

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO 147/2019 OF 30TH DECEMBER 2019

BETWEEN

UTMOST INSURANCE BROKERS LTD.....APPLICANT

AND

KENYA PORTS AUTHORITY.....1ST RESPONDENT

THE ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....2ND RESPONDENT

AND

**DISNEY INSURANCE BROKERS
LIMITED.....1ST INTERESTED PARTY**

AND

**PELICAN INSURANCE BROKERS (KENYA)
LIMITED.....2ND INTERESTED PARTY**

AND

LIAISON GROUP INSURANCE.....3RD INTERESTED PARTY

Review against the decision of Kenya Ports Authority in relation to Tender No. KPA/003/2019-20/INS for the Provision of Insurance Services for the year 2020-2022.

BOARD MEMBERS

- | | |
|---------------------------|------------------|
| 1. Mr. Steven Oundo, OGW | -Member Chairing |
| 2. Ms. Phyllis Chepkemboi | -Member |

3. Mr. Alfred Keriolale

-Member

IN ATTENDANCE

1. Mr. Philip Okumu

-Holding brief for Secretary

2. Ms. Judy Maina

-Secretariat

PRESENT BY INVITATION

APPLICANT

-UTMOST INSURANCE BROKERS LTD

1. Mr. Gideon Muturi

-Advocate, Mwaniki Gachoka & Co.
Advocates

2. Ms. Florence Mugi

-Advocate, Mwaniki Gachoka & Co.
Advocates

3. Mr. Stanley Gikandi

-S.P.O

PROCURING ENTITY

- KENYA PORTS AUTHORITY

1. Mr. Stephen Kyandih

-Advocate

2. Mr. Moses Sirgoi

-Procurement Officer

1ST INTERESTED PARTY

1. Mr. Anthony Kiprono
2. Mr. Kagwe Githui

-DISNEY INSURANCE BROKERS LTD

- Advocate, A. E Kiprono Associates
- Pelican Insurance Brokers

2ND INTERESTED PARTY

1. Mr. Anthony Kiprono
2. Mr. Martin Ciira

-PELICAN INSURANCE BROKERS (K) LTD

- Advocate, A. E Kiprono Associates
- Disney Insurance Brokers

3RD INTERESTED PARTY

1. Innocent Muganda
2. Ms. Ann Amisi
3. Mr. Moses Mathini

-LIAISON GROUP INSURANCE LTD

- Advocate, Sagana Biriq & Co. Advocates
- Sagana Biriq & Co. Advocates
- Liaison Group

OTHER INTERESTED PARTIES

1. Mr. Boniface Mungai

- Acentria Brokers Insurance Ltd

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Ports Authority (hereinafter referred to as “the Procuring Entity”) placed an advertisement for various tenders which included *inter alia* Tender No. KPA/003/2019-20/INS Provision of Insurance Services (hereinafter referred to as “the subject tender”) on My Gov Newspaper inviting eligible bidders to bid for the same.

Bid Submission Deadline and Opening of Bids

The deadline was previously set for 8th August 2019 at 1000 hours, however vide Addendum number 3 dated 30th July 2019, the deadline was extended to 15th August 2019 at 1000 hours. The Procuring Entity received a total of 57 bids by the bid submission deadline of 15th August 2019 and the same recorded as follows:-

No.	Firm
1.	M/s. Fidelity Insurance
2.	M/s. Liberty Assurance
3.	M/s. Mayfair Insurance
4.	M/s. Losagi Insurance Brokers Ltd
5.	M/s. Octagon Insurance
6.	M/s. Kelon Insurance Brokers
7.	M/s. Pacific Insurance
8.	M/s. Minet (K) Insurance Brokers Ltd
9.	M/s. Britam Life Assurance
10.	M/s. UAP Insurance

No.	Firm
11.	M/s. Heritage Insurance
12.	M/s. AAR Insurance
13.	M/s. Pioneers Assurance
14.	M/s. Kenindia Assurance
15.	M/s. Gemenia Insurance
16.	M/s. Hawk Bay Insurance Brokers Ltd
17.	M/s. Alpine Insurance Brokers Ltd
18.	M/s. HP Insurance
19.	M/s. Gold Field Insurance Brokers
20.	M/s. Chansary Wright
21.	M/s. CIC Group
22.	M/s. Saham Assurance
23.	M/s. APA Insurance
24.	M/s. Madison Life Assurance
25.	M/s. Madison Insurance
26.	M/s. Occidental Life Assurance
27.	M/s. A-Plan Insurance Brokers
28.	M/s. Utmost Insurance Brokers Ltd
29.	M/s. Gras Savoye
30.	M/s. HS Judley Insurance
31.	M/s. Clarkson Insurance
32.	M/s. Broad Cover Insurance Brokers
33.	M/s. Acal Insurance Brokers
34.	M/s. Arena African Insurance Brokers
35.	M/s. Britam General Insurance
36.	M/s. AMRO Insurance Brokers
37.	M/s. Plan & Place Insurance Brokers
38.	M/s. Royal Associate Insurance Brokers
39.	M/s. Waumini Insurance Brokers
40.	M/s. Zamara
41.	M/s. Jubilee Insurance
42.	M/s. Chester Insurance
43.	M/s. Trust Mark Insurance Brokers
44.	M/s. Miran Insurance Brokers Ltd
45.	M/s. Canopy Insurance Brokers
46.	M/s. AIG (K) Insurance
47.	M/s. Old Mutual Life Assurance
48.	M/s. Sedgwick Insurance Brokers
49.	M/s. Disney Insurance Brokers
50.	M/s. 4M Insurance Brokers Ltd
51.	M/s. Acentria Insurance Brokers
52.	M/s. Assured Insurance Brokers
53.	M/s. Getrio Insurance Brokers
54.	M/s. Eagle Africa Insurance
55.	M/s. AMS Insurance Brokers (K) Ltd

No.	Firm
56.	M/s. Pelican Insurance (K) Ltd
57.	M/s. Liaison Group Insurance

Evaluation of Bids

Underwriters and Brokers were evaluated separately, since the tender document had two different evaluation criteria for the respective category of underwriters and brokers (bidders). The Evaluation committee separated Underwriters from Brokers and listed the following for the Insurance Company (Underwriters): -

a. Underwriters

The Evaluation Committee adopted the evaluation criteria as stipulated in Clause **2.4.1** for Preliminary and Technical Evaluation of underwriters. At the end of evaluation, the following underwriters were found technically responsive having attained 20 marks and above:-

No.	S/No	Name of the Firm	Marks Attained
1	9	M/s Britam Life Assurance	22
2	21	M/s CIC Group	21
3	1	M/s Fidelity Insurance	20
4	25	M/s Madison Insurance	20
5	35	M/s Britam General Insurance	20

b. Brokers

Under the Brokers list the following Insurance brokerage firms submitted their bids:-

