. Mr. Kush Devraj
4. Ms. Sonia Shah

#### **-AUTOXPRESS LIMITED**

- Advocate, Onyoni, Opini & Gachuba Advocates
- Head of Tyres and Wheels
- Personal Assistant to Managing Director
- Personal Assistant to Managing Director

#### **RESPONDENT**

#### **-MANAGING DIRECTOR, KENYA POWER & LIGHTING COMPANY**

1. Mr. Jude Ochieng -Advocate, Legal Services Department
2. Mr. Wakala Irene -Advocate, Legal Services Department
3. Ms. Lorna Mitine -Supply Chain Department

- |                        |                       |
|------------------------|-----------------------|
| 4. Mr. Stephen Mitiri  | -Supply Chain Officer |
| 5. Mr. Vincent Mugendi | -Engineer             |

**1<sup>ST</sup> INTERESTED PARTY**

**-TREADSETTERS TYRES LIMITED**

- |                       |                             |
|-----------------------|-----------------------------|
| 1. Mr. Emmanuel Mumia | -Advocate, MG Law Advocates |
| 2. Mr. Moses Kahon    | -Advocate, MG Law Advocates |
| 3. Ms. Manish Shah    | -Sales Director             |
| 4. Mr. Bernard Mubea  | -General Supply Manager     |

**2<sup>ND</sup> INTERESTED PARTY**

**-SAMEER AFRICA PLC**

- |                      |                                      |
|----------------------|--------------------------------------|
| 1. Mr. Alex Thangei  | -Advocate, Waruhiu K'Owade Advocates |
| 2. Ms. Keziah Muoria | -Waruhiu K'Owade Advocates           |

**OTHER INTERESTED PARTIES**

**A. ACHELIS MATERIAL HANDLING LTD**

- |                        |                |
|------------------------|----------------|
| 1. Mr. Vincent Mutisya | -Sales Manager |
| 2. Mr. Mwenda Mworira  | -Tenderers     |

**B. MUSTRAL GENERAL TRADERS LTD**

- |                    |                |
|--------------------|----------------|
| 1. Mr. Cyrus Kuria | -Sales Manager |
|--------------------|----------------|

**C. RONGALINK ENT LTD**

1. Mr. George Njoroge -Operations Manager

**D. KINGSWAY TYRES LTD**

1. Mr. Shehzan Luhar -Manager, Imports and Supply Chain

**E. ROSSWELL CLEANING & SUPPLIES**

1. Mr. Geoffrey Otieno -Enquiry

**BACKGROUND TO THE DECISION**

**The Bidding Process**

Kenya Power & Lighting Company Limited (hereinafter referred to as “the Procuring Entity”) advertised an open tender, to wit, Tender No. KP3/9A/OT/01/19-20 for the Supply of New Tyres & Tubes for Motor Vehicles, Motor Cycles, Light & Heavy Trucks, Teleloggers, Forklifts & Tractors (hereinafter referred to as “the subject tender”), on My Gov Print Media and through the Procuring Entity’s e-procurement portal on 14<sup>th</sup> August 2019.

**Tender Submission Deadline and Opening of Bids**

The Procuring Entity received a total of eight (8) bids by the tender closing date of 13<sup>th</sup> September 2019. The bids were opened shortly thereafter and recorded as follows:-

No.	Bidders Who Responded
1.	M/s Kingsway Tyres Ltd.

<b>No.</b>	<b>Bidders Who Responded</b>
2.	M/s Mustral General Traders Ltd.
3.	M/s Rongalink Enterprises Ltd.
4.	M/s Sai Raj Ltd.
5.	M/s Treadsetters Tyres Ltd
6.	M/s Sameer Africa PLC
7.	M/s Autoxpress Ltd
8.	M/s Achelis Material Handling Ltd.

## **Evaluation of Bids**

Having appointed an Evaluation Committee, the 8 No. bids were evaluated in the following three stages:-

- i.** Preliminary Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

### **1. Preliminary Evaluation**

At this stage, the Evaluation Committee applied the evaluation criteria under Part 1 of Section VI. Evaluation Criteria of the Document for Supply of New Tyres & Tubes for Motor Vehicles, Motor Cycles, Light & Heavy Trucks, Teleloggers, Forklifts and Tractors (hereinafter referred to as "the Tender Document"). At the end of this stage, the results of evaluation were tabulated as follows:-

<b>Bidder Name</b>	<b>Responsive/ Non Responsive</b>
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<b>Bidder Name</b>	<b>Responsive/ Non Responsive</b>
M/s Achelis Material Handling Ltd	Responsive
M/s Treadsetters Tyres Ltd	Responsive
M/s Autoxpress Ltd	Responsive
M/s Sai Raj Ltd	Responsive
M/s Sameer Africa PLC	Responsive
M/s Kingsway Tyres Ltd	Responsive
M/s Rongalink Enterprises Ltd	Non Responsive
M/s Mustral General Traders Ltd	Responsive

According to the Evaluation Report, seven (7) bidders were found responsive and were allowed to proceed to Technical Evaluation. M/s Rongalink Enterprises Ltd was found to be non-responsive hence disqualified from further evaluation.

## **2. Technical Evaluation**

Technical Evaluation was carried out in accordance with the criteria outlined in Part II of Section VI read together with the Technical Specifications outlined at page 81 to 85 of the Tender document. At the end of this stage, only 4 No. bidders were found responsive hence recommended for Financial Evaluation. These include the following:-

- M/s Achelis Material Handling Ltd
- M/s Treadsetters Tyres Ltd
- M/s Sai Raj Ltd

- M/s Kingsway Tyres Ltd

The following three bidders were found to be non-responsive for their failure to meet the requirements specified in the table below:-

No.	Bidder	Reason for Non Compliance.
1.	M/s Autoxpress Ltd	Did not attach the General requirements of the Guaranteed Technical Particulars (GTPs) which was a mandatory requirement in the Tender document.
2.	M/s Sameer Africa PLC	Did not attach the General requirements of the Guaranteed Technical Particulars (GTPs) which was a mandatory requirement in the Tender document.
3.	M/s Mustral General Traders Ltd.	1. Did not attach a manufacturers' authorizations for the bid items. 2. Did not submit manufacturers' Warranty Certificates for the bid items.

### 3. Financial Evaluation

At this stage, the Evaluation Committee applied the criteria under Part III of Section VI. Evaluation Criteria of the Tender Document. The award criteria was further expressed in clause 6.4 of Section VI. Evaluation Criteria of the Tender Document to be the one of lowest evaluated price in the respective depots/outlets/region of operation of dealership that the bidder indicated on the prescribed form provided in the Tender Document.

### Recommendation

At the end of Financial Evaluation, the Evaluation Committee recommended that the subject tender be awarded to the lowest evaluated bidder with respect to the specific depots/outlets/region of operation of dealership that

the bidder indicated on the prescribed form and emerged the lowest evaluated bidder as summarized below:-

**a) Supply and Fitting of Tyres**

No.	Vendor/Supplier
1.	M/s Achelis Material Handling Ltd
2	M/s Treadsetters Ltd
3	M/s Sai Raj Ltd
4.	M/s Kingsway Tyres Ltd

**b) The rates for wheel balancing and wheel alignment shall apply as a separate service as tabled below:**

**(i). Wheel Balancing as (per tyre) as a separate service**

No.	Service Description	M/s Treadsetters Tyres Ltd Total Price VAT Excl.	M/s Kingsway Tyres Ltd Unit Price VAT Excl.
1	Passenger cars	N/a	431.04
2	4WD and SUVs.	300	N/a

**(ii). Wheel Alignment as a separate service**

No.	Service Description	M/s Sai Raj Ltd Unit Price VAT Excl.	M/s Kingsway Tyres Ltd Unit Price VAT Excl.
1	Passenger cars and – Per vehicle	1,426.00	N/a
2	4WD and SUVs – Per Vehicle	N/a	1,724.14
3	Commercial Vehicles/Light Trucks – Per vehicle	1,426.00	N/a
4	Heavy Commercial – per axle	1,901.00	N/a



## **Professional Opinion**

Pursuant to Section 84 of the Public Procurement and Asset Disposal Act 2015, (hereinafter referred to as "the Act"), the Procuring Entity's Head of Procurement function reviewed the Evaluation Report. In his Professional Opinion dated 25<sup>th</sup> November 2019, she noted that the procurement process of the subject tender complies with the provisions of the Act and that the resultant recommendation of the Evaluation Committee to award the subject tender in the specific categories outlined above can be approved. The Accounting Officer approved the awards on 28<sup>th</sup> November 2019.

## **Notification**

In letters dated 13<sup>th</sup> December 2019, all successful and unsuccessful bidders were notified of the outcome of their bids.

