

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION No. 77/2017 OF 21ST AUGUST, 2017

BETWEEN

BETOYO CONTRACTORS1ST APPLICANT

AND

JONA PESTCON.....2ND APPLICANT

AND

KENYA PORTS AUTHORITYPROCURING ENTITY

Review against the decision of Kenya Ports Authority in the Matter of Tender Number KPA/113/2016-2017/ADM for Provision of Biennial Contract Housekeeping Services.

BOARD MEMBERS PRESENT

- | | | |
|----|----------------------------|------------|
| 1. | Mr. Paul Gicheru | - Chairman |
| 2. | Mrs. Josephine W. Mong'are | - Member |
| 3. | Mr. Hussein Were | - Member |
| 4. | Mr. Nelson Orgut | - Member |
| 5. | Mrs. Gilda Odera | - Member |
| 6. | Mr. Peter B. Ondieki, MBS | - Member |
| 7. | Mr. Paul Ngotho | - Member |

IN ATTENDANCE

1. Mr. Henock Kirungu - Board Secretary
2. Philemon Kiprop - Secretarat
3. Philip Okumu - Secretarat
4. Maureen Kinyundo - Secretariat

PRESENT BY INVITATION

Applicant - Betoyo Contractors

1. Gikandi Ngibuini - Advocate, Gikandi & Co. Advocates
2. Gladys Kiptum - Pupil, Gikandi & Co. Advocates
3. Mara Mwanzia - Pupil, Gikandi & Co. Advocates

Procuring Entity- Kenya Ports Authority

1. Wamuyu Ikegu - Legal Officer, KPA
2. Rehema Mudzo - Pupil, KPA

Interested Parties:

1. William Mogaka - Advocate, Mogaka Omwenga & Mabeya
2. Bidders as captured on the Board's record of proceedings

BOARD'S DECISION

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

BACKGROUND OF DECISION

Introduction

The Kenya Ports Authority (hereinafter “KPA” or “the Procuring Entity”) invited Tenders from eligible suppliers for the Biennial Contract for Provision of Housekeeping Services.

Tender Invitation

The Tender was advertised in *The Star* and *The Daily Nation* newspapers and KPA website on 15th March 2017. The tender was closed on 5th April, 2017 at 00900 hours and opened immediately thereafter. Ninety three (93) firms submitted bids by the closing time.

Tender Evaluation

KPA’s tender evaluation committee evaluated the tenders in three stages of preliminary (mandatory), technical and financial evaluation.

Preliminary Evaluation

During preliminary evaluation, bidders were assessed for compliance with mandatory requirements. Fifty (50) tenderers, including Messrs Betooyo Contractors, the First Applicant herein, failed to comply with the mandatory requirements at this stage and were disqualified from further evaluation and from the rest of the tender process. Forty three (43) tenderers complied and were declared responsive and hence proceeded to technical evaluation stage.

Technical Evaluation

Bidders were evaluated for specific experience in relation to this assignment; adequacy of personnel; and possession of machinery, tools and equipment. The pass mark at the technical evaluation stage was 75%. Eighteen (18) bidders, including Messrs Jona Pestcon, the Second Applicant herein, failed to attain the minimum score of 75% and were disqualified from further evaluation. Twenty Five (25) bidders attained a minimum score of 75% and qualified to be evaluated at the financial stage.

Financial Evaluation

The financial bids for the twenty five firms were opened on 31st May, 2017 and evaluated according to their quotations. Their prices were compared and ranked.

Recommendations

After detailed individual zones evaluation, the Committee recommended that the tender be awarded to the lowest evaluated bidders as follows:

Zone No.	Bidder Name	Amount in Kshs (VAT included)
1	Suldanka Harti Ltd	1,225,250.00
2	Halsa Solutions Ltd.	634,580.78
3	Nakaj Services	539,864.00
4	Sender Services	670,971.48
5	Tudor Services Ltd	796,644.80
6	Rokeen Enterprises	813,624.00
7	Space Contractors & Supplies Investment Ltd	1,052,803.24

8	Ephtacia Ltd.	810,149.00
9	Yadhiriba Ltd	830,920.50
10	Chenda Investments Ltd	813,624.00
11	Tech Africa Ltd.	897,840.00
12	Digital Sanitation	918,430.88
13	Simca Agencies	861,958.57
14	Handibo Services	556,042.50
15	Virgin Clean Ltd	507,567.71
16	Africa Memsap Technology Ltd	1,017,559.00
17	Demack Services	678,600.00
18	Ollreggy Investments	725,697.15
19	Norgen Enterprises Ltd	850,745.57
20	Forbes International Ltd	731,301.10
21	Subisa Communications Ltd	536,108.00
22	Harp General Merchants.	787,640.00
23	Two Clix Enterprises	510,093.00