No.	Firm
1.	M/s. Losagi Insurance Brokers Ltd
2.	M/s. Octagon Insurance
3.	M/s. Kelon Insurance Brokers
4.	M/s. Pacific Insurance
5.	M/s. Minet (K) Insurance Brokers Ltd
6.	M/s. Hawk Bay Insurance Brokers Ltd
7.	M/s. Alpine Insurance Brokers Ltd
8.	M/s. HP Insurance
9.	M/s. Gold Field Insurance Brokers
10.	M/s. Chansary Wright
11.	M/s. A-Plan Insurance Brokers
12.	M/s. Utmost Insurance Brokers Ltd
13.	M/s. Gras Savoye
14.	M/s. HS Judley Insurance
15.	M/s. Clarkson Insurance
16.	M/s. Broad Cover Insurance Brokers
17.	M/s. Acal Insurance Brokers
18.	M/s. Arena African Insurance Brokers
19.	M/s. AMRO Insurance Brokers
20.	M/s. Plan & Place Insurance Brokers
21.	M/s. Royal Associate Insurance Brokers
22.	M/s. Waumini Insurance Brokers
23.	M/s. Zamara Brokers
24.	M/s. Chester Insurance
25.	M/s. Trust Mark Insurance Brokers
26.	M/s. Miran Insurance Brokers Ltd
27.	M/s. Canopy Insurance Brokers
28.	M/s. Sedgwick Insurance Brokers
29.	M/s. Disney Insurance Brokers
30.	M/s. 4M Insurance Brokers Ltd
31.	M/s. Acentria Insurance Brokers
32.	M/s. Assured Insurance Brokers
33.	M/s. Getrio Insurance Brokers
34.	M/s. Eagle Africa Insurance
35.	M/s. AMS Insurance Brokers (K) Ltd
36.	M/s. Pelican Insurance (K) Ltd
37.	M/s. Liaison Group Insurance

1. Preliminary Evaluation

At this stage, the Evaluation Committee applied the evaluation criteria under Section III. Qualification Criteria and Requirements of the Tender document and found 19 firms responsive, hence proceeded to Technical Evaluation Stage.

2. Technical Evaluation

The bid proposals were subjected to the criteria provided in Clause 2.4.1 of Section III. Evaluation Criteria and Requirements of the Tender Document. To be qualified, a bidder ought to have met all mandatory requirements and have an overall technical score of 60% and above after Technical Evaluation.

The 19 firms attained the following marks at the end of Technical Evaluation:-

No.	S/No.	Name of The Firm	Marks Attained
1.	57	M/s. Liaison Group Insurance	74
2.	56	M/s. Pelican Insurance (K) Ltd	74
3.	53	M/s. Getrio Insurance Brokers	74
4.	51	M/s. Acentria Insurance Brokers	74
5.	40	M/s. Zamara Brokers	74
6.	39	M/s. Waumini Insurance Brokers	72
7.	49	M/s. Disney Insurance Brokers	71
8.	36	M/s. AMRO Insurance Brokers	70
9.	18	M/s. HP Insurance	69
10.	8	M/s. Minet (K) Insurance Brokers Ltd	69
11.	35	M/s. Gold Field Insurance Brokers	68
12.	27	M/s. A-Plan Insurance Brokers	65
13.	28	M/s. Utmost Insurance Brokers Ltd	65
14.	37	M/s. Plan & Place Insurance Brokers	65
15.	43	M/s. Trust Mark Insurance Brokers.	64
16.	6	M/s. Kelon Insurance Brokers	62

17.	31	M/s. Clarkson Insurance	61
18.	7	M/s. Pacific Insurance	60
19.	48	M/s. Sedgwick Insurance Brokers	53

At the end of this stage, it is only M/s Sedgwick Insurance Brokers that did not attain the minimum technical score required to proceed to Financial Evaluation and was therefore found non-responsive at the end of this stage.

3.1. Financial Opening of Bids

The Evaluation Committee opened the financial bids of the eighteen (18) firms which had been recommended for financial stage for having scored above the pass mark 60% and analyzed the prices as per their quotes and their underwriters. The following firms were non-responsive because their quoted underwriters were un-successful thus they did not proceed to financial evaluation stage.

No.	Name of the Insurance broker	Underwriter
1.	M/s Zamara Brokers	a. Geminia Insurance
		b. Sanlam Insurance
		c. ICEA Lion
		d. Pioneer Insurance
2.	M/s Minet (K) Insurance Brokers	a. Geminia Insurance
		b. Jubilee Insurance
		c. Liberty Assurance
3.	M/s A Plan Insurance Brokers	a. Heritage Insurance
		b. APA Insurance
		c. Jubilee Insurance
4.	M/s Trust Mark Insurance Brokers	a. Geminia Insurance
		b. AIG Insurance
		c. UAP insurance
		d. Heritage

The firms which their quoted underwriters proceeded to the financial evaluation stage were responsive. These are as shown below:-

1.	M/s. Liaison Group Insurance
2.	M/s. Pelican Insurance (K) Ltd
3.	M/s. Getrio Insurance Brokers
4.	M/s. Acentria Insurance Brokers
5.	M/s. Waumini Insurance Brokers
6.	M/s. Disney Insurance Brokers
7.	M/s. AMRO Insurance Brokers
8.	M/s. HP Insurance
9.	M/s. Gold Field Insurance Brokers
10.	M/s. Utmost Insurance Brokers Ltd
11.	M/s. Plan & Place Insurance Brokers
12.	M/s. Kelon Insurance Brokers
13.	M/s. Clarkson Insurance
14.	M/s. Pacific Insurance

The Evaluation Committee deliberated and evaluated as per current rates of the policy and recommended bidders for award as per line items.

Professional Opinion

In a memo dated 3rd December 2019, the Acting Head of Procurement and Supplies expressed his professional opinion on the subject procurement process and advised the Managing Director of the Procuring Entity to award the subject tender for the year 2020-2022 to the firms recommended by the Evaluation Committee for a period of three years.

The Managing Director having reviewed the said professional opinion approved the same on 4th December 2019.

Notification to Bidders

In letters dated 16th December 2019, all successful and unsuccessful bidders were notified of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Utmost Insurance Brokers Limited (hereinafter referred to as “the Applicant”) lodged a Request for Review on 30th December 2020 together with a Statement in Support of the Request for Review dated and filed on even date.

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

- 1. An order annulling and setting aside the Respondent’s decision awarding Tender No. KPA/003/2019-20/INS to the alleged successful bidders in the respective classes or policies;***
- 2. An order substituting the decision of the Review Board for the decision of the Respondent and award the tender to the Applicant in the respective classes or policies upon reviewing all records of the procurement process (particularly the***

technical and financial evaluation thereof) relating to Tender No. NO.KPA/003/2019-20/INS;

- 3. An order directing the Respondent to sign a contract with the Applicant in accordance with the Tender and decision of the Board;***
- 4. Further and in the alternative, an order nullifying the entire tender process ordering the Respondent to re-tender afresh;***
- 5. An order directing the Respondent to pay the costs of and incidental to these proceedings; and***
- 6. Such other or further relief or reliefs as this Board shall deem just and expedient.***

During the hearing, the Applicant was represented by Mr. Muturi on behalf of the firm of Mwaniki Gachoka & Company Advocates while the Respondents were represented by Mr. Kyandih on behalf of Addraya Dena Advocate. Mr. Kiprono represented the 1st and 2nd Interested Parties on behalf of the firm of A.E. Kiprono & Associates Advocates while the 3rd Interested Party was represented by Mr. Muganda on behalf of the firm of Caroline Oduor and Associates Advocates.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Muturi, fully relied on the Request for Review, the Applicant's Statement and Further Affidavit.