## **THE REQUEST FOR REVIEW**

M/s Autoxpress Limited (hereinafter referred to as "the Applicant") lodged a Request for Review on 24<sup>th</sup> December 2019 together with a Supporting Affidavit sworn and filed on even date (hereinafter referred to as "the Applicant's Supporting Affidavit"). The Applicant also lodged a Reply to the Respondent's Response dated 7<sup>th</sup> January 2020 and filed on even date, a

Further Affidavit sworn and filed on 8<sup>th</sup> January 2020 and Written Submissions filed dated and filed on 9<sup>th</sup> January 2020.

In response, the Respondent lodged a Response to the Request for Review dated and filed on 2<sup>nd</sup> January 2020 (hereinafter referred to as "the Procuring Entity's Response"), Written Submissions dated and filed on 6<sup>th</sup> January 2020 together with Supplementary Submissions dated and filed on 9<sup>th</sup> January 2020. The 1<sup>st</sup> Interested Party lodged a Replying Affidavit sworn and filed on 7<sup>th</sup> January 2020 (hereinafter referred to as "the 1<sup>st</sup> Interested Party's Affidavit") and Written Submissions on 9<sup>th</sup> January 2020 (hereinafter referred to as "the 1<sup>st</sup> Interested Party's Written Submissions") while the 2<sup>nd</sup> Interested Party lodged an Affidavit in Support of the Request for Review sworn and filed on 8<sup>th</sup> January 2020 (hereinafter referred to as "the 2<sup>nd</sup> Interested Party's Affidavit") and Written Submissions dated and filed on 9<sup>th</sup> January 2020 (hereinafter referred to as "the 2<sup>nd</sup> Interested Party's Written Submissions").

The Applicant sought for the following orders:-

- i. An order annulling and setting aside the Accounting Officer's decision to award the Tender for Supply of New Tyres & Tubes for Motor Vehicles, Motor Cycles, Light & Heavy Trucks, Teleloggers, Forklifts and Tractors (Tender No. KP3/9A/OT/01/19-20);***

- ii. ***An order declaring the tenders submitted by Achelis Material Handling Limited, Treadsetters Limited and Sai Raj Limited technically non-responsive;***
- iii. ***An order declaring the Applicant's tender technically responsive;***
- iv. ***An order directing the Accounting Officer to re-admit the Applicant's tender and to cause the Evaluation Committee to conduct financial evaluation thereof; and***
- v. ***An order awarding the Applicant costs of the application.***

### **First time matter came up for hearing**

The Request for Review first came up for hearing on 7<sup>th</sup> January 2020 wherein the Applicant was represented by Mr. Mwaniki Gachuba on behalf of the firm of Onyoni, Opini & Gachuba Advocates, the Respondent was represented by its in-house Counsel, Mr. Jude Ochieng', the 1<sup>st</sup> Interested Party was represented by Mr. Emmanuel Mumia on behalf of the firm of Mwaniki Gachoka & Co. Advocates while the 2<sup>nd</sup> Interested Party was represented by Mr. Murithi holding brief for Mr. Alex Thangei on behalf of the firm of Waruhiu, K'Owade & Ng'ang'a Advocates.

The Chairperson informed all parties to the Request for Review that her law firm is in a panel of advocates for the Procuring Entity and enquired from parties whether they had any objection to her hearing and

determining the Request for Review application. In response, all parties confirmed that they had no objection.

Subsequently thereafter, Counsel for the Applicant, Mr. Gachuba submitted that he was served with the 1<sup>st</sup> Interested Party's Replying Affidavit a few minutes before the hearing and was seeking an adjournment to obtain further instructions from his client. Counsel for the Procuring Entity opposed the application for adjournment and submitted that he was ready to proceed with the hearing.

Counsel for the 1<sup>st</sup> Interested Party, Mr. Mumia opposed the application for adjournment stating that the 1<sup>st</sup> Interested Party's Replying Affidavit only responded to issues raised by the Applicant and did not raise new issues. He therefore urged the Board to decline granting the application for adjournment.

On behalf of the 2<sup>nd</sup> Interested Party, Mr. Murithi who was holding brief for Mr. Thangei supported the Applicant's application for adjournment since Mr. Thangei was only instructed at noon on the said hearing date and was not ready to proceed with the hearing.

The Board having heard parties' submissions on the Applicant's application for adjournment allowed the same directing parties to file written

submissions and allowed the Applicant to file a Further Affidavit in support of its Request for Review, if need be. Accordingly, the hearing was stood over to 2.30 pm on Thursday, the 9<sup>th</sup> day of January 2020 wherein the same proceeded by way of highlighting of submissions.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

In his submissions, Counsel for the Applicant, Mr. Mwaniki Gachuba, fully relied of the Request for Review, the Applicant's Supporting Affidavit and Further Affidavit, the Applicant's Response and Written Submissions.

Mr. Gachuba submitted that only one issue for determination is raised by the Applicant for the Board's determination, that is, *whether the subject tender was fairly evaluated, awarded and notification issued to bidders in accordance with provisions of the Tender Document, the Act and the Constitution.*

Mr. Gachuba referred the Board to the provisions of section 46 (4) (a) and 80 (1), (2) and (3) of the Act, read together with Regulation 16 (1) and (2) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") to support his view that evaluation of tenders is only conducted at Technical and Financial Evaluation stages, and that these stages do not include Preliminary Evaluation. To this end, Counsel submitted that the Procuring Entity failed to conduct its evaluation

in accordance with the aforesaid provisions when it included a Preliminary Evaluation stage. Counsel further submitted that the 2015 Act does not envision Preliminary Evaluation of tenders neither does it give the Evaluation Committee the mandate to conduct evaluation in the aforementioned stage.

On his second ground, Counsel submitted that the Procuring Entity's Evaluation Committee failed to conduct evaluation within the maximum period of 30 days provided for in section 80 (6) of the Act. He further referred the Board to section 176 (1) (c) of the Act which makes it an offence to delay evaluation and comparison of tenders. Counsel further submitted that tenders were opened on 13<sup>th</sup> September 2019 whereas notification of the outcome of evaluation was made on 13<sup>th</sup> December 2019. In his view, evaluation of bids in the subject tender was therefore conducted in 3 months, hence contravening section 80 (6) of the Act. Counsel relied on **Judicial Review Miscellaneous Civil Application No. 540 of 2008, Republic v. Public Procurement Administrative Review Board & Another (2008) eKLR** where it was held that evaluation of bids outside the prescribed statutory period makes the evaluation process unprocedurally fair and in clear contravention of provisions of the Act. Counsel further referred the Board to **PPARB Application No. 62 of 2017, Parity Performance & Compliance Limited v. Ministry of Devolution and Planning, State Department of Devolution** where the Board was deadline with a Request for Proposal tender and found that evaluation of bids in that tender was unlawful for

the Procuring Entity's failure to conduct evaluation within the maximum period of 21 days provided for in section 126 (3) of the Act.

On his third ground, Counsel referred the Board to clauses 3.19.1 and 3.35.1 of Section III. Instructions to Tenderers of the Tender Document read together with section 87 of the Act to support his submission that the Procuring Entity failed to notify bidders of the outcome of their bids within the tender validity period. Counsel submitted that the tender validity period was 90 days from the tender opening date of 13<sup>th</sup> September 2019 which lapsed on 11<sup>th</sup> December 2019 before bidders were notified of the outcome of evaluation on 13<sup>th</sup> December 2019. Counsel then submitted that even though clause 1.4 of Section I. Invitation to Tender of the Tender Document cited a validity period of 120 days, the Procuring Entity did not amend its instructions to tenderers leaving bidders to rely on the period of 90 days to be the tender validity period of the subject tender.

On his fourth ground related to the issue of notification, Mr. Gachuba submitted that the Procuring Entity failed to disclose the amounts at which the tender was awarded to the bidders determined to be successful bidders in the subject procurement process, therefore, the notifications did not meet the threshold of section 87 (3) of the Act.

On his fifth ground, Counsel submitted that the Applicant provided technical specifications of its Guaranteed Technical Particulars as required

in the Tender Document yet its bid was disqualified on this basis. Counsel referred the Board to pages 21 to 315 and page 328 to page 330 of its original bid to support its view that the required Guaranteed Technical Particulars could be found in the aforesaid pages of the Applicant's bid.

Counsel then directed the Board to the prayers sought therein and urged the Board to grant the same. However, upon enquiry by the Board as to whether the Board may order a re-evaluation assuming the tender validity period has indeed expired, Counsel submitted that the most appropriate prayer to grant is the first prayer, that is nullifying the awards issued to the successful bidders in the subject tender. On further enquiry as to whether a prayer nullifying the awards can be granted where the process is void ab initio, Counsel maintained his position that the Board ought to nullify the awards issued to the successful bidder in the subject tender.

