

THE REPUBLIC OF KENYA
THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 64/2020 OF 18TH MAY 2020

BETWEEN

ERDEMANN PROPERTY LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

EXPORT PROCESSING ZONES AUTHORITY

**KENYA.....PROCURING
ENTITY**

Review against the decision of the Accounting Officer of Export Processing Zones Authority Kenya terminating the procurement process in Tender No. RFP/EPZA/01/2019-2020 for the Development of Affordable Housing at the Athi River EPZA Site to be undertaken through Joint Venture Partnership.

BOARD MEMBERS

- | | |
|-------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Joseph Gitari | -Member |
| 3. Mr. Alfred Keriolale | -Member |
| 4. Mr. Ambrose Ogetto | -Member |

IN ATTENDANCE

1. Mr. Stanley Miheso -Holding brief for the Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Export Processing Zones Authority (hereinafter referred to as “the Procuring Entity”) advertised Tender No. RFP/EPZA/01/2019-2020 for the Development of a Housing Estate at the Athi River EPZA Site to be undertaken through Joint Venture Partnership (hereinafter referred to as “the subject tender”) through the Government Advertising website (www.mygov.go.ke), the Daily Nation Newspaper on November 5th 2019 and the Procuring Entity’s website (www.epzakenya.com). A Pre-Bid Site Visit was held on 27th November 2019 at the Procuring Entity’s Conference Room in Athi River, attended by candidates from 6 firms.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received 4 No. of bids by the bid submission deadline of 20th December 2019 and the same were opened shortly thereafter by a Tender Opening Committee and recorded as follows:-

Bid No.	Name of firm
1	Costa Valley Homes Ltd lead Comprising Afra Holdings PTE Ltd (Singapore) who is the lead Consortium Member of the Bidding Consortium Morphosis Ltd, BECS Consultancy, Metrix Integrated Consultancy, Linx Consulting Engineers Ltd and Ahmedkadir& Co. Advocate who are consortium members

2	Bola Associates Ltd
3	Edermann Property Ltd
4	Property Dynamics as lead Consortium Member S2S International & Darendeli Holding

Evaluation of Bids

An Evaluation Committee appointed by the Acting Chief Executive Officer undertook evaluation of bids in the following stages:-

- i.** Mandatory Requirements Evaluation;
- ii.** Technical Proposal Evaluation; and
- iii.** Financial Evaluation.

1. Mandatory Requirements Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Annex B. Mandatory and Eligibility Requirements of Section V. of the Document for Development of Affordable Housing at the Athi River EPZA Site to be undertaken through Joint Venture Partnership (hereinafter referred to as "the Tender Document"). The four bids were subjected to evaluation based on the aforementioned criteria. However, it is only M/s Costa Valley Homes Ltd and M/s Erdemann Property Ltd that were found responsive to Mandatory and Eligibility requirements hence proceeded to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Annex C. Technical Bid Requirements of Section V. of the Tender Document which required bidders to attain an overall aggregate score of 70% to proceed to Financial Evaluation. The results of Technical Evaluation was recorded as follows:-

Bidders	Bidder No. 1 M/s Costa Valley Homes Ltd	Bidder No.3 M/s Erdemann Property Ltd
Total Score	86.625	95.5
Remarks	Qualified	Qualified
TS x 40%	34.65	38.2

The two bidders achieved the overall aggregate score at this stage, hence were found responsive and eligible to proceed to Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Section VI. Financial Proposal of the Tender Document which set out the constituent parts of the Financial Bids submitted by bidders read together with Annex D. Financial Bid Form 1, Annex E. Financial Bid Form 2, Annex F. Financial Bid Form 3, the Financial Evaluation Criteria at pages 56 to 57 and Clause 3.25. Award Criteria of the Tender Document. At the end of Financial Evaluation, the scores of the two bidders were recorded as follows: -

No	Evaluation Attributes	Maximum Score	Bidder No. 1	Bidder No. 3
1	Project Financial Package	75	64.45	68.75
2	Proposed Mortgage Facility / Tenant Purchase Scheme	15	12.5	14.75
3	Marketing Plan	10	9.25	9.25
4	Total Score	100	86.2	92.75
5	Weighted	60	51.72	55.65

Overall Aggregate Score = $T_x + F_x$

Aggregate Score for Financial and Technical

	Bidder	Bidder No. 1 M/s Costa Valley Homes Ltd	Bidder No. 3 M/s Erdemann Property Ltd
1	Technical Total Score	34.6	38.2
2	Financial Total Score	52.465	55.65
	Total	87.065	93.858

Recommendation

From the above analysis, **M/s Erdemann Property Ltd** attained the highest aggregated score and therefore emerged as the successful bidder. The Evaluation Committee recommended award of the subject tender to the said bidder as per the following table: -

Bidder	Cost Per Sq.M (kshs)	Total Cost of Development (kshs)	Total No. of Units (1,2,3 Br)	Mortgage Rate/Years
Erdemann Property Ltd	59,583.3	24,768,000,000.00	5,520	8.5% for 25 Years

Professional Opinion

In a professional opinion dated 17th January 2020, the Acting Manager, Supply Chain reviewed the Evaluation Report dated 17th January 2020 and expressed his satisfaction that the evaluation process met the requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). He therefore urged the Acting Chief Executive Officer to award the subject tender to **M/s Erdemann Property Ltd** as recommended by the Evaluation Committee. The said professional opinion was approved by the Acting Chief Executive Officer on 20th January 2020.