Mr. Muturi submitted that the Request for Review challenges the Procuring Entity's failure to adhere to the provisions of the law while conducting its procurement process, in that despite the Applicant being the lowest evaluated bidder in all the categories it bid for, it was denied award of the tender in the said categories. He submitted that the tender was opened on 15th August 2019 and evaluation was two-fold, beginning with the underwriters proposed by bidders, and subsequently, evaluation on the insurance agents. In his view, the Applicant qualified for award of the tender in four major categories, which include; port package, staff policies, asset based related policies and motor trade.

Counsel referred the Board to page 2 of the Respondents' Replying Affidavit and submitted that the Respondent admitted that the Applicant did indeed qualify for award of the tender in the aforementioned categories. He also referred the Board to the Applicant's Further Statement at page 2 thereof and submitted that for Port Liability, the Applicant submitted a bid worth USD 436,076 with the underwriter as CIC Insurance Limited but that despite the Applicant being the lowest evaluated bidder, the tender was awarded to the 3rd Interested Party at USD 1,031,503 which was not the lowest bid price.

He then directed the Board to the category of "Plant All Risk" which he alleged was awarded at USD 26 Million and that the Applicant quoted 13 Million for Fire and Perils but was awarded at 14 Million. Mr. Muturi then referred the Board to clause 2.25 of the Tender Document which spells out the award criteria that was to be used by the Procuring Entity, which was to be based on the bidder who was substantially responsive. In his view, the Applicant was substantially responsive in the categories raised in the Request for Review therefore entitled to be awarded the tender.

Counsel then referred the Board to the reasons cited by the Procuring Entity for disqualifying the Applicant's bid, to wit, that the Applicant did not propose the entity that would provide the insurance. He then submitted that there was no such requirement at pages 41 and 42 of the Tender Document cited by the Procuring Entity. The second reason provided was that the Applicant's bid proposed an unreasonably low premium compared to the current premium. In response to this, Counsel submitted that this was not a criterion for evaluation in the Tender Document. In essence, Counsel submitted that no provision in the Tender Document allows the Procuring Entity to compare its rates to the rates proposed by bidders in all the categories covered in the Tender Document.

On his next ground, Counsel submitted that the tender validity period of the subject tender was 90 days from the tender opening date of 14th August 2019 as provided for in clause 2.13 of the Tender Document. He further submitted that this period was extended for a further 30 days from its earlier expiry date of 14th November 2019 and therefore lapsed on 14th December 2019, yet award of the tenders was made on 16th December 2019, two days after the expiry date of the subject tender. To support this position, Counsel referred the Board to section 57 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya and argued that when a day does not fall on a Sunday or a Public Holiday, it must be reckoned in the computation of time. He therefore took the view that despite 14th December 2019 falling on a Saturday, the same is not recognized in our statutes as an official non-working day and ought to be reckoned in the computation of time.

In conclusion, Counsel urged the Board to take into account the fact that the subject tender was an open tender which ought to be awarded to the bidder who submitted the lowest bid and to allow the Request for Review with costs to the Applicant.

Respondents'/Procuring Entity's Submissions

In his submissions, Counsel for the Respondents, Mr. Kyandih, fully relied on the Procuring Entity's Response, and Replying Affidavit. Mr. Kyandih

submitted that the Procuring Entity never admitted the Applicant was the lowest evaluated bidder, but that, it was an allegation by the Applicant. Mr. Kyandih proceeded to elaborate how evaluation of tenders in this procurement process was conducted, in that there was evaluation of insurance brokers together with underwriters. He further submitted that the tender was divided into 3 categories, to wit, port package, staff policies and asset based policies and referred the Board to page 2 of the Procuring Entity's Response comparing the same with page 25 of the Tender Document wherein he stated, was the criteria for evaluation used by the Procuring Entity.

He further referred the Board to clause 2.25.1 and clause 2.2.9 of the Tender Document which in his view provide the award criteria of lowest evaluated bidder. He submitted that the Procuring Entity does not dispute that the Applicant provided the lowest bid in a number of policies, but that award of the subject tender was made to lowest evaluated tenderers and not solely basing the award on tender amounts.

On the policy of Port Liability, Counsel submitted that the Applicant proposed an amount of USD 463,076/- but that the policy was awarded to the 3rd Interested Party at USD 1,031 603 because the Applicant failed to meet a requirement at page 41 of the Tender Document in that the Applicant failed to indicate the underwriter who would provide re-insurance and at what percentage. In his view, the Applicant ought to have

demonstrated a minimum of 30% of reinsurance to be provided and by what underwriter. He urged the Board to interrogate the Applicant's bid to establish whether it proposed a re-insurer, whereas that should the Board interrogate the 3rd Interested Party's bid, it will find that the 3rd Interested Party provided a re-insurer.

On the policy of "Plant All Risk", Mr. Kyandih submitted that the policy was awarded to M/s Pelican Insurance Limited at USD 50,733,098/- even though the Applicant proposed an amount of USD 25,704,883/- and Fidelity Insurance had a bid lower than that of the Applicant but was not awarded the tender. He further submitted that the Procuring Entity pays USD 98 Million for this policy and that the bids which were between USD 26 Million were unreasonably low and could not be awarded the tender since such a bidder may not have the capacity to meet and settle claims when they arise.

On the policy of Fire and Perils, Counsel submitted that the Applicant did not meet the lowest evaluated bid, since some bidders quoted an amount of USD 12 Million and that upon concluding evaluation, the policy was awarded to the 3rd Interested Party and that the Applicant's bid of USD 5.6 Million was unreasonably low.

On the issue of tender validity period, Counsel submitted that according to Order 50 Rule 2 of the Civil Procedure Rules, 2010, Saturday is a public holiday hence should not be taken into account in the computation of time. In his view, 14th December 2019 which was the day when the tender was to lapse fell on a Saturday, a day when the Procuring Entity does not open its offices and that the next official day was Monday, the 16th day of December 2019 when letters were dispatched to bidders. He further submitted that the subject tender was opened on 15th August 2019 and would have expired on 14th November 2019 but an extension was sought and given for a further period of 30 days up to 14th December 2019, then notifying bidders on 29th November 2019.

Counsel further submitted that since the tender lapsed on 16th December 2019, the Procuring Entity cannot execute a contract as the same would be in violation of section 135 (3) of the Act. He therefore urged the Board to extend the tender validity period of the subject tender, to enable the Procuring Entity complete the procurement process by executing contracts in the respective policies. To buttress this view, he referred the Board to **PPARB Application No. 133 of 2019, Med Marine Kilavuzluk Ve Romorkor Hizmetleri Ins. San. Ve Tic. A.S v. The Accounting Officer, Kenya Ports Authority & Another** wherein the Board extended the tender validity period to enable the procuring entity therein to conclude the procurement process.