## **2<sup>nd</sup> Interested Party's Submissions**

In his submissions, Counsel for the 2<sup>nd</sup> Interested Party, Mr. Alex Thangei, fully relied on the 2<sup>nd</sup> Interested Party's Affidavit and Written Submissions together with the List of Authorities attached thereto.

Mr. Thangei fully supported the Applicant's Request for Review. He however submitted that the Procuring Entity unfairly and illegally evaluated the 2<sup>nd</sup> Interested Party's bid. Counsel further submitted that even though



the 2<sup>nd</sup> Interested Party did not file a Request for Review application before the Board, nothing barred the 2<sup>nd</sup> Interested Party from demonstrating the illegalities conducted by the Procuring Entity in support of the Request for Review application and in so far as the 2<sup>nd</sup> Interested Party is concerned.

Counsel referred the Board to page 204 of the 2<sup>nd</sup> Interested Party's Affidavit to support his submission that the 2<sup>nd</sup> Interested Party's bid was found non-responsive for the alleged failure to submit General Requirements of Guaranteed Technical Particulars. In his view, this requirement was satisfied by the documents at pages 99 to 111 and pages 111 to 113 of the 2<sup>nd</sup> Interested Party's bid.

Counsel relied on section 80 (2) of the Act and Article 227 (1) of the Constitution to support his view that the subject procurement process failed to meet the threshold set in the aforementioned provisions. He also relied on **Judicial Review Miscellaneous Application No. 122 of 2018, Republic v. Public Procurement Administrative Review Board & 2 Others ex parte BABS Security Services Limited** to support his view that the court held that bidders have a legitimate expectation in any procurement process that the same would be conducted in a fair and transparent manner.

On the issue of the tender validity period of the subject tender, Mr. Thangei supported the Applicant's submission that the same already lapsed

on 11<sup>th</sup> December 2019 thereby making the letters of notification issued to bidders, null and void.

In conclusion, he urged the Board to nullify the subject procurement process to pave way for all bidders to participate in the process a second time, should the Procuring Entity re-advertise the goods and services being procured.

### **Respondent/Procuring Entity's Submissions**

In his submissions, Counsel for the Procuring Entity, Mr. Jude Ochieng', fully relied on the Procuring Entity's Relying affidavit, Response and Written Submissions.

Mr. Ochieng' gave a brief background to the procurement process emphasizing that the Procuring Entity required bidders to submit their tenders in response to the advertisement through the Procuring Entity's e-procurement portal. Counsel further submitted that to assist tenderers with the required documents, a checklist was provided at page 4 of the Tender Document and that bidders were reminded to examine all the instructions, forms, provisions, terms and specifications in the Tender Document at clause 3.5.2 of Section III. Instructions to Tenderers of the Tender Document. In the same clause, Counsel submitted that all the tenderers were warned that failure to furnish all information or submitting a tender that is not substantively responsive to the Tender Document is at their own

risk as that failure would result in their respective tender being found non-responsive.

Regarding the period taken to evaluate tenders in the subject procurement process, Mr. Ochieng submitted that the tender opening date of 13<sup>th</sup> September 2019 fell on a Friday. As a result, the Procuring Entity began evaluation on 16<sup>th</sup> September 2019 which was on a Monday. Counsel referred the Board to section 57 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya to support his view that Friday is an excluded day, hence, since the next two days fell on a weekend which are also excluded days, evaluation could only commence on 16<sup>th</sup> September 2019. He then submitted that the same was concluded on 7<sup>th</sup> October 2019 which period was within the maximum period of 20 days provided for in section 80 (6) of the Act.

Counsel then submitted that the Procuring Entity conducted its evaluation in three stages that is, Preliminary, Technical and Financial Evaluation. He refuted the Applicant's submission that Preliminary Evaluation is not envisioned in the 2015 Act and referred the Board to section 80 (2) of the Act which requires a procuring entity to evaluate tenders using the procedures and criteria set out in its tender document. In this regard, Counsel submitted that Preliminary Evaluation was one of the procedures for evaluation provided for in the Tender Document. He further referred

the Board to Regulation 47 of the 2006 Regulations which cites Preliminary Evaluation as the first stage of evaluation of open tenders.

On his next point, Counsel submitted that the Procuring Entity awarded the tender within the validity period of 120 days provided for in clause 1.4 of Section I. Invitation to Tender of the Tender Document. According to Counsel, the period of 90 days at Section III. Instructions of Tenderers of the Tender Document was an inadvertent error that was not used as the determining factor in computing the tender validity period of the subject tender. Upon enquiry by the Board as to whether the tender validity period is similar to bid price validity period, Mr. Ochieng submitted that the two are different, however, that 120 days provided in Section I. Invitation to Tender which talks of price validity was the period taken as the tender validity period. Mr. Ochieng summed up his submissions on this point stating that the subject tender was awarded and notification issued to bidders within the tender validity period. He further took the view that the tender validity period of the subject tender is still in existence and will expire on 16<sup>th</sup> January 2020.

Mr. Ochieng further submitted that bidders were notified of the outcome of their bids including the reasons why their bids were found non-responsive in accordance with section 87 (3) of the Act, He further submitted that the successful bidders were disclosed in the said letters of notification.

Regarding the question whether the Applicant's tender was responsive or not, Counsel submitted that the Applicant failed to provide the General Requirements of Guaranteed Technical Particulars required at pages 81 to 85 of the Tender Document and was therefore non-responsive. Counsel submitted that this criterion was divided into 3 parts, that is, Part A, B and C with specific requirements for each part. According to Counsel, the Applicant failed to satisfy Part A, as the Item 1 thereof was not provided neither was a schedule of General Requirements of Guaranteed Technical Particulars that is signed and stamped attached. Counsel further submitted that the Applicant was invited to view its bid and it did not demonstrate how its satisfied the General Requirements of Guaranteed Particulars under Part A of the Tender Document. Mr. Ochieng submitted that both the Applicant and 2<sup>nd</sup> Interested Party failed to provide the General Requirements of Guaranteed Particulars under Part A of the Tender Document and were therefore found non-responsive.

Counsel took the view that the Applicant is not entitled to the prayers sought in the Request for Review and that the Applicant has suffered no prejudice as a result of the outcome of its bid. He urged the Board to allow the procurement process to proceed since the materials being procured are critical to the operations of Procuring Entity and that it is a traffic offence for any motor vehicle to be used on the road with worn out tyres. Counsel took the view that it would be difficult for the Procuring Entity to ground motor vehicles and that the public will suffer if the prayers sought by the Applicant are to be allowed.

He therefore urged the Board to dismiss the Request for Review and allow the procurement process to proceed to its logical conclusion.

### **1<sup>st</sup> Interested Party's Submissions**

In his submissions, Counsel for the 1<sup>st</sup> Interested Party, Mr. Emmanuel Mumia, fully relied on the 1<sup>st</sup> Interested Party's Affidavit and Written Submissions.

Mr. Mumia fully supported the submissions made by the Procuring Entity and further gave a brief background to the Procuring Entity's e-procurement process. Mr. Mumia further submitted that the 1<sup>st</sup> Interested Party fully satisfied the requirements at page 81 to 85 of the Tender Document. He submitted that the form at page 81, Part A of the Tender Document and submitted the same in its bid. He however took the view that the Applicant and 2<sup>nd</sup> Interested Party failed to complete this form and were therefore found non-responsive.

Counsel then referred the Board to Item 23 of Table A at page 81 of the Tender Document, which the Applicant alleges was not satisfied by the 1<sup>st</sup> Interested Party. In response, Counsel submitted that the said items were duly submitted in the 1<sup>st</sup> Interested Party's original bid.

On the issue of the tender validity period of the subject tender, Counsel associated himself with submissions by the Procuring Entity and further submitted that the 1<sup>st</sup> Interested Party took the tender validity period of the subject tender to be 120 days as provided for in Section I. Invitation to Tender of the Tender Document, despite the existence of 90 days in Section III. Instructions to Tenderers of the Tender Document.

In conclusion, Counsel urged the Board to dismiss the Request for Review and allow the Procuring Entity to conclude the procurement process.

### **Applicant's Rejoinder**

In a rejoinder, Mr. Gachuba referred the Board to page 81 of the Tender Document and submitted that the table at Part A thereof comprised of general requirements. In his view, these were documents and information that bidders were required to submit in so far as clause 3.9 of Section III. Instructions to Tenderers of the Tender Document required. In Counsel's view, no provision in the Tender Document required bidders to submit a separate Schedule of Item 1 of Part A at page 81 of the Tender Document.

Counsel further maintained his submissions that the Procuring Entity failed to specify the reasons why the successful bidders were found successful and the amount at which the tender was awarded to them.

On the Procuring Entity's prayer that the Request for Review be dismissed so that the Procuring Entity's motor vehicle tyres are not grounded by traffic police, Counsel submitted that the Procuring Entity failed to disclose to the Board that the Procuring Entity extended the existing contract to March 2020 and has not suffered any prejudice.