PROFESSIONAL OPINION

The head of Procurement, pursuant to Section 84 (1) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter "the Act"), having reviewed the evaluation reports and recommendations made therein, expressed to the accounting officer his satisfaction that the process was done in accordance with the Act and consequently recommended award of the tender as recommended by the evaluation committee for a period of three (3) years.

The First and Second Applicants (hereinafter “the Applicant”) were notified *vide* letters dated 9th August 2017 that their tenders were unsuccessful, which decision they disagreed with and opted to challenge through this Request for Review.

REQUEST FOR REVIEW No. 77/2017

The Request for Review was lodged by M/s Betoyo Contractors and M/s Jona Pestcon (hereinafter “the Applicant”) on 21st August, 2017 in the matter of Tender Number KPA/113/2016-17/ADM - Biennial Contract for Provision of Housekeeping Services for Kenya Ports Authority (hereinafter “the Procuring Entity”).

The Applicant sought the following orders of the Board:

1. *That the entire decision of the Respondent made on 9th August, 2017 in respect of Tender No. KPA/113/2016-17/ADM be annulled in its entirety.*
2. *Order termination of the procurement process of Tender No. KPA/113/2016-17/ADM and direct the commencement of a fresh procurement process of the said tender.*
3. *Award of costs to the Applicant*

The Applicant argued nine grounds in support of the Request for Review and was represented by Mr. Gikandi Ngibuini, Advocate from the firm of Gikandi & Company Advocates. The Procuring Entity was represented by Ms. Wamuyu Ikegu, Legal Officer at Kenya Ports Authority. Mr. William Mogaka, Advocate from the firm of Mogaka Omwenga & Mabeya Advocates represented the Interested Parties.

APPLICANT'S CASE

The Applicant stated in its case that the Procuring Entity invited eligible bidders to bid for Tender Number KPA/113/2016-17/ADM - Biennial Contract for Provision of Housekeeping Services. It stated further that it submitted its bid as per the Procuring Entity's request to all prospective tenderers to submit their bids before 09:00 Hours on 5th April, 2017.

The Applicant averred that, in accordance with the tender document and instructions to tenderers, the validity period for the tender was 90 days starting from 5th April, 2017 and as such, the tender validity period for the subject tender ran from 5th April to 5th July, 2017. It averred further that on 11th July, 2017 the Procuring Entity issued a notice indicating that the tender validity period had been extended by 30 days effective 16th July, 2017. The Applicant claimed that the tender validity period had lapsed on 5th July, 2017 and, in its opinion, the tender was not in existence after 5th July, 2017.

The Applicant argued that the Procuring Entity's decision to extend the tender validity period after the validity period had already lapsed was a violation of the law thereby rendering the Procuring Entity's decision to award the said tender null and void. It argued further that the Procuring Entity notified some bidders of the extension of the tender validity period directly through their postal addresses but not to the Applicant who only learnt of the said extension through the Procuring Entity's website.

The Applicant concluded that in the light of the above the, Procuring Entity's actions constituted an affront to the Constitution of Kenya, 2010 and particularly Articles 10, 27 and 47; and Section 88 of the Act which oblige the Procuring Entity to strictly act in an accountable manner so as to ensure that public funds are expended strictly in accordance with the law.

PROCURING ENTITY'S RESPONSE

In Response to the Request for Review the Procuring Entity, through an affidavit sworn by Cosmas Makori, Principal Procurement Officer (Tenders) submitted that the tender was opened on Wednesday 5th April 2017 and thereafter evaluated for technical responsiveness between 18th April and 7th May 2017. It submitted further that the First Applicant failed to meet the mandatory requirements and therefore did not qualify for technical evaluation. It also submitted that the Second Applicant did not attain the pass mark of 75% at technical stage. Both the First and Second Applicants were hence disqualified from the tender process.