He submitted that this is one of those instances that the Board should come to the procuring entity's rescue in order to give effect to section 3 of the At read together with Article 227 of the Constitution.

In conclusion, he urged the Board to dismiss the Request for Review with costs to the Procuring Entity and further allow it to proceed with the procurement process upon extension of the tender validity period.

1st and 2nd Interested Parties' Submissions

In his submissions, Counsel for the 1st and 2nd Interested Parties, Mr. Kiprono fully relied on the 1st Interested Party's Response and the 2nd Interested Party's Response.

Mr. Kiprono submitted that all parties do not dispute the fact that the policies were to be treated as separate contracts as stipulated in Clause C at page 28 of the Tender Document and that the Applicant does not challenge the award to the 1st Interested Party, hence the Board ought not interfere with the said award.

On the tender validity period, Mr. Kiprono associated himself with submissions of the Procuring Entity and took the view that the tender validity period lapsed on 16th December 2019. To support his submissions

on this issue, he referred the Board to **Republic v. Public Procurement Administrative Review Board & 3 others ex parte Saina Chemi Ltd** on the court's finding on paragraph 21 thereof where he opined the court found Saturday to be an excluded day.

On behalf of the 2nd Interested Party, Counsel submitted that 3 of the 4 policies awarded to the 2nd Interested Party have not been challenged by the Applicant and urged the Board not to interfere with the uncontested awards of Group Life and Goods in Transit.

He submitted that the only policy in contention is that of Plant All Risk in which the Applicant and the 2nd Interested Party both sought a price from the same underwriter and that the price given for the two bidders are similar. He however took the view that a tender is not awarded to a bidder simply because the bidder had the lowest bid price, but such bidder ought to have been substantially responsive as well. Mr. Kiprono further directed the Board to pages 107 and 139 of the Tender Document and submitted that the Procuring Entity provided a schedule and that it the Procuring Entity had taken the quotation from CIC as submitted by the Applicant which restricted the policy to only 1 year, then the risk that the Procuring Entity sought to have covered would not have been covered and it would not have met the requirements of the Tender Document. He therefore concurred with the Procuring Entity that the Applicant was not the lowest evaluated bidder even though it submitted the lowest bid price.

In conclusion, Mr. Kiprono urged the Board to dismiss the Request for Review and award costs as it deems fit in the interest of justice.

3rd Interested Party's Submissions

In his submissions, Counsel for the 3rd Interested Party, Mr. Muganda, fully relied on the 3rd Interested Party's Replying Affidavit and the annexures thereto.

Mr. Muganda began his submissions on the tender validity period of the subject tender. He submitted that it was common ground between parties that the tender validity period was extended by the Procuring Entity, but that the contention before the Board is computation of time to determine the date when such tender validity period was supposed to lapse. He referred the Board to section 57 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya and took the view that the Applicant misled the Board on the days which are official non-working days. He therefore relied on the court's decision in **Republic v. Public Procurement Administrative Review Board & 3 others ex parte Saina Chemi Ltd** and argued that Saturday is also an official non-working day.

On his next submission, Counsel referred the Board to **Civil Appeal No. 131 of 2018, James Oyondi t/a Betoyo Contractors Ltd v. Public Procurement Administrative Review Board & 2 Others** and stated that the Court in that case found there was no reason to delay the procurement process any further hence allowed it to proceed. He therefore urged the Board to extend the tender validity period to facilitate signing of contracts in this procurement process.

In his third argument, Counsel referred the Board to page 25 of the Tender Document specifically clause 2.22 thereof and took the view that bidders who proposed an exceptionally low price could not be deemed to be the lowest evaluated bidders. He therefore took the view that the Applicant failed to meet the evaluation criteria under clause 2.24 and clause 2.26 of the Tender Document hence the reason why it was not the lowest evaluated bidder.

In conclusion, he urged the Board to dismiss the Request for Review and extend the tender validity period of the subject tender.

Applicant's Rejoinder

In a rejoinder, Mr. Muturi maintained his submissions that the tender validity period of the subject tender lapsed on 14th December 2019, which even though was a Saturday, is not an excluded day within the meaning of

the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya. He further submitted that even if the arguments by the Respondent and Interested Party that the tender lapsed on 16th December 2019, are to be considered, the Board cannot revive a dead tender. He referred the Board to section 135 (3) of the Act which specifies that a contract must be signed within the tender validity period.

On the award criteria, Mr. Muturi stated that page 42 of the Tender Document cited by parties does not have any provision requiring insurance for a specific purpose such as re-insurance as alleged by the Respondents and Interested Parties. He further submitted that the Procuring Entity did not explain how it would determine a bid to be reasonably low. He therefore took the view that proper sanctions need be placed against the Procuring Entity to ensure it carries out this procurement process in a cost-effective manner in accordance with Article 227 of the Constitution.

He referred the Board to the prayer sought in the Request for Review and urged the Board to nullify the procurement process directing the Procuring Entity to re-tender for the services afresh.

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 Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as “the Act”) and oral submissions of the parties.

The issues for determination are as follows:-

- I. Whether the Procuring Entity awarded the subject tender in accordance with clause 2.25.1 of Section II. Instructions to Tenderers of the Tender Document and section 86 (1) (a) of the Act read together with Article 227 (1) of the Constitution;***
- II. Whether the Tender Validity Period of the subject tender exists; and***
- III. What are the appropriate orders to grant in the circumstances?***

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

On the first issue, the Board observes that the Procuring Entity herein invited eligible bidders to bid for the subject tender in the following main categories:-

Category	Policies
Port Package	Marine Hull, Protection & Indemnity and Port Liability
Staff Policies	GPA/WIBA, Group Life, D & O Liability, GPA Directors, Medical Scheme Directors, Medical Scheme Staff and Travel Insurance
Asset based and related	Public Liability, Pension Trustees Liability, Hospital Malpractice, Fire & Perils, S & T, All Risks (Electronic), Money, Fidelity Guarantee,

policies	G.I.T, Plant/Machinery All Risks, Burglary and Motor Policies
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Subsequently, the Procuring Entity subjected the bids received by it after the tender closing date to evaluation and upon concluding the said process, the Applicant was notified of the outcome of evaluation in a letter dated 16th December 2019 which stated as follows:-

"Reference is made to your participation in the above mentioned tender

This is to notify you that you have been awarded the following policies for a period of Thirty-Seven (37) months from 1st January 2020:-

<i>Policy Description</i>	<i>Premium</i>	<i>Underwriter</i>
<i>Motor Trade</i>	<i>Kshs. 20,090.00</i>	<i>Britam Insurance</i>

..."

The Applicant herein alleges that despite having submitted the lowest bid price in respect of the Motor Trade Policy, Port Liability, Fire and Perils (Industrial Risks), Terrorism and Sabotage and Plant/Machinery All Risks, it was only awarded the tender in respect of the Motor Trade Policy, which falls under the category of Asset Based and Related Policies.