In conclusion, Counsel urged the Board to grant the prayers sought in the Request for Review.

### **BOARD'S DECISION**

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

The issues for determination are as follows:-

- I. Whether the Procuring Entity found the Applicant's bid non-responsive in accordance with Section VI. Technical Specifications of the Tender Document read together with section 79 (1) of the Act, and provisions of the Constitution;***
- II. Whether the Procuring Entity's evaluation and comparison of tenders at the Preliminary Evaluation stage contravenes the provisions of the Act;***



- III. Whether evaluation of bids in the subject tender was carried out within the maximum period provided for in section 80 (6) of the Act;***
- IV. Whether the Procuring Entity's Letter of Notification issued to the Applicant meets the threshold of section 87 (3) of the Act; and***
- V. Whether the Tender Validity Period of the subject tender is still in existence***

Before addressing the issues framed for determination, the Board would like to dispense with two preliminary aspects arising from the proceedings before it.

During the hearing, Counsel for the 2<sup>nd</sup> Interested Party submitted that the Procuring Entity unfairly evaluated the 2<sup>nd</sup> Interested Party's bid who was aggrieved by the outcome of evaluation on its bid. The Board enquired from Counsel for the 2<sup>nd</sup> Interested Party whether or not he was supporting the Request for Review, or in the alternative, whether he would like to advance arguments against the Procuring Entity's decision on the 2<sup>nd</sup> Interested Party's bid.

In response, Counsel for the 2<sup>nd</sup> Interested Party submitted that he was supporting the Request for Review but would also demonstrate that the Procuring Entity's evaluation on the 2<sup>nd</sup> Interested Party's bid was unfair.

The Board considered the provision of section 167 (1) of the Act which provides as follows:-

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

From the above provision, a tenderer such as the 2<sup>nd</sup> Interested Party herein, that is aggrieved by a decision of a procuring entity on its bid ought to move this Board by way of a Request for Review. Further to this, the proper manner of filing a Request for Review is outlined in Regulation 73 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") as follows:-

***"73. (1) A request for review under the Act shall be made in Form RB 1 set out in the Fourth Schedule to these Regulations.***

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

**(a) *state the reasons for the complaint, including any alleged breach of the Act or these Regulations;***

**(b) *be accompanied by such statements as the applicant considers necessary in support of its request...***

Regulation 73 of the 2006 Regulations guides an aggrieved candidate or tenderer on the applicable Form for filing a Request for Review (i.e. Form RB 1 set out in the Fourth Schedule to the 2006 Regulations) which is an application that should state the reasons for the complaint, including any alleged breach of the Act or the 2006 Regulations.

The 2<sup>nd</sup> Interested Party submitted that the Procuring Entity unfairly evaluated its bid with respect to the criterion of General Requirements to Guaranteed Technical Particulars under Part A of Section VI. Technical Specifications of the Tender Document. This shows that the 2<sup>nd</sup> Interested Party was introducing a request for review through the backdoor despite having failed to file a Request for Review in the manner prescribed under Regulation 73 of the 2006 Regulations in exercise of the right to administrative review under section 167 (1) of the Act.

Had the 2<sup>nd</sup> Interested Party lodged a Request for Review, perhaps the Board would have exercised its discretion and consolidated the instant Request for Review together with that of the 2<sup>nd</sup> Interested Party, once the Board addressed its mind on the question whether the tender in dispute is the same and whether the procuring entity in both Request for Review applications is the same. This discretion is provided for in Regulation 82 of the 2006 Regulations which reads as follows:-

***"Where two or more requests for review are instituted arising from the same tender or procurement procedure the Review Board may consolidate the requests and hear them as if they were one request for review"***

The Supreme Court in **Petition No. 15 & 16 of 2015 (Consolidated), Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR** while considering the role that an Interested Party should play had this to say:-

***"Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that***

***such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether new issue to be introduced before the Court.***

The Supreme Court in the above decision held that even though an Interested Party may have an identifiable stake in the proceedings before a court or any other decision body, such a stake cannot take the form of an altogether new issue introduced before the court or other decision making body. The 2<sup>nd</sup> Interested Party herein failed to exercise the right to administrative review afforded to an aggrieved candidate or tenderer under section 167 (1) of the Act within the statutory timeline specified under that provision and is therefore estopped from introducing new issues touching on its complaint against the decision of the Procuring Entity on its bid.

As a result, the Board finds that the 2<sup>nd</sup> Interested Party's complaint in respect of the Procuring Entity's decision on its bid has not been lodged in accordance with section 167 (1) of the Act read together with Regulation 73 of the 2006 Regulations but the same has been raised outside the statutory period thereby depriving this Board of jurisdiction to entertain the same.

Despite the foregoing findings, the Board makes an observation that the 2<sup>nd</sup> Interested Party supports the Applicant's contention raised at

paragraph 3 of the Request for Review, in that the Accounting Officer of the Procuring Entity breached Article 47 (1) and 227 (1) of the Constitution, section 86 (1) (a) of the Act and clause 3.33.1 of Section III. Instructions to Tenderers of the Tender Document for awarding the tender to bidders who the Applicant alleges, did not submit the responsive and lowest evaluated tenders. Further to this, the 2<sup>nd</sup> Interested Party concurred with the Applicant on the question whether a procuring entity may proceed with a procurement process outside the tender validity period.

The Board finds that the issues raised by the Applicant and supported by the 2<sup>nd</sup> Interested Party will require this Board to interrogate whether the Procuring Entity complied with provisions of the Tender Document, the Act and the Constitution in carrying out its procurement process in the subject tender.

Accordingly, the Board shall address them in the substantive Request for Review as they form part of the issues framed for determination.

Secondly, the Board questioned the Procuring Entity on the aspect of confidentiality of its procurement process vis à vis the provisions of the Act, in light of the invitation extended to the Applicant in the letter dated 20<sup>th</sup> December 2019 to view the bid it submitted on the Procuring Entity's e-portal by the tender closing date of 13<sup>th</sup> September 2019.

The Board observes that section 67 (1) of the Act provides as follows:-

***"(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—***

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

***(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;***

***(c) .....; or***

***(d) the contents of tenders, proposals or quotations"***

***(2) .....***

***(3) This section does not prevent the disclosure of information if any of the following apply—***

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

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

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

***(d) .....; or***

***(e) the disclosure is made to the Authority or Review Board under this Act.***

***(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 67 (2) (d) (iii) [i.e. section 68 (2) (d) (iii)].***

Pursuant to section 67 (1) (d) of the Act, the contents of tenders, proposals and quotations are classified as confidential information which should not be disclosed during or after procurement proceedings subject to the exceptions provided in section 67 (3) and (4) of the Act.

The Board notes that the Procuring Entity submitted that the Applicant was only allowed to view its bid on the said e-portal and did not view any other bidder's bid. Such an invitation ought not to be used to extend any favour to the Applicant in the evaluation and comparison of tenders in a manner that would prejudice any of the other bidders' legitimate commercial interests, intellectual property rights or inhibit fair competition, if indeed the Applicant was only allowed to view its bid.

This is not to say that such an invitation is encouraged. The provisions of section 67 (3) (e) of the Act are clear that a disclosure is made to this Board for purposes of a Request for Review and further that pursuant to section 67 (4) of the Act, it is only an Applicant seeking a review that can obtain the summary contemplated under section 68 (2) (d) (iii) of the Act.



The Board finds that no provision of the Act allows the Procuring Entity herein to invite bidders to view their bids before or after concluding its procurement process even though the invitation in this instance was not used to the detriment of any other bidder who participated in the subject procurement process.

Having disposed of the above preliminary aspects, the Board now turns to address issues in the substantive Request for Review.

On the first issues, the Board heard submissions by parties on the manner in which the criterion under Section VI. Technical Specifications of the Tender Document ought to have been satisfied. In the first instance, the Board makes an observation that this was a criterion for evaluation at the Technical Evaluation Stage. Clause 6.2.1.6 of Part II. Technical Evaluation Criteria of Section VI. Evaluation Criteria of the Tender Document supports this position as it provides as follows:-

***"Part II: Technical Evaluation Criteria***

***6.2.1 Evaluation of the following technical information against Tender Requirements and Specifications:-***

***...6.2.1.6: As contained in the following documents-***

***(a) Manufacturer's Warranty***

***(b) Catalogues and/or Manufacturer's drawings***

***(c) Schedule of Guaranteed Technical Particulars as per Technical Specifications***

From the Procuring Entity's Evaluation Report dated 7<sup>th</sup> October 2019, the Applicant together with all other bidders who proceeded to Technical Evaluation were evaluated on this criterion at the Technical stage. At the end of the aforementioned stage, the Procuring Entity found the Applicant's bid non-responsive which decision has now been challenged before this Board.