The Procuring Entity averred that the tender was valid for the full period of 120 days as indicated in the tender security and that the tender evaluation process was completed within the tender validity period. It averred further that the validity period was extended to ensure completion of the tender process up to the point of award of the tender to successful bidders as communicated *vide* letters dated 11th July 2017 and also on the Procuring Entity's website. The Procuring Entity denied the allegation that it selectively notified some of the bidders, averring that bidders had been advised in the advertisement notices and the tender document to regularly check the website for additional information. It averred further that the tender was awarded within the validity period since the same had been extended to 16th August 2017, bidders having been advised to extend their tender securities and several of them having acknowledging the extension of the validity period.

The Procuring Entity submitted that the First and Second Applicants having been declared unsuccessful were duly notified that their bids were not technically responsive and, as such, were properly disqualified. The Procuring Entity prayed that the Request for Review be dismissed with costs.

INTERESTED PARTIES' RESPONSE

Mr. Mogaka for the Interested Parties argued that under Section 170 of the Act the parties to a review are the person who requested the review and the accounting officer of the Procuring Entity, the tenderers notified as successful by the Procuring Entity such as his clients and any other person that the Board may determine. He submitted that the accounting officer of the Procuring Entity had not been made a party to these review proceedings and urged the Board to consider the consequences of not joining the accounting officer, who was supposed to be a party, to the proceedings. He requested the Board to refer to look at Sections 44, 45, 60, 74, 87, 88, 92, 93, 94, 96 and 100, among other sections of the Act, to be able to establish that, in all processes under the Act, the person supposed to take action and ensure that the processes are proper is the accounting officer. Mr. Mogaka also stated that Section 173 of the Act enjoined the Board to issue orders against the accounting officer who, in Mr. Mogaka's view, is in charge of the procurement process.

Counsel for the Interested Parties averring that the Act is a special statute, urged the Board to consider the proceedings as special litigation and argued that when a statute provides for a special process on how to determine specific matters, the provisions of that special statute ought to be followed. He contended that there were no proceedings before this Board against the

accounting officer, who is the managing Director under the Kenya Ports Authority Act. Counsel urged the Board to consider the question why parliament decided that it is the accounting officer to be brought before the Board and why the Procuring Entity was excluded from Sections 170 and 173 of the Act. He argued that given that since there is no procedure providing for suing of the Procuring Entity and further that since the joinder of the Procuring Entity in these proceedings was not pursuant to the orders of the Board, then there were no proceedings before the Board and that whatever was before it was without jurisdiction as the accounting officer was not sued within 14 days as required. He therefore urged the Board to down its tools by striking out the request for review with costs.

Turning to the issue of tender validity, the Interested Party averred that under Section 167, of the Act a candidate or a tenderer who claims to have suffered or to risk suffering, loss or damage due to a breach of a duty imposed on the Procuring Entity may seek administrative review. It argued that the Applicants had not suffered any loss or damage because their bids were not responsive at a very early stage of the evaluation process adding that the Applicants' claims were an afterthought after they failed at a very early stage. It contended that the tender process was open, accountable and transparent and that a party who was knocked out at a very early stage ought not to be allowed to reverse the whole process.

In conclusion, counsel for the Interested Parties submitted that he agreed with and adopted the submissions made by the Procuring Entity, and went on to urges the Board to dismiss the Request for Review.

APPLICANT'S REPLY

Mr. Ngibuini, in reply on behalf of the Applicant, submitted that the general principle of law was that where there is an agent and the principle person is known then the agent cannot be sued. He averred that the words "accounting officer" meant the Procuring Entity because that is what remains in perpetuity but the accounting officer, being a natural person, can leave the organization at any time. He pointed out that the answer lay in the Affidavit sworn by Cosmas Makori on behalf of the Procuring Entity and which stated at Paragraph 1 as follows:

"I am an adult male of sound mind employed by the Procuring Entity as the Principal Procurement Officer (tenders) and I am competent and duly authorized by the Procuring Entity to swear this affidavit on their behalf".

Mr. Ngibuini urged the Board, in interpreting the law, to consider the provisions of Article 159 of the Constitution which enjoins the Board to decide the case based on the substance and purpose of the law.

On the issue of tender validity period, Mr. Ngibuini submitted that even if the period was 120 days, the same lapsed on 5th August 2017 and yet the letter of notification was dated 9th August, 2017 which was outside the validity period. He added that even the letter that called for extension of tender validity did not state that there would be effective extension of the bid bond. He opined that the award was made on a nullity, on nothing, on something that died and that it ought to be nullified and the tender floated again.