The letter dated 16th December 2019 does not contain the specific reasons why the Applicant was not awarded the tender in the categories the Applicant believes it submitted the lowest bid price. The reasons were only cited by the Procuring Entity in its Response to the Request for Review, which the Board proceeds to interrogate as follows:-

Firstly, according to the Procuring Entity, the Applicant failed to provide the entity that will take up re-insurance policy in the category of Port Liability. To support this view, the Board was referred to the Notes under page 41 of the Tender Document which provides as follows:-

"The Procuring Entity reserves the right to the allocation of co-insurance Schedule if any. The Procuring Entity shall not accept any conditions by the lead underwriter on any co-insurance of facultative placement"

The Board observes that the above provision informed bidders that the Procuring Entity reserves the right to the allocation of co-insurance but does not mention any requirement by bidders to provide re-insurance. Bidders were further informed that the Procuring Entity would not accept any condition by the lead underwriter on co-insurance. This provision was reiterated on clause (d) of Section II. Instructions to Tenderers of the Tender Document which states that:-

"The Tenderers shall not submit any conditional terms with regard to placement, co-insurance, re-insurance or accommodation terms. The Procuring Entity shall be entitled to treat any such bid as non-responsive"

Having studied the Tender Document, the same does not mention a requirement for bidders or their respective underwriters to propose an entity that would take up re-insurance. In any case, the Applicant's underwriter in the category of Port Liability, that is, CIC Insurance was found responsive after Preliminary and Technical Evaluation as can be seen at page 8 of the Evaluation Report received on 17th September 2019.

The Board finds that the Procuring Entity's allegation that the Applicant failed to propose an entity that would take up re-insurance under the category of Port Liability, lacks merit noting that this was not a criterion for evaluation and that the Applicant's Underwriter was found responsive after Preliminary and Technical Evaluation.

Secondly, the Procuring Entity, in its response alleged that the Applicant's Underwriter, CIC Insurance did not indicate whether it replaces equipment if the equipment is over one year.

Similar to the finding in the first sub-issue, the Board observes that the Tender Document did not require bidders to declare whether or not their respective underwriters replace equipment if the equipment is over one year. This in our view is a reason that was introduced by the Procuring Entity in its response to the Request for Review when the same was not a criterion for evaluation in the Tender Document.

It is worth noting that from the Procuring Entity's Evaluation Report, the above two reasons were not cited as being the reasons why the Applicant was not awarded the tender, in the categories the Applicant believes it submitted the lowest evaluated bid. These reasons were also not cited in the letter of notification dated 16th December 2019 issued to the Applicant.

Article 47 (2) of the Constitution provides that:-

"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"

Further, section 87 (3) of the Act 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 Procuring Entity herein did not expressly state in its confidential file (that is, the Evaluation Report and Professional Opinion) that the aforestated two reasons formed part of the reasons why the Applicant was not awarded the subject tender in the categories the Applicant believes it was entitled to the same, neither were any written reasons availed to the Applicant as required by Article 47 (2) of the Constitution read together with section 87 (3) of the Act. It is the Board's considered view that even though the Applicant was awarded one of the policies in the subject tender, written reasons ought to have been given to the Applicant explaining why it was not awarded other policies that it bided for, rather than cite the reasons for the first time in the response to the Request for Review and at the hearing of the said application.

The Board finds that the Procuring Entity failed to comply with Article 47 (2) of the Constitution read together with section 87 (3) of the Act, by its failure to provide specific reasons to the Applicant explaining why it was not awarded the policies the Applicant believes it was entitled to the same, noting that the reasons cited at the hearing were not part of the criteria for evaluation in the Tender Document.

Thirdly, the Procuring Entity submitted that the Applicant was not awarded the tender in some of the categories challenged in the Request for Review for the reason that the Applicant proposed amounts that were “unreasonably low” in the respective categories.

In particular, the following categories were raised by both the Applicant and the Procuring Entity:-

Category	Applicant	Awarded Bidder	Procuring Entity's Rate
<u>Port Package</u> Port Liability	USD 436,076/- (Underwriter CIC General Insurance)	Liaison Group Insurance at USD 1,031,503/- (Underwriter CIC General Insurance)	USD 1,094,977/-
<u>Asset Based and Related Policies</u> 1. Fire and Perils (Industrial Risks)	KES 13,290,564 (Underwriter CIC General Insurance)	Gold Field Insurance Brokers At KES 14,718,010/- (Underwriter-Fidelity Insurance)	KES 14,587,775/-
2.Terrorism and Sabotage	KES 2,449,085/- (Underwriter is Britam Insurance)	Acentria Insurance Brokers at KES 3,581,180 (Underwriter-Britam General)	KES 4,345,046
3.Plant/Machinery All Risks	KES 26,704,883/- (Underwriter CIC General Insurance)	Pelican Insurance (K) Ltd at KES 50,733,098/-	KES 98,542,983/-
4. Goods in Transit	Rate of 1.5%	Pelican Insurance Ltd at the rate of 0.40%	Rate of 0.75%
5. Motor Trade	KES 20,090/-	Applicant at KES 20,090/-	KES 20,090/-

From the above table, the Board notes that the Applicant was only awarded the tender with respect to the Motor Trade Policy. The Board studied all the 37 policies in the subject tender and notes that it is only 4 categories that the Procuring Entity did not award to the bidders who submitted the lowest prices having evaluated bidders with a view of confirming whether their prices were “unreasonably low” compared with the Procuring Entity’s rates. The rest of the categories were awarded to bidders who submitted the lowest prices, including Motor Trade Policy, which as earlier noted was awarded to the Applicant.

The Board heard submissions by the Procuring Entity and the Interested Parties that the Procuring Entity awarded the tender to the lowest evaluated bidder and not to the bidder with the lowest amount. Evidently, clause 2.25.1 of Section II. Instructions to Tenderers of the Tender Document provided for the award criteria as follows:-

"Subject to paragraph 2.29, the Procuring Entity will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily "

Clause 2.29 referenced by clause 2.25.1 of Section II. Instructions to Tenderers of the Tender Document is on the performance security that a successful tenderer would be required to furnish to the Procuring Entity

when executing the contract in respect of the subject tender. The Board observes that a determination of the substantial responsiveness of a tender is done at the Preliminary and Technical Evaluation stages in accordance with section 79 (1) and 80 (2) of the Act which reads as follows:-

Section 79 (1): A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents

Section 80 (2): The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

It is therefore true to conclude that before an evaluation based on the price submitted by bidders can be done, a procuring entity must determine whether the bids submitted to it are substantially responsive to eligibility and mandatory requirements, including technical specifications in the tender document. Thereafter, all bidders who are found substantially responsive are subjected to Financial Evaluation where evaluation based on the price is conducted in accordance with the provisions of Regulation 50

of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") in so far as they do not contradict provisions of the Act. Regulation 50 of the 2006 Regulations provides as follows:-