The Board studied the Tender Document and notes that at pages 81 to 85 thereof, a detailed description of the Technical Specifications of the Guaranteed Technical Particulars (GTPs) is provided. In particular, the GTPs are divided into three parts as follows:-

- Part A- General Requirements with a Table to be completed, signed and stamped by bidders;
- Part B- Detailed Technical Specifications (DTS) KPLC requirements; and
- Part C- Detailed Technical Specifications (DTS) –Tenderer (Bidder) (Offer) to be completed, signed and stamped by bidders.

The Procuring Entity contended that the Applicant failed to provide a duly completed, signed and stamped General Requirements to the GTPs under Part A above. This prompted the Board to further study the Tender Document to establish the documentary evidence that was required in the Tender Document.

The Applicant herein referred the Board to clause 3.9 of Section III. Instructions to Tenderers of the Tender Document to support its view that the documents listed under that clause were the only documents required. The said clause provides as follows:-

***"The Tender prepared and submitted by the Tenderer shall include but not limited to the following components***

- (a) Declaration Form, Tender Form and a Price Schedule completed in compliance with paragraphs 3.2, 3.10, 3.11 and 3.12***
- (b) Documentary evidence established in accordance with paragraph 3.13 that the tenderer is eligible to tender and is qualified to perform the contract if its tender is accepted***
- (c) Documentary evidence established in accordance with paragraph 3.14 that the goods and ancillary services to***

*be supplied by the tenderer are eligible goods and services and conform to the tender documents, and*

*(d) Tender security furnished in accordance with paragraph 3.18*

*(e) a detailed list of previous customers as prescribed for similar items on tender and their contact addresses shall be submitted with the tender for the purpose of reference*

*(f) And all other documents indicated in Section II (Tender Submission checklist)”*

The introductory sentence of clause 3.9 above states that the documents listed therein are not a limited list. This means, the documents envisioned in clause 3.9 above were not the only documentary evidence required by the Procuring Entity. Further, the introductory clause of Section VI. Technical Specifications of the Tender Document provides as follows:-

***"Technical Specifications describe the basic requirements for goods. In addition to the information and documentation in the Tender Document regarding the technical aspects of this tender, all Tenderers shall comply with the following:-***

**GUARANTEED TECHNICAL PARTICULARS (GTPS)**

**Note: all pages of GTPs and DTSS to be signed and stamped by the bidder**

## **Part A-General Requirements”**

The foot of Part A-General Requirements at page 83 of the Tender Document further provides as follows:-

***“The above are indicative minimum requirements only. Suppliers must meet or exceed these specifications”***

This provision indicates that bidders were required to at least satisfy the minimum requirements indicated under Part A-General Requirements at page 83 of the Tender Document in addition to other specifications that bidders may provide.

The Applicant referred the Board to pages 328 to 330 of its original bid. However, upon studying the same, the Board notes that the Applicant indicated that the table therein is with respect to *“Part C-Detailed Technical Specifications (DTS)”*. The Applicant further made reference to pages 254 and 255 of its original bid which contains a duly completed table termed as *“Guaranteed Technical Particulars”*.

The Board compared the Applicant’s *“Part C-Detailed Technical Specifications (DTS)”* at pages 328 to 330 of its original bid to its duly completed table of *“Guaranteed Technical Particulars”* at page 255 and notes that the items therein are similar, save that the Applicant added

more columns with additional technical specifications to the table that is on page 255 of its original bid.

The Applicant further referred the Board to pages 314 and 315 of its original bid containing a duly completed "Part A (1). Total Estimated Tyre Quantities" and "Part A (2). Tubes". Having studied the Tender Document, the Board notes, these were submitted by the Applicant in response to the requirements under Section IV. Schedule of Requirements at page 27 of the Tender Document and are not in contention as the Applicant was found responsive on the same.

In essence, the Procuring Entity's allegation is not whether the Applicant submitted "Detailed Technical Specifications (DTS)" under Parts B and C or the Schedule of Requirements required under Section IV at page 27 of the Tender Document, but that the Applicant failed to provide a duly completed signed and stamped "General Requirements to Guaranteed Technical Particulars" under Part A of Section VI. Technical Specifications which ran through pages 81 to page 83 of the Tender Document and which was a mandatory requirement.

The Board studied the Applicant's original bid but did not find a duly completed table under Part A- General Requirements of the GTPs, which is outlined through pages 81 to 83 of the Tender Document.

The introductory clause of Section VI. Technical Specifications of the Tender Document made it mandatory for bidders to provide the duly completed, signed and stamped tables under Parts A, B and C therein. This being a mandatory requirement, a bidder's failure to comply with the same would lead to their bid being found non-responsive. Section 79 (1) of the Act states that:-

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

Further, Article 227 (1) of the Constitution provides as follows:-

***"Whenever a State organ or other public entity contract for goods and services, it shall do so in a system that is fair, equitable, transparent, competitive and cost-effective"***

The Board studied the bids of all bidders found to be successful in this tender and notes that they all provided their respective duly completed, signed and stamped tables under Part A-General Requirements of the GTPs together with the duly completed, signed and stamped Detailed Technical Specifications (DTS) required under Parts B and C of the Tender Document.

This demonstrates that the Procuring Entity applied the criterion under Section VI. Technical Specifications of the Tender Document uniformly to all bidders in respect of the three parts evaluated in the Technical Evaluation Stage.

In **Miscellaneous Civil Application No. 85 of 2018, Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**, the court while considering the need for bidders to comply with requirements of a tender, held as follows:-

***"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions."***

The Applicant's failure to comply with all mandatory requirements in the Tender Document means that the Procuring Entity herein would not



consider its bid for further evaluation, since as noted in the above case, a procuring entity should only consider conforming, compliant or responsive tenders.

The Board finds that the Procuring Entity rightfully found the Applicant's bid non-responsive in accordance with Section VI. Technical Specifications of the Tender Document read together with section 79 (1) of the Act and Article 227 (1) of the Constitution.

On the second issue for determination, the Board observes that the Applicant herein challenged the Procuring Entity's evaluation and comparison of tenders at the Preliminary Evaluation stage. In the Applicant's view, the Act does not envision an evaluation in the aforesaid stage. To support its view, the Applicant relied on section 79 (1) of the Act cited hereinbefore and submitted that despite the said provision citing eligibility and mandatory requirements as the essence of responsiveness of a tender, the same are not considered during a Preliminary Evaluation stage.

Counsel for the Applicant further referred the Board to section 46 (4) (a) of the Act which provides as follows:-

***"An evaluation committee established under subsection (1), shall—***

***(a) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it"***

In the Applicant's view, an Evaluation Committee only deals with Technical and Financial aspects of a bid, since the Act does not mention Preliminary aspects as part of an evaluation at section 46 (4) (a) thereof.

The Board having considered these submissions notes that section 46 (4) (a) of the Act does not mention technical and financial aspects in the sense that they are the only stages of evaluation. In the contrary, this provision requires an evaluation committee to deal with technical and financial aspects of a procurement as well as the negotiation of the process and while doing so, conduct an evaluation of bids.

In order to conduct such an evaluation, section 80 (2) of the Act allows the evaluation committee to undertake the following:-

***"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents"***

The Act permits a procuring entity to evaluate and compare tenders using the procedure and criteria set out in its tender documents. In this instance, the Procuring Entity cited its evaluation criteria to comprise of three stages of evaluation that is, Preliminary, Technical and Financial Evaluation as can be found in Section VI. Evaluation Criteria of the Tender Document. These stages are not prohibited under the Act. Further, the 2006 Regulations, which are applicable in so far as they do not contradict the Act recognize the stages of evaluation at Regulation 47 thereof which states as follows:-

***"47. (1) Upon opening of the tenders under section 60 [i.e. section 78 of the Act], the evaluation committee shall first conduct a preliminary evaluation to determine whether-***

***(a) the tender has been submitted in the required format;***

***(b) any tender security submitted is in the required form, amount and validity period;***

***(c) the tender has been signed by the person lawfully authorised to do so;***

***(d) the required number of copies of the tender have been submitted;***

***(e) the tender is valid for the period required;***

***(f) all required documents and information have been submitted; and***

***(g) any required samples have been submitted.***

In **Civil Appeal No. 145 of 2011, Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others [2012] eKLR**, the Court of Appeal while considering an application brought before it under the repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Repealed Act") held as follows:-

***"By S.66 (2) of the Act [which is now section 80 (2) of the 2015 Act], the responsive tenders are evaluated using only the procedures and criteria set out in the tender documents and not any other criteria. The tender evaluation undergoes three stages as stipulated in Reg. 47 and 50 namely; preliminary evaluation, technical evaluation and financial evaluation. The evaluation committee has power under Reg. 47 (2) to reject any tender which does not satisfy the threshold requirements, after the preliminary evaluation.***

***Further by Reg. 48 an evaluation committee is required to reject all tenders which are not responsive as stipulated in S.64 of the Act – that is to say, tenders which do not conform with the mandatory requirements in the tender documents.***

***After the financial evaluation process is completed the tender with the lowest evaluated price should be the successful tender (S. 66(4) as read with Reg. 50(3) and the procurement process is completed by execution of a contract for a procurement (S.68 and S.31)”***

The Court of Appeal in the above case outlined the stages of evaluation which stages include Preliminary Evaluation. Notably, section 47 of the Repealed Act expressly provided for preliminary evaluation immediately after the opening of tenders. However, upon enactment of the 2015 Act, no express provision provided for Preliminary Evaluation. This however does not mean that the 2015 Act prohibited an evaluation committee from undertaking preliminary evaluation.