THE BOARD'S FINDINGS

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

1. *Whether the Board is deprived of jurisdiction in the matter on account of the accounting officer of the Procuring Entity not having been sued in the proceedings.*
2. *Whether the Procuring Entity violated the provisions of Section 87 (1) of the Act by awarding the tender outside the tender validity period.*

The Board now proceeds to determine the issues framed for determination as follows:-

1. As to whether the Board is deprived of jurisdiction in the matter on account of the accounting officer of the Procuring Entity not having been sued in the proceedings.

A jurisdictional issue having arisen, the Board is duty bound to inquire into it first and down its tools if it finds that it has no jurisdiction and shall not therefore delve further into the merits of the request for review.

The Board has heard submissions by Counsel for the Interested Parties, Mr. Mogaka that under Section 170 of the Act, the party to a review shall be the person who requested the review and the accounting officer of the Procuring Entity, the tenderers notified as successful by the Procuring Entity and any

other person that this Board may determine. In Mr. Mogaka's view, Section 170 of the Act does not list the Procuring Entity as a party to a review. Further submissions by the Interested Parties are that Section 173 of the Act enjoins the Board to issue orders against the accounting officer and not the Procuring Entity. Contingent upon these submissions, counsel for the Interested Parties contended that there were no proceedings before the Board and that whatever was before it was without jurisdiction and the Board therefore ought to down its tools by striking out the request for review.

To determine this issue the Board has considered the provisions of Section 170 of the Act which states as follows:

Section 170 *"The parties to a review shall be -*

- a) The person who requested the review;*
- b) The accounting officer of a procuring entity;*
- c) The tenderer notified as successful by the procuring entity; and*
- d) Such other persons as the Review Board may determine".*

The Board notes that the Applicant filed with the Board the request for review dated 21st August 2017 on even date and the same was served upon the Procuring Entity. It is further noted that the Procuring Entity filed a response dated 28th August 2017 drawn by a commissioner for oaths and filed with the Board on 30th August 2017. The same was served upon the Applicants' advocate. It is also noted that the Procuring Entity's response was supported by an affidavit sworn by Cosmas Makori, which stated in part as follows:

1. *"That I am an adult male of sound mind employed by the Procuring Entity as the Principal Procurement Officer (Tenders) and I am competent and duly authorised by the Procuring Entity to swear this affidavit on its behalf.*
2. *That I have been shown a copy of the Request for Review filed by the Applicants on 21st August 2017 and I am fully conversant with the matters of fact involved in this application and I wish to respond as hereunder...."*

It is common knowledge that the Procuring Entity is a state corporation with perpetual succession. As a state corporation the Procuring Entity discharges its functions through its employees, including the accounting officer. Employees of the Procuring Entity when performing their duties in accordance with their terms of employment do so as agents of the Procuring Entity.

It is evident from the affidavit of Cosmas Makori that he was authorised to act on behalf of the Procuring Entity in this Request for Review. Having been so authorised to act, Cosmas Makori was an agent of the Procuring Entity. The role of Cosmas Makori in this Request for Review could have been handled by any other competent officer of the Procuring Entity so long as the officer was authorised to do so. The accounting officer of the Procuring Entity would equally have to be authorised by the Procuring Entity to participate in the proceedings on the Procuring Entity's behalf.

It therefore follows that the accounting officer of the Procuring Entity is an agent and the principle is the Procuring Entity. Under the principle of vicarious liability the actions of the agent are attributable to the principle. It is also a basic principle of the law of agency that the principal is bound by the

actions of its agent. The Board finds and holds that the accounting officer is an agent of the Procuring Entity and where an agent and the principle are known as it is the case here, the principle is the one to be sued and not the agent. The accounting officer acts on behalf of the Procuring Entity but the Procuring Entity does not act on behalf of the accounting officer. It is the firm view of the Board that the Procuring Entity is the party in this Request for Review and was properly sued and, equally, was properly represented in the proceedings.

This ground of review fails and is dismissed. The Board determines that it has jurisdiction in the matter and now proceeds to determine the Request for Review on its merits by delving into the second issue framed for determination.

2. As to whether the Procuring Entity violated the provisions of Section 87 (1) of the Act by awarding the tender outside the tender validity period.