"Regulation 50 (1) Upon completion of the technical evaluation under Regulation 49, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by-

(a) taking the bid price, as read out at the bid opening;

(b);

(c);

(e);

(f);

(g)

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be the tender with the lowest evaluated price in

accordance with section 66 (4) of the Act [that is section 86 (1) (a) of the 2015 Act]” [Emphasis by the Board]

Regulation 50 (3) of the 2006 Regulation cites the award criteria applicable in open tenders where the Request for Proposal method of tendering has not been used. This criterion is further provided in section 86 (1) (a) of the Act as follows:-

"The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price”

The award criterion of lowest evaluated price was specified by the Procuring Entity under clause 2.25.1 of Section II. Instructions to Tenderers of the Tender Document and was to be applied after bidders have been evaluated to determine their substantial responsiveness. Consideration of price as the last aspect of an evaluation ensures that bidders do not feel entitled to an award simply because they quoted the lowest bid amount. Article 227 (1) of the Constitution provides that:-

"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system

that is fair, equitable, transparent, competitive and cost-effective”

Procurement of goods and services in a cost-effective manner is not the only principle cited by Article 227 (1) of the Constitution. A procurement process must also promote the principle of competitiveness and this can only be demonstrated during evaluation in all the three stages. This explains why evaluation based on price is conducted at the last stage of evaluation so that bidders demonstrate their substantial responsiveness to Preliminary and Technical requirements in a tender document. Justice Mativo in **Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR** has had the opportunity to explain this aspect when he held as follows:-

"Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for

compliance with other criteria, such as functionality, pricing or empowerment. [Emphasis by the Board]

In this instance, the Applicant was found substantially responsive at the end of Preliminary and Technical Evaluation stages in the Port Package (Port Liability) and Asset Based and Related Policies Category [Fire and Perils (Industrial Risks)]; (Terrorism and Sabotage); (Plant/Machinery All Risks) Categories and proceeded to Financial Evaluation stage where consideration would ordinarily be based on the tender sum. No provision in the Tender Document cited comparison of bidder's amounts to the rates of the Procuring Entity as an evaluation criterion in order to determine whether or not such tender amounts are "unreasonably low".

Section 80 (2) of the Act provides that:-

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

From the above provision, a procuring entity has the obligation to evaluate tenders using the procedures and criteria set out in its tender documents, and cannot therefore introduce a new criterion for evaluation of bids that was not previously provided in the tender document. In doing so, such a procuring entity must also take into account the award criterion applicable to the method of procurement used in its procurement process.

It is therefore the Board's considered view that having determined the bidders who were substantially responsive and eligible to proceed to Financial Evaluation and this being an open tender where the Request for Proposal method of tendering was not used, the Procuring Entity had the obligation to determine the lowest evaluated bidders and award the tender in the respective categories in accordance with clause 2.25.1 of Section II. Instructions to Tenderers of the Tender Document, read together with section 86 (1) (a) of the Act and Article 227 (1) of the Constitution.

The Board finds that the Procuring Entity failed to award the subject tender in accordance with clause 2.25.1 of Section II. Instructions to Tenderers of the Tender Document, read together with section 86 (1) (a) of the Act and Article 227 (1) of the Constitution with respect to the policies that the Applicant ought to have been found to be the lowest evaluated bidder at the Financial Evaluation stage as can be seen in the table drawn on page 30 herein with respect to the following categories:-

- Port Liability;
- Fire and Perils (Industrial Risks);
- Terrorism and Sabotage; and
- Plant/Machinery All Risks.

On the second issue, the Board observes that all parties to this Request for Review have taken the view that the tender validity period of the subject

tender ought to have lapsed on 14th November 2019 and that this period was extended for a further period of 30 days. The Applicant argued that upon extension, the tender validity period lapsed on 14th December 2019, which fell on a Saturday but that the same is not an excluded day within the meaning of section 57 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya (hereinafter referred to as "the Interpretation and General Provisions Act")

The Respondents and Interested Parties based their arguments on Order 50, Rule 3 of the Civil Procedure Rules, 2010 and took the view that Saturday is an official non-working day, hence upon extension of the tender validity period, the next official working day was 16th December 2019 and they therefore concluded that the letters of notification dated 16th December 2019 were issued within the tender validity period.

Before addressing our minds on the submissions made with respect to section 57 of the Interpretation and General Provisions Act vis a vis Order 50, Rule 3 of the Civil Procedure Rules, the Board deems it fit to determine whether parties to this Request for Review correctly computed the time when this tender was supposed to lapse at the first instance.

The relevant provisions of the Tender Document that guide on this aspect are as follows:-

Clause 2.13 of Section II. Instructions to Tenderers of the Tender Document provides that:-

"Tenders shall remain valid for 90 days after the date of tender opening pursuant to paragraph 2.18"

Clause 2.18 that is reference above states as follows:-

"The Procuring Entity will open all tenders in the presence of tenderers' representatives who choose to attend, at (time, day and date of closing) and in the location specified in the invitation for tender..."

Turning to the provisions of Section I. Invitation to Tender of the Tender Document, clause 1.6 thereof previously specified the date of tender opening as 8th August 2019. However, vide Addendum No. 3 dated 30th July 2019, the Procuring Entity informed bidders that:-

"...submission deadline is extended to 1000hours on Thursday, 15th August 2019"

Accordingly, the tender validity period was 90 days from 15th August 2019.

Before determining the period when this tender would lapse, the Board would like to address the position taken by the Procuring Entity regarding computation of time. At paragraph 17 of its Replying Affidavit, the Procuring Entity averred as follows:-

"THAT the 1st Respondent opened the tender on 15th August 2019 up to 14th November 2019 (90 days). On 15th November 2019, the Procuring Entity obtained an extension of 30 days up to 14th December 2019. The Respondents wishes to invite the Review Board to take Judicial Notice that public holidays do not count in computing days for requiring a legal obligation to be fulfilled. During the tender process, there were three public holidays, namely; Moi day, Mashujaa Day, and Jamhuri Day, therefore if you take these three days out of the computation, then the tender validity period expired on 16th December 2019. Therefore, it follows suit that the notification letters were within the tender validity period"

In order to determine whether or not the Procuring Entity correctly calculated the period when the subject tender validity would lapse, the Board is guided by section 57 (a) of the Interpretation and General Provisions Act which provides as follows:-

"In computing time for the purposes of a written law, unless the contrary intention appears—

- (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”***

According to section 57 (a) of the Interpretation and General Provisions Act, the first day for the happening of an event should not be reckoned in

the computation of time, Hence, the 90 days of the tender validity period started running on 16th August 2019. Secondly, it is not in dispute that in the course of the subject procurement process, there were three public holidays, namely; Moi day, Mashujaa day, and Jamhuri day. However, section 57 (b) cannot be read in isolation and must be considered together with section 57 (d) of the Interpretation and General Provisions Act which provides that it is only when the period for the happening of an event is less than six days, then, excluded days are not reckoned in the computation of time. This therefore means, when the period for the happening of an event is more than six days, excluded days are reckoned in the computation of time.