This is because, section 80 (2) of the Act, still allows a procuring entity to evaluate and compare tenders using the procedures and criteria set out in its tender documents, and one of such procedure is usually provided for as a preliminary evaluation stage that kicks off an evaluation process. Secondly, Regulation 47 of the 2006 Regulations which are still applicable, outline how a preliminary evaluation ought to be conducted. It is therefore the Board's considered view that preliminary evaluation, even though not expressly provided for in the 2015 Act, is an important stage that ought to be carried out by a procuring entity.

As stated in Regulation 47 of the 2006 Regulations, evaluation of mandatory requirements at the Preliminary Evaluation stage is concerned with whether bidders have provided documents and information requested in the Invitation to Tender relating to eligibility requirements. To omit Preliminary Evaluation of bids would mean that a procuring entity fails to consider whether or not bidders are responsive to eligibility requirements. This therefore implies that a procuring entity would subject bidders to Technical Evaluation even though the bidders may not have given documents and information that is crucial to their eligibility to bid.

It is worth noting the 2006 Regulations are still in force until new Regulations are made in so far as the 2006 Regulations are not inconsistent with provisions of the Act. Section 24 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya (hereinafter referred to as "the Interpretation and General Provisions Act") guides on this aspect as it states:-

***"Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder"***

Section 80 (2) of the Act read together with Regulation 47 of the 2006 Regulations supports the view that Preliminary Evaluation is a crucial stage that a procuring entity should include in its evaluation stages.

The Board finds that the Procuring Entity's evaluation and comparison of tenders at the Preliminary Evaluation stage was done in accordance with section 79 (1) and 80 (2) of the Act read together with Regulation 47 of the 2006 Regulations.

On the third issue framed for determination, the Board observes that the Procuring Entity herein opened all 8 tenders received by it, on 13<sup>th</sup> September 2019, which fell on a Friday. However, according to Counsel for the Procuring Entity, evaluation of bids commenced on 16<sup>th</sup> September 2019, which in the Procuring Entity's view was the next official day, which was a Monday and completed the said evaluation on 7<sup>th</sup> October 2019.

The Applicant and the 2<sup>nd</sup> Interested Party on the other hand contended that evaluation of bids in the subject tender took 3 months since the bids were opened on 13<sup>th</sup> September 2019 and that bidders were only notified of the outcome of evaluation on 13<sup>th</sup> December 2019. In the Applicant's and 2<sup>nd</sup> Interested Party's view, the Procuring Entity deliberately delayed evaluation of bids in the subject tender contrary to provisions of the Act.

Before addressing our minds to the question whether evaluation of bids in the subject tender was conducted within the maximum period provided for in the Act, the Board deems it necessary to establish the meaning of evaluation and at what point evaluation ends.

The Black's Law Dictionary, 6<sup>th</sup> Edition defines "Bid Evaluation" as:-

***"After the submission deadline, the process of examining, and evaluating bids to determine the bidders' responsiveness, and other factors associated with selection of a bid for recommendation for contract award."***

Section 85 of the Act states that:-

***"Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers"***

From the above provisions and having noted the ordinary meaning of bid evaluation, it is the Board's considered view that evaluation and comparison of tenders is conducted with a view of recommending a bidder



for award of a tender. Section 80 (4) of the Act is further instructive on the document that marks the end of evaluation. It states as follows:-

***"The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation"***

An Evaluation Committee having conducted an evaluation of tenders is able to recommend a bidder for award of the tender in accordance with the award criteria set out in the tender document applicable to the method of procurement used by the Procuring Entity. The recommendation envisioned by the Head of Procurement function is only in respect of his professional opinion given pursuant to section 84 of the Act advising the Accounting Officer on the appropriate action to take.

The Board further notes that if a procuring entity wishes to conduct a due diligence exercise, section 83 of the Act is instructive that such a process is conducted after tender evaluation but prior to award of a tender. The said provision states as follows:-

***"An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest***

***evaluated responsive tender to be awarded the contract in accordance with this Act”***

This provision supports the view that once evaluation and comparison of tenders has been concluded, one of the processes that may follow includes a due diligence exercise prior to award of a tender. If such a due diligence exercise is conducted, then the Head of Procurement function’s advice to the Accounting Officer will follow and subsequently, the Accounting Officer’s decision awarding the tender. In essence, evaluation of bids ends once the Evaluation Committee prepares and signs an Evaluation Report containing a summary of evaluation and comparison of tenders.

At this juncture, the Board deems it necessary to examine the provisions relating to evaluation as was provided in the Repealed Act and whether the position changed in the 2015 Act.

Section 66 (6) of the Repealed Act provides as follows: -

***“The evaluation shall be carried out within such period as may be prescribed.”***

The above provision required the period of evaluation to be prescribed by way of Regulations. Consequently, the 2006 Regulations were made pursuant to the Repealed Act to specify the period of evaluation. Regulation 46 of the 2006 Regulations provided as follows:-

***"A procuring entity shall, for purposes of section 66 (6) of the Act, evaluate the tenders within a period of thirty days after the opening of the tender."***

Moving forward, Regulation 18 (2) of the Public Procurement and Disposal (Amendment) Regulations, 2013 (Legal Notice No. 106 of 18<sup>th</sup> June 2013) (hereinafter referred to as "the Amendment Regulations") were enacted and provided that: -

***"The period of tender award shall not exceed thirty days from the date of tender opening."***

However, upon enactment of the 2015 Act, section 80 (6) specified the evaluation period by providing as follows: -

***"the evaluation shall be carried out within a maximum period of thirty days"***

From the above background, the Board notes that the Repealed Act had not given a time limit for evaluation, hence the reason why the 2006 Regulations prescribed 30 days after the date of tender opening. However,

the Amendment Regulations saw it fit to provide that the period leading up to tender award should not exceed 30 days. Having noted that evaluation ends once the Evaluation Committee prepares and signs an Evaluation Report containing a summary of evaluation and comparison of tenders, then it means, the Amendment Regulations prescribed a period of 30 days for carrying out all processes leading to award of a tender, that is; tender opening, evaluation, preparation and signing of an evaluation report, preparation and signing of a professional opinion and award of a tender.

Section 67 of the Repealed Act required that award of a tender to be made within the tender validity period when it provided as follows: -

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

However, the 2015 Act having recognized that evaluation and award of a tender as separate from each other and that some intervening factors may delay award of a tender, saw it fit to provide a maximum period of evaluation and not for award of a tender.

This does not mean that the 2015 Act requires award of a tender to take an unreasonably long period. Just like the Repealed Act, section 87 (1) of the Act states that: -

***"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"***

This means, even though a specific timeline for award of a tender is not provided in the 2015 Act, such award must be made within the tender validity period. A due diligence exercise is an example of a process that may take some time especially in instances where a procuring entity writes to third parties enquiring about the experience of the lowest evaluated responsive tenderer and such third parties may delay in responding to queries raised by a procuring entity during a due diligence process. However, the Act is instructive that a procuring entity should take careful consideration to award a tender within the tender validity period.

The Board finds that evaluation of bids does not include all other processes after a summary of evaluation and comparison of tenders contained in the Evaluation Report has been prepared and signed by the Evaluation Committee and that an award of a tender by a procuring entity must be made within the tender validity period.

Having noted that the period of evaluation (which does not include award of tenders), is a maximum of 30 days pursuant to section 80 (6) of the Act, the Board now turns to determine whether the Procuring Entity complied with the timelines provided for in the Act.

The Board notes that 13<sup>th</sup> September 2019 when bids received in the subject tender were opened, fell on a Friday. On its part, section 57 of the Interpretation and General Provisions Act states as follows regarding computation of time: -

- "(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or***

***taken on the next day afterwards, not being an excluded day***

***(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time"***

The Interpretation and General Provisions Act does not clarify whether Saturday is an official non-working day or an excluded day. Further, the Employment Act, 2007 does not recognize Saturday as an official working day but is also silent on whether it is an official non-working day.