The Board has considered the Applicant's Request for Review dated and filed with the Board on 21st August 2017 together with the verifying affidavit sworn by Mr. James Oyondi on 21st August 2017. The Board has also considered the Procuring Entity's Response dated 30th August, 2017 together with the submitted confidential documents and the oral submissions made by the parties to this Request for Review. It was common ground during the hearing of this Request for Review that the present dispute arose from the

letter of notification dated 9th August 2017 to the Applicant which the Procuring Entity wrote thus,

“This is to notify you that your bid was not successful. Pursuant to section 83 (3) of the Public Procurement and Asset Disposal Act, 2015, your bid was not technically responsive as required in the instruction to tenderers Clause ITT 12 & 13 of the tender document”.

It is not in dispute that the Procuring Entity advertised Tender Number KPA/113/2016-2017/ADM for Provision of Biennial Contract Housekeeping Services on 15th March 2017. The contract was to run for a period of 36 months. The said tender was closed and opened on 5th April, 2017 with ninety three (93) tenderers, including the Applicant, submitting bids. It is further not in dispute that the tender was evaluated in three stages of preliminary (mandatory), technical and financial evaluation. The First and Second Applicants were disqualified at the preliminary evaluation stage and technical evaluation stage, respectively, for failure to meet the stated requirements at the respective stages of evaluation.

It is uncontested that the Procuring Entity, *vide* letter dated 11th July 2017, sought to extend the tender validity period of the subject tender. The letter stated as follows:

“Pursuant to section 88 (2) of the Public Procurement and Asset Disposal Act, 2015, the Authority requests all bidders who participated in the above tenders to extend tender validity by a further 30 days

effective from 16th July, 2017 to facilitate completion of tendering process”.

It is also uncontested that the Procuring Entity evaluated the tenders and awarded various tenderers based on zones. The letters of award to successful bidders and notifications to unsuccessful bidders were dated 9th August 2017.

The issue for the Board to determine is whether the Procuring Entity awarded the tender to successful bidders outside the tender validity period as alleged by the Applicant and, if that is the case, whether such award was proper in the eyes of the law.

To determine this issue the Board has looked at the tender document and in particular:

- i) Invitation for Tenderers found at Section I;
- ii) Instructions to Tenderers found at Section II;
- iii) Forms of Security at Section X

The Board notes the following provisions of the tender document:

Section I - Invitation for Tenderers

Item 5 *“Tenderers shall be required to submit a Tender Security amounting to Kenya Shillings One Hundred Thousand ...valid for 120 days from the date of tender opening in the format provided in the tender document”.*

Item 7 *"... tenders shall be submitted at the Head of Procurement & Supplies ... 09:00 Hours on Wednesday, 5th April, 2017".*

Item 8 *"Tenders will be opened promptly thereafter in the presence of Tenderers representatives who choose to attend ..."*

Section II -Appendix to Instructions to Tenderers

Clause 17.1 *"Tenders shall remain valid for the period specified in the Tender Data Sheet after the deadline for Tender submission Specified in ITT Clause 21".*

Clause 17.2 *"In exceptional circumstances, prior to expiry of the original Tender validity period, the Procuring Entity may request that the Tenderers extend the period of validity for a specified additional period".*

Clause 18A.3 *"Any Tender security must be valid for a period of at least 30 (Thirty) days after the expiry of the Tender Validity Period.*

Forms of Security

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

Having looked at the sections of the tender document outlined above, particularly Item 5 of Invitation for Tenderers, the Board observes that the tender security of the subject tender was valid for 120 days from the date of tender opening. It is further observed that the Tender Data Sheet did not specify the period tenders were to remain valid pursuant to Clause 17.1 of the Appendix to Instructions to Tenderers. However Clause 18A.3 of the Appendix to Instructions to Tenderers and the Form of Tender Security found at Section X of the tender document resolves the question of the tender validity period as they state clearly that the tender security must be valid for at least 30 (thirty) days after the expiry of the tender validity period. It is therefore clear to the Board that Clause 18A.3 and Section X have discounted the submission of the Procuring Entity that the period of the tender security was the same as the tender validity, at 120 days. From the foregoing, the Board finds that the tender validity period was, at the maximum, 30 (thirty) days less than the period of tender security. It is realistic to place the tender validity period at 90 (ninety) days from the date of tender opening.

The Board has heard arguments by the Procuring Entity that the period of the tender validity was 120 days, the same as the period of tender security. This argument is contrary to the provisions of Clause 18A.3 of the Appendix to Instructions to Tenderers and the Form of Tender Security found at Section X of the tender document. Based on the provisions of the tender document as stated above, the Board affirms that the tender security period was 120 days and, consequently, finds that the tender validity period was 90 days.