Accordingly, the Board finds that the tender validity period of 90 days started running on 16th August 2019 and the same lapsed on 13th November 2019 and not 14th November 2019 as suggested by all parties to this Request for Review.

Despite the foregoing findings, the Board would like to address the submissions by parties that the tender validity period was extended for a further 30 days from 14th November 2019, despite having found that the correct date when the tender validity period of the subject tender lapsed, was 13th November 2019.

It therefore behooves on this Board to determine whether such extension was conducted in accordance with provisions of the Act. Section 88 (1) of the Act provides that:-

"Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period"

The operative words of section 88 (1) of the Act indicate that the tender validity period is extended only before that period expires. According to the Procuring Entity's confidential file, there is no document showing that the subject tender was extended before its expiry date of 13th November 2019 in exercise of the discretion under section 88 (1) of the Act.

The Board was referred to a letter dated 29th November 2019 addressed to bidders which states as follows:-

"Extension of Bid Validity

Pursuant to clause 88 (3) of the Public Procurement and Asset Disposal Act, 2015, you are hereby requested to extend your tender validity period by additional 30 days with effect from 14th November 2019..."

The Board has previously addressed the difference between the tender validity period and bid price validity period in light of the person who extends the tender validity period and the one who extends the bid price validity period. In **PPARB Application No. 131 of 2019, Limah East Africa Limited v. The Accounting Officer, Mathari National Hospital & 2 Others**, it was held as follows:-

"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...

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.

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."

The Board in the above case outlined the differences between the tender validity period and the bid price validity period. In particular, a procuring entity extends the tender validity period by virtue of the discretion under section 88 (1) of the Act. This discretion is exercised by the Procuring Entity at any time before the tender validity period lapses and such discretionary power is not available to bidders. It is therefore the Board's finding that the letter dated 29th November 2019 was not an extension of the tender validity period, because it requested bidders to extend their tender validity instead notifying bidders that the procuring entity had extended the tender validity as required under section 88 (2) of the Act and further, the said letter 29th November 2019 sought bidders to extend their tender validity by an additional period of 30 days with effect from 14th November 2019 after the tender validity had expired on 13th November 2019.

In PPARB Application No. 23 of 2018, Bricks Security Services Limited -vs- Egerton University, the Board had occasion to explain the person who extends the tender validity period and when such extension can be made. The Board held as follows:-

It is also now trite that where the period of tender validity is due to expire the only option open to the Procuring Entity is to extend the tender validity period before the same expires. The tender validity period cannot therefore be extended when the same has already lapsed.

This legal position is illustrated by among other decisions the case of **PPARB Application No. 45 of 2004, Vulcan Limited –vs- Ministry of Health** where the Board held as follows:-

"...The Board considers that with regard to its validity, a tender must be valid on the date it is opened and thereafter for the requisite duration indicated by the tender conditions. As such, the duration of the validity of a tender should be counted commencing from and including the date of tender opening and expiring on the last day indicated in the tender conditions."

That the proper procedure for the Procuring Entity to follow is to extend tender validity before it expires and before making an award and also to ensure that a bid bond must be valid at the time the award is being made by the tender committee."

On the other hand, if this Board were to find based on the arguments by parties that the tender validity period of the subject tender lapsed on 14th November 2019 and that the same was extended for a further period of 30 days up to 14th December 2019, the Board observes that section 57 of the Interpretation and General Provisions Act only cites Sunday and Public Holidays as excluded days. Further, 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."

According to the Public Holidays Act, 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.

It is not lost to the Board that Order 50, Rule 3 of the Civil Procedure Rules, 2010 cited by the Procuring Entity states as follows:-

"Time expiring on Sunday or day offices closed [Order 50, rule 3.]

Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open"

The Procuring Entity relied on this provision to support its submission that the last day of the extended tender validity period was Saturday, the 14th day of December 2019, a day when the Procuring Entity's offices were closed and is therefore an excluded day.

The Board would like to make an observation that Order 50 Rule 3 of the Civil Procedure Rules were made pursuant to the Civil Procedure Act, whose application in so far as section 1 (2) thereof is concerned is as follows:-

"This Act applies to proceedings in the High Court and, subject to the Magistrate's Courts Act (Cap. 10), to proceedings in subordinate courts."

The Civil Procedure Act and subsidiary legislation made under it applies in so far as proceedings and procedures in the High Court and subordinate courts to which the Magistrates Courts Act, 2015 applies, are concerned. Section 33 of the Interpretation and General Provisions Act lays emphasis on this aspect as it provides that:-

"An act shall be deemed to be done under an Act or by virtue of the powers conferred by an Act or in pursuance or execution of the powers of or under the authority of an Act, if it is done under or by virtue of or in pursuance of subsidiary legislation made under a power contained in that Act."

Therefore, acts done under the Civil Procedure Act and the Civil Procedure Rules apply to the High Court and subordinate courts subject to the Magistrates Court Act.

Furthermore, the Interpretation and General Provisions Act and the Public Holidays Act are both substantive law, whose provisions take precedence over a subsidiary legislation such as the Civil Procedure Rules, 2010.

Hence, provisions of section 57 of the Interpretation and General Provisions Act and the Public Holidays Act would prevail in the computation of time to the effect that Saturday is not recognized as an excluded day

under the said legislation and moreso, where the time computed exceeds six days.

In this instance, the Board has made a finding that the tender validity of the subject tender already lapsed on 13th November 2019 which fell on a Wednesday, that is, an official working day within the meaning of section 57 of the Interpretation and General Provisions Act and any purported extension after 13th November 2019 was futile.

Having found that the tender validity period lapsed on 13th November 2019, the Board finds it necessary at this point to explain the importance of the tender validity period and the effect of such period lapsing. The Court in **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Higawa Enterprises Limited [2017] eKLR** 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. Failure by a procuring entity to state the tender validity period in any tender in my view would render any award therein a nullity. The tender validity period further determines by what date if

it is found necessary, a tender validity period may be extended under Section 88(1) of the Act.”

As stated in the above decision, the Board observes that the tender validity period is a critical factor in determining the legality or lack thereof, of the award of a tender by a procuring entity. Section 87 of the Act states that:-

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

Section 87 (1) of the Act is instructive that successful and unsuccessful bidders must be notified of the outcome of their bids within the tender validity period. Failure to notify the successful bidder of the award within the tender validity period, would render the resultant notification null and void.

Having found that the tender validity period lapsed on 13th November 2019 and that the purported extension by the Procuring Entity contravenes the provisions of section 88 (1) of the Act, the Board finds that the Procuring Entity failed to notify bidders of the outcome of evaluation within the

tender validity period as required by section 87 of the Act, thereby making the resultant notification letters dated 16th December 2019, null and void.

The Procuring Entity admitted that since the tender validity period has lapsed, it cannot execute contracts with the bidders determined to be successful as the said contracts would contravene section 135 (3) of the Act, which provides as follows:-

"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. The Applicant referred the Board to **Civil Appeal No. 35 of 2018, Ederman Property Limited v Lordship Africa Limited & 2 others [2019] eKLR**, where 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, in this case, section 135 (3) of the Act, goes against public policy, as the contract would be 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 13th November 2019, the Procuring Entity herein cannot execute contracts with the successful bidders in any category of the subject tender, as such contracts would be null and void.