The Board observes that section 4 of the Public Holidays Act, Chapter 110, Laws of Kenya states that: -

***"Where, in any year, a day in Part I of the Schedule falls on a Sunday, then the first succeeding day, not being a public holiday, shall be a public holiday and the first-mentioned day shall cease to be a public holiday."***

From the above provision, it is only when a Public Holiday falls on a Sunday that Kenyans usually observe the first succeeding day (i.e. Monday) as a Public Holiday. However, when a Public Holiday falls on a Saturday,

Monday is not declared or observed as a public holiday. This therefore means, even though not expressed by statute, Saturday is considered a non-excluded day.

Given that 13<sup>th</sup> December 2019 in this instance was a Friday and is an excluded day within the meaning of section 57 (a) of the Interpretation and General Provisions Act, and that Saturday is not recognized as an excluded day under Section 57 (b) of the Interpretation and General Provisions Act, time for evaluation started running on 14<sup>th</sup> December 2019.

It is therefore the Board's view that in the circumstances, the Evaluation Committee should have commenced evaluation on 14<sup>th</sup> September 2019, being the next day that was not an excluded day. From the Procuring Entity's confidential file, the Evaluation Report is signed on 7<sup>th</sup> October 2019, meaning that evaluation of bids in the subject tender was conducted in 24 days from the date of tender opening. Even if the Board were to go by the assertion that the Procuring Entity commenced evaluation on 16<sup>th</sup> September 2019 and the Evaluation Report was signed on 7<sup>th</sup> October 2019, the period taken for evaluation would have been 22 days from the date of tender opening.

The Board was referred to section 176 (1) (c) of the Act which states that:-

***"A person shall not-***



***delay without justifiable cause the opening or evaluation of tenders, the awarding of contract beyond the prescribed period or payment of contractors beyond contractual period and contractual performance obligations”***

Section 176 (1) (c) of the Act makes it an offence to delay evaluation of tenders. This therefore means that a procuring entity should take reasonable steps to ensure that an evaluation committee is available to commence evaluation immediately after tender opening in order to meet the maximum period of 30 days provided under section 80 (6) of the Act.

Further, the Applicant herein referred the Board to the decision in **PPARB Application No. 62 of 2017, Parity Performance & Compliance Limited v. Ministry of Devolution and Planning, State Department of Devolution** where the Board held as follows:-

***“The Board has considered the decision of the High Court in Republic v. Public Procurement Administrative Review Board and Kenya Revenue Authority (2008) eKLR which is binding on it and finds based on the above decision that failure to evaluate a tender and make an award within the period provided in statute is fatal”***

We agree with the decision in the above case to the extent that the Act only requires a procuring entity to conduct evaluation within 30 days as provided for in section 80 (6) of the Act but that the procuring entity must award the tender within the tender validity period. Having studied the Procuring Entity's confidential file, the Board observes that the Procuring Entity complied with the timelines for evaluation provided for in section 80 (6) of the Act and did not in any way offend the provision of section 176 (1) (c) of the Act.

The Board finds that the Procuring Entity conducted evaluation of bids received in the subject tender within the maximum period provided for in section 80 (6) of the Act.

On the fourth issue for determination, the Board observes that the Applicant herein challenged the letter of notification issued to it by the Procuring Entity since the Procuring Entity did not specify the reasons why the successful bidders therein were found successful. Counsel for the Applicant further submitted that the Procuring Entity ought to have disclosed the amount at which award was made to the successful bidders in the subject tender.

To address this issue, the Board turned to section 87 (3) of the Act which states 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"***

The Board has heard the opportunity to address the import of section 87 (3) of the Act in its previous decision in **PPARB Application Number 169 of 2018, Arid Contractors & General Supplies Limited v. Kangaroo School** where it was held as follows:-

***"The Board observes that section 87 of the Act cannot be read as a standalone clause. Therefore, the same must be interpreted in its entirety alongside sections 135 (3) and 167 (1) of the Act. When this is done, the Board observes that the letter of notification serves the following functions: -***

- i. It guarantees and protects the successful and unsuccessful bidder's right to be informed of the outcome of their bids;***
- ii. It allows the successful bidder to promptly signify its acceptance of the award but subject to the fourteen (14) day standstill period under section 167 (1) of the Act;***
- iii. It allows an unsuccessful bidder aggrieved by a procuring entity's decision on its bid to exercise the***

***right to administrative review under section 167 (1) of the Act;***

***iv. It marks the beginning of the fourteen (14) day stand still period within which a procuring entity and a successful bidder are precluded from entering into a written contract pursuant to the right to an administrative review afforded to an aggrieved candidate or tenderer under section 167 (1) of the Act;***

***v. It informs the parties that the contract must be entered into within the tender validity period.”***

The purpose of a notification issued to bidders pursuant to section 87 (3) of the Act was outlined in the above decision. This Board further notes that the import of section 87 (3) of the Act supports the right to fair administrative action under Article 47 (2) of the Constitution which states as follows:-

***“If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”***

The Applicant herein was afforded the reasons why its bid was found non-responsive thereby allowing it to challenge the outcome of its bid pursuant to its right to administrative review under section 167 (1) of the Act. From

the Procuring Entity's confidential file, all bidders were evaluated against their responsiveness to preliminary, technical and financial proposals, in order to arrive at the lowest evaluated responsive tenderers. The mere fact that the successful bidders were found successful means they met the requirements in the Tender Document. It is therefore not rational that an unsuccessful bidder should be given reasons (a)....., (b)..... and (c)..... why a successful bidder was successful in each stage of evaluation applied by a procuring entity.

The Act requires the Procuring Entity to disclose the successful tenderer or tenderers as appropriate, in that, if evaluation of bids has already been concluded, then such successful tenderer or tenderers must be disclosed in the letter of notification issued to bidders. Assuming the Applicant was disqualified at Preliminary Evaluation stage and notified of such outcome before evaluation is concluded, then in those circumstances, the Procuring Entity would not have disclosed a successful tenderer since none would have been determined at that time when evaluation has not been concluded.

It is not lost to the Board that Article 227 (1) of the Constitution cites transparency as one of the principles that guide public procurement process. Further, Article 201 (a) of the Constitution provides that:-

***"The following principles shall guide all aspects of public finance in the Republic—***

***(a) there shall be openness and accountability,  
including public participation in financial matters”***

This therefore means that a procuring entity should demonstrate openness and accountability in its procurement process which in our view includes, disclosing the price at which a tender has been awarded to the successful bidder. This would promote the values and principles of governance enshrined in the Constitution among them "*good governance, integrity, transparency and accountability*" cited in Article 10 (2) (c) thereof.

Even though the Procuring Entity failed to disclose the amount at which the tender was awarded to the successful bidders, the Applicant was not adversely affected by such omission, noting that the letter of notification issued to it enabled it to exercise its right to administrative review under section 167 (1) of the Act read together with Article 47 of the Constitution.

Accordingly, the Board finds that the letter of notification dated 13<sup>th</sup> December 2019 issued to the Applicant meets the threshold of section 87 (3) of the Act, despite the Procuring Entity's failure to observe the principles enshrined in Articles 201 (a) and 227 (1) of the Constitution.

On the fifth issue for determination, the Board observes that all parties to this Request for Review took varied positions regarding the tender validity period of the subject tender.

On one hand, the Applicant and the 2<sup>nd</sup> Interested Party relied on clause 3.19.1 of Section III. Instructions to Tenderers of the Tender Document to support their view that the tender validity period of the subject tender was 90 days from the date of tender opening. On the other hand, the Procuring Entity submitted that despite the existence of a period of 90 days under the aforementioned clause, it took the tender validity period to be 120 days from the date of tender opening pursuant to clause 1.4 of Section I. Invitation to Tender of the Tender Document. Counsel for the 1<sup>st</sup> Interested Party submitted that according to the instructions given by his client, the 1<sup>st</sup> Interested Party took the tender validity period to be 120 days but he himself believed the tender validity period to be 90 days from the date of tender opening.

Upon further enquiry by the Board, all parties to the Request for Review admitted that bid price validity period and tender validity period are different. This prompted the Board to enquire from the Procuring Entity concerning the two periods of 120 days and 90 days which are both found in the Tender Document. In response, the Procuring Entity submitted that it made an error in its Tender Document and that its intention was for the tender validity period to be 120 days, and not 90 days as alleged by the Applicant.