The finding of the Board is buttressed by the provisions of Public Procurement and Asset Disposal Regulations, 2006 which state at Regulation 44 as follows:

Regulation 41 (4) "No tender security shall be accepted under the Act unless such security is valid for a period of at least thirty days after the expiry of the tender validity period.

(5) "The procuring entity shall, where it extends the tender validity period, request the tenderers to extend the period of validity of their tender securities".

Regulation 41 (4) of the Regulations validates the finding of the Board on the tender validity period being at least 30 days less than the period of tender security.

Having established that the tender validity period of the tender subject of this Request for Review was 90 days, the Board turns to determine whether the tender was awarded within the validity period. The Board is cognizant of the provisions of Section 87 (1) the Act, which states as follows:

Section 87(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".

On extension of tender validity, Section 88 (1) of the Act provides as follows:

Section 88(1): *“Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.*

At this point, the Board considers it appropriate to cite several of its past decisions and those of the High Court which have established this legal position. In the case of **Bricks Security Services Limited -vs- Egerton University PPARB Appl. No. 23 of 2008**, the Board stated as follows at page 6 of the said decision:-

“The Board finds that the Procuring Entity ought to have notified the successful and the unsuccessful tenderers by 5th July, 2008. In this particular instance, the Procuring Entity did not do so until 9th July, 2008. The Board holds that the tender validity period expired on 5th July, 2008 and since the Procuring Entity did not extend the period, the tender then lapsed with expiry of the tender validity period. In the circumstances, there was no tender to be awarded as the life of the tender had lapsed on 5th July, 2008”.

It is now trite law 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. The case of **Vulcan Limited -vs- Ministry of Health (PPARB Appl. No. 45 of 2004)** illustrates this legal position 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”.

The Board further declared as follows:-

“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...”.

In a very recent case of Transcend Media Group Ltd -vs- Kenya Power & Lighting Company Ltd (PPARB Appl. No. 70 of 2017, the Board held as follows:-

“... once the tender validity period expires the procurement process dies a natural death and there is even no need to terminate the same”.

The Board now considers the issues that arose in this Request for Review to establish if there are circumstances that warrant a deviation from the precedent outlined above.

It is not in doubt that the tender subject of this Request for Review was opened on 5th April 2017. A countdown of 90 days from tender opening takes the validity of the tender to a date not later than 5th July, 2017. It is further not in doubt that the Procuring Entity, *vide* letter dated 11th July 2017, sought to extend the validity period of the subject tender. The Board finds that the tender lapsed on 5th July 2017. Even assuming that the tender validity period was properly extended, the extension of 30 days takes the tender validity up to 5th August 2017. The award having been made on 9th August 2017 was still outside the extended validity period. It is the respectful view of the Board that, as at 11th July 2017, there was no valid tender to be extended as the same

had lapsed on 5th July 2017. In a manner of speaking, the Procuring Entity could not extend what was not there. The tender had, in effect, "died" on 5th July, 2017.

The Act requires at Section 87 (1) that a tender must be awarded within the tender validity period. Once the tender validity period lapses the requirement under Section 87 (1) of the Act cannot be met and award of the tender after the validity period has lapsed, in the Board's view, amounts to an exercise in futility.

The Board therefore upholds this ground of review and proceeds to allow it.

COSTS

The Board identified one issue in this request for review and which has been determined in favour of the Applicant. It is noted that the Applicant asked for costs of review which ordinarily it would be granted given the outcome of review. The Board having found that the Procuring Entity awarded the tender outside the validity period, it follows that the said award was null and void and the remedy lies in the cancellation of the tender. Since the Applicant will have another opportunity to participate in the tender and further, since the Applicant was not responsive at the evaluation stage, the Board shall not order any party to pay the costs of review.

FINAL ORDERS

In view of all the foregoing findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement

and Disposal Act, 2015 the Board makes the following orders on this Request for Review:-

1. The Request for Review dated 21st August, 2017 and filed with the Board on the same date by the First Applicant, M/s Betoyo Contractors and the Second Applicant, M/s Jona Pestcon in respect of Tender Number KPA/113/2016-17/ADM for Biennial Contract for Provision of Housekeeping Services to Kenya Ports Authority be and is hereby allowed.
2. The award of subject tender to the successful tenderers be and is hereby annulled.
3. The Procuring Entity is instructed to start the procurement process afresh within fourteen days from the date of this decision.
4. Each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 7th September, 2017



CHAIRMAN
PPARB



SECRETARY
PPARB