The Board is therefore left with the third issue concerning the appropriate orders to grant in the circumstances.

The Procuring Entity and the 3rd Interested Party submitted that this Board should exercise its discretion and extend the tender validity period to enable the Procuring Entity conclude the procurement process. The Applicant opposed this prayer and submitted that the Act does not allow the Board to "revive a dead tender."

The 3rd Interested Party referred the Board to **Civil Appeal No 131 of 2018, James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019]** eKLR where it was held as follows:-

"The tendering process was complete and the successful candidates, the petitioners, were known. The process had been delayed by all manner of factors including at the last, the review proceedings filed by the appellants. It was only logical and fair and in the interests of sound management of public resources, that the process be completed, hence the direction by the learned Judge that the contracts be executed. We see no error in that direction."

The 3rd Interested Party cited the decision of the Court of Appeal to support its view that the Board should grant orders extending the tender validity period to allow the logical conclusion of this procurement process. The Board would however like to distinguish the circumstances in the above case to those of the instance review, in that the Court of Appeal did not address the issue of tender validity period since the same was not an issue before it.

Further, when the matter was before the High Court through **Petition No. 50 of 2017, El Roba Enterprises Limited & 5 others v James**

Oyondi t/a Betoyo Contractors 5 others [2018] eKLR, the court did not address the issue of tender validity period, rather, the court addressed its mind to the fact that the existing suppliers of the procuring entity in that case continued to offer services to the procuring entity despite the allegations raised before the High Court that the tender (i.e. contracts) had lapsed. At paragraph 45, it was held as follows:-

"The Petitioners allege that the 1st and 2nd Respondents continued to offer services when the tenders (KPA/024/2011-12/HSE and KPA/025/2011-12/HSE) had already lapsed. However, the Petitioners did not tender any evidence to show that extension of the said tenders by the 3^d and 4th Respondents was indeed a breach of the constitution or the substantive statute. The Petitioners did not also dispute the allegation by the 1st and 2nd Respondents that some of the Petitioners who were also successful bidders as the 1st and 2nd Respondents had continued to offer services to the 4th Respondent despite the alleged lapse of the tenders. A keen perusal of the pleadings filed by the parties reveals that the 2nd and 3^d Petitioners had benefited from the tenders alleged to have lapsed. Further, the Petitioners did not seek a refund of the money paid to the 2nd and 3^d Petitioners on account of provision of services after the alleged lapse of the tender. This court can therefore not conclude that the 3^d and 4th Respondent did not act in a transparent and accountable manner.

In essence, the Court of Appeal and the High Court in the above decisions, did not address the question whether the tender validity period can be extended after the lapse of such period. Notably, the High Court only addressed the issue that a procuring entity can extend a contract of an existing supplier.

The Procuring Entity on its part cited the Board's decision in **PPARB Application No. 133 of 2019, Med Marine Kilavuzluk Ve Romorkor Hizmetleri Ins. San. Ve Tic. A.S v. The Accounting Officer, Kenya Ports Authority & Another** (hereinafter referred to as "the Med Marine Case") where the Board extended the tender validity period for a further period of 45 days to allow the Procuring Entity to conclude the procurement process. However, the Board in the *Med Marine case* found that the tender validity period was still in existence, thus extending the said period. At page 57 of its decision, the Board held as follows:-

"The courts support the view that this Board ought to take the tender validity period of a tender into account so as to avoid issuing orders in vain. In taking such period into account, nothing bars the Board from extending the tender validity period (if such period has not lapsed before review proceedings are lodged before the Board) to ensure a procuring entity can comply with the orders of this Board and that the procurement process is completed to its logical

conclusion. As a result, the Board finds it fit to extend the tender validity period"

In the *Med Marine Case*, the tender validity period had not lapsed as at the time the Request for Review was lodged before the Board. However, the circumstances in the *Med Marine Case* do not apply to the instant Request for Review where we have found the tender validity period lapsed even before bidders were notified of the outcome of their bids and no tender existed when the Applicant filed this Request for Review.

The Supreme Court of South Africa in **Telkom SA Limited v Merid Training (Pty) Ltd and Others, Bihati Solutions (Pty) Ltd v Telkom SA Limited and Others [2011] ZAGPPHC dated 7 November 2011 - now reported at [2011] JOL 26617 (GNP)** had occasion to address the question whether extension of an already lapsed tender is lawful when it held as follows:-

"The question to be decided is whether the procedure followed by the applicant and the six respondents after 12th April 2008 (when the validity period of the proposals expired) was in compliance with section 217 of the Constitution.

In my view it was not. As soon as the validity period of the proposals had expired without the applicant awarding a tender, the tender process was complete- albeit unsuccessfully - and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive.

All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the tender validity period of the proposals.

It failed to award a tender within the validity period of the proposals it received, it had to offer all interested parties a further opportunity to tender.”

This decision was followed by Court of Appeal of South Africa in **Joubert Galpin Searle and Others v. Road Accident Fund and Others [2014] 1 All SA 604 (ECP)** where it was held as follows:-

"The central issues to be decided were the effect on the tender process of the expiry of the tender validity period and whether, if the expiry of the tender validity period put an

end to the process, it could subsequently be revived.

Once the tender validity period had expired, the tender process had been completed, albeit unsuccessfully. There were then no valid bids to accept and the tender could not be revived by an extension”

As can be noted above, the decisions of the courts in South Africa are on all fours with the present case. This Board cannot therefore purport to revive a tender by extending the tender validity period.

The Procuring Entity herein is a public entity required in terms of Article 227 (1) of the Constitution, when it contracts for goods and services, to do so in accordance in a system that is “fair, equitable, transparent, competitive and cost effective”. These core principles of public procurement are reiterated in section 3 as some of the guiding principles under the Act.

The Applicant urged this Board to order the Procuring Entity to re-tender afresh for the services under the subject tender. However, since the procurement process of the subject tender no longer exists due to lapse of the tender validity period, it is only appropriate to direct the Procuring

Entity to re-tender for the services required in the subject tender.

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. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior to, during, and subsequent to the actual process of litigation"

Having found that the tender validity period of the subject tender already lapsed, the Board notes that should the Procuring Entity retender for the subject tender, the Applicant will have another opportunity to compete for award of the re-tender in the respective categories. 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 Provision of Insurance Services for the year 2020-2022 within fourteen (14) days from the date of this decision.**
- 2. Each party shall bear its own costs in the Request for Review**

Dated at Nairobi this 20th day of January 2020

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CHAIRPERSON

PPARB

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SECRETARY

PPARB

Delivered in the presence of:-

- i. Mr. Muturi for the Applicant;**

- ii.** Mr. Kyandih for the Respondents;
- iii.** Mr. Kiprono for the 1st and 2nd Interested Parties; and
- iv.** Mr. Muganda for the 3rd Interested Party.