Having considered all parties' submissions on the provision of the Tender Document dealing with the tender validity period and varying submissions on the question whether the tender validity period existed as at the time the Applicant lodged this Request for Review, the Board proceeds to make the following findings:-

Clause 1.4 of Section I. Invitation to Tender of the Tender Document provides as follows:-

***"Prices***

***Offered prices should be inclusive of all taxes, duties and levies and delivery costs to the premises (where applicable) of KPLC or other specified site must be in Kenya Shillings or freely convertible currency in Kenya and shall remain valid for one hundred and twenty (120) days from the closing date of the tender"***

On its part, Clause 3.9.1 of Section III. Instructions to Tenderers of the Tender Document states as follows:-

***"Tenders shall remain valid for ninety (90) days after the date of tender opening as specified in the Invitation to Tender or as otherwise may be prescribed by KPLC, pursuant to paragraph 3.23"***



Clause 1.4 cited above provides that the prices offered by bidders shall remain valid for 120 days whereas clause 3.9.1 cited above does not mention prices, but talks of “tenders”, which shall remain valid for 90 days. The Board deems it fit to determine whether the two provisions in the Tender Document as cited hereinbefore are similar or different. To answer this question, the Board shall first address its mind on the meaning of a tender.

The Act defines a “tender” under section 2 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.***

From the above provision, the Board notes that the price of a tender forms part of or is a component of the tender submitted by a bidder in response to an invitation to tender. During a procurement process, bidders submit a tender, that is, an offer in writing to supply goods, services or provide works at a price pursuant to an invitation to tender issued by a procuring entity.

The Act does not define what tender validity means in its interpretation section. Despite this, the Board studied section 88 of the Act to understand the meaning of tender validity, which section reads as follows: -

- (1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.***
- (2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.***
- (3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.***
- (4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1).***

Section 88 (1) of the Act only provides a discretion to a 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 is 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 by the procuring entity.

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.

According to the Notes to Section IX. Tender Form at page 51 of the Tender Document, it is stated as follows:-

***"KPLC requires a validity period of at least (90) days"***

Further, paragraph 4 of the Notes to Section IX. Tender Form at page 51 of the Tender Document states that:-

***"We agree to abide by this Tender for a period of ..... days (Tenderer please indicate the validity of your tender) from the date fixed for tender opening as per the Tender***

**Document and it shall remain binding upon us and may be accepted at any time before the expiration of that period”**

Having found that it is a bidder that provides the bid price validity period, the above provisions explains why the Procuring Entity herein required a bid price validity of at least 90 days (and that the maximum period of the bid price proposed by a bidder would be 120 days), since it is bidders who ought to specify such a period.

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, an award made and a contract signed 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 means 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 offers to supply goods or services 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 as the same will remain binding to the bidder during the bid price validity period.

It is therefore our considered view that Clause 1.4 of Section I. Invitation to Tender deals with the bid price validity period of 120 days, whereas Clause 3.9.1 of Section III. Instructions to Tenderers deals with the tender validity period of 90 days and as observed earlier, these two provisions are distinct.

In computing the date when the tender validity period of the subject tender would lapse, the Board considered the provision under section 57 (d) of the Interpretation and General Provisions Act that was cited hereinabove stating that *"where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time"*

This means, since the tender validity period in this instance exceeds 6 days, all public holidays and official non-working days that fell a day after 13<sup>th</sup> September 2019 to the 90<sup>th</sup> day when this tender was to lapse ought to be reckoned in the computation of time.

The Board finds that the tender validity period of the subject tender was 90 days after the tender opening date of 13<sup>th</sup> September 2019 and the same lapsed on 12<sup>th</sup> December 2019 therefore no tender existed as at 24<sup>th</sup> December 2019 when the Applicant lodged this Request for Review.

Despite the tender validity period having lapsed on 12<sup>th</sup> December 2019, the Procuring Entity went ahead to issue notification letters to successful and unsuccessful bidders on 13<sup>th</sup> December 2019 in clear contravention of the provisions of section 87 (1) of the Act which provides thus:-

***"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"***

When the above provision is read together with section 87 (3) of the Act which was cited herein, it is worth noting that notification to the successful and unsuccessful bidders must also be made within the tender validity period.

The Applicant herein referred the Board to the decision in **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Higawa Enterprises Limited [2017] eKLR** wherein the High

Court addressed its mind on the importance of the tender validity period where it held 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. 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."***

As stated in the above decision, the Board observes that the tender validity period is a critical factor in determining whether or not a procuring entity can award a tender. In addition to this, the failure to notify the successful bidder of the award within the tender validity period, would render the resultant notification null and void.

The importance of the tender validity period can also be determined by considering the provisions of section 135 (3) of the Act which provides that:-

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

The above provision expressly states that a procurement contract must be entered into within the tender validity period. In **Civil Appeal No. 35 of 2018, Ederman Property Limited v Lordship Africa Limited & 2 others [2019] eKLR**, the Court of Appeal while considering the import of section 135 (3) of the Act held as follows:-

***"the express provisions of Section 135 of the Act states that the written contract should be entered into within the period specified in the notification but not before fourteen (14) days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.***

***It is true to say that a contract entered in contravention of the law is against public policy, it is illegal and cannot be allowed to stand"***

The Court of Appeal in the above case held that a contract executed in contravention of the law goes against public policy, the said contract is illegal and cannot be allowed to stand. The Board would like to reiterate that having found that the tender validity period of the subject tender lapsed on 12<sup>th</sup> December 2019, the Procuring Entity herein cannot execute contracts with the successful bidders as such contracts would be null and void.



Having found that the tender validity period lapsed on 12<sup>th</sup> December 2019 long before the Request for Review was filed by the Applicant, the Board deems it necessary to consider the appropriate orders to grant in the circumstances.

The first prayer sought by the Applicant in the Request for Review is to nullify the awards issued by the Accounting Officer of the Procuring Entity. In **Macfoy v. United Africa Co. Ltd (1961) 3 All E.R 1169**, Lord Denning stated as follows concerning an act which is a nullity:-

***"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado"***

From the above case, we find that anything undertaken by the Accounting Officer of the Procuring Entity after the tender validity period lapsed on 12<sup>th</sup> December 2019 is a nullity and therefore null and void ab initio. There would be no need to nullify anything undertaken after that date, since any process initiated after a tender has lapsed is of no legal consequence as the same amounts to nothing and is therefore null and void.

Having found that the Applicant did not satisfy all the mandatory requirements of the subject tender, specifically, that it failed to provide a duly completed signed and stamped "General Requirements to Guaranteed Technical Particulars" under Part A of Section IV. Technical Specifications which ran through pages 81 to 83 of the Tender Document, and that all the successful bidders provided the said document, it is the Board's finding that the second and third prayer sought in the Request for Review cannot be granted.

The Applicant further urged the Board to grant an order directing the Accounting Officer to re-admit the Applicant's tender at the Financial Evaluation stage and to cause the Evaluation Committee to conduct financial evaluation thereof. The Board has already established that the tender validity period lapsed on 12<sup>th</sup> December 2019 before the Request for Review was filed. This therefore means even if the Board found the Applicant was unfairly evaluated and that a re-evaluation was necessary in order for the Evaluation Committee to properly discharge its mandate under section 46 (4) of the Act, this Board would be incapable of ordering a re-evaluation when the tender validity period already "died a natural death" on 12<sup>th</sup> December 2019.

As regards the issue of costs, the Supreme Court in **Jasbir Singh Rai & 3 Others v Tavlochan Singh Rai & 4 others (2014) eKLR** set out the

following jurisprudential guidelines on the exercise of the discretionary power to award costs when it held as follows:-

***"It emerges that the award of costs would normally be guided by the principle that costs follow the event; the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously exercised discretion of the court, accommodation of the special circumstances of the case, while being guided by the ends of justice."***

Having found that the tender validity period of the subject tender already lapsed as at the time the Applicant lodged the Request for Review, the Board notes that Counsel for the Applicant, in his oral submissions, prayed that the Board directs the Procuring Entity to re-tender for the services required in the subject tender, should we find that the tender validity period has already lapsed.

The Board finds this prayer to be merited and observes that when the Procuring Entity re-tenders for the services it requires in the subject tender, the Applicant will have another opportunity to participate in the re-tendered services and compete for award of the same. In the circumstances, the Board shall refrain from awarding costs in this Request for Review application.

In totality, the Request for Review succeeds in so far as the tender validity period of the subject tender is concerned and the Board proceeds to make the following specific orders:-

**FINAL ORDERS**

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

- 1. The Procuring Entity is hereby directed to re-tender for the Supply of New Tyres & Tubes for Motor Vehicles, Motor Cycles, Light & Heavy Trucks, Teleloggers, Forklifts and Tractors.**
- 2. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 14<sup>th</sup> day of January 2020**

.....

**CHAIRPERSON**

**PPARB**

.....

**SECRETARY**

**PPARB**

**Delivered in the presence of:-**

- i.** Mr. Gachuba for the Applicant and holding brief for Mr. Thangei for the 2<sup>nd</sup> Interested Party;
- ii.** Ms. Walala for the Respondent; and
- iii.** Mr. Kamau holding brief for Mr. Mumia for the 1<sup>st</sup> Interested Party.