Notification to Bidders

In letters dated 20th January 2020, the Acting Chief Executive Officer notified the successful bidder and all unsuccessful bidders of the outcome of their bids.

REQUEST FOR REVIEW NO. 17 OF 2020

M/s Afra Holdings PTE Limited lodged a Request for Review dated 6th February 2020 and filed on 7th February 2020. However, on 20th February 2020, M/s Afra Holdings PTE Limited lodged an Amended Request for Review seeking the following orders: -

- i. An order annulling and setting aside the Procuring Entity's decision contained in the letter dated 20th January 2020***

declaring the Applicant's bid for Tender No. RFP/EPZA/01/2019-2020 was unsuccessful;

- i. An order annulling and setting aside the Procuring Entity's decision awarding Tender No. RFP/EPZA/01/2019-2020 to the successful bidder;***
- ii. An order directing the Procuring Entity to re-evaluate the two responsive bids for Tender No. RFP/EPZA/01/2019-2020 and give due consideration of the mandatory provisions of sections 86 (2), 89 and 155 of the Public Procurement and Asset Disposal Act, 2015;***
- iii. In the alternative to prayer (iii) above, an order declaring that the procurement process in Tender No. RFP/EPZA/01/2019-2020 carried out by the Procuring Entity was unfair, irregular and in contravention of Articles 19, 47, 201 and 227 (1) of the Constitution as well as in contravention of sections 3, 80, 86 (2) and 89 of the Public Procurement and Asset Disposal Act, 2015;***
- iv. In the alternative to prayer (iii) above, an order directing the Procuring Entity to carry out the procurement process in Tender No. RFP/EPZA/01/2019-2020 afresh***
- v. An order awarding costs of the Request for Review to the Applicant; and***
- vi. Any other order as applicable as the Board may deem fit to grant.***

THE PRELIMINARY OBJECTIONS

In response to the Request for Review No. 17 of 2020, the Procuring Entity lodged a Preliminary Objection to the jurisdiction of the Board under section 167 (1) of the Act and further that the applicant failed to join the Accounting Officer of the Procuring Entity as a party to the Request for Review pursuant to section 170 (b) of the Act. M/s Edermann Property Limited (who was an Interested Party in Request for Review No. 17 of 2020) also lodged two Preliminary Objections to the jurisdiction of the Board.

In its first Preliminary Objection, M/s Edermann Property Limited alleged as follows: -

"The Request for Review is fatally defective and incompetent as it offends the mandatory provisions of section 170 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 in that the following were not made parties to the Request for Review in the first instance:

- i. The Accounting Officer of the Procuring Entity being the Chief Executive Officer of the Respondent herein and***
- ii. The successful tenderer being the 2nd Interested Party herein"***

In its second Preliminary Objection, M/s Edermann Property Limited alleged as follows: -

“The Board lacks jurisdiction to hear and determine the Applicant’s Amended Request for Review Application on the following grounds: -

- 1. The instant Amended Request for Review is fatally defective and incompetent as it offends the mandatory provisions of section 167 (1) of the Public Procurement and Asset Disposal Act No. 33 of 2015 in that the nature of the amendment equated the Amended Request for Review to a fresh/new request for review that has been filed out of the mandatory stipulated timeline of fourteen days of notification of the award thus fatally and incurably defective and is for dismissal with costs.***
- 2. The Amended Request for Review is fatally defective and incompetent as it offends the mandatory provisions of section 2 and 170 of the Public Procurement and Asset Disposal Act No. 33 of 2015 as read with section 2 of the Public Finance Management Act, 2012 and section 6 (2) of the Export Processing Zones Act, Cap 17 in that the Chief Executive Office of the Respondent herein has not been made a party to the subject Amended Request for Review.”***

The Board having heard parties' submissions allowed the preliminary objection and ordered as follows in its decision rendered on 27th February 2020 in Request for Review No. 17 of 2020: -

- 1. The Amended Request for Review filed by the Applicant on 20th February 2020 with respect to Tender No. RFP/EPZA/2019-2020 for Development of Affordable Housing at Athi River Under Joint Venture Partnership is hereby struck out.***
- 2. The Request for Review filed by the Applicant on 7th February 2020 with respect to Tender No. RFP/EPZA/2019-2020 for Development of Affordable Housing at Athi River Under Joint Venture Partnership is hereby struck out.***
- 3. The Procuring Entity is at liberty to proceed with the procurement process with respect to Tender No. RFP/EPZA/2019-2020 for Development of Affordable Housing at Athi River Under Joint Venture Partnership to its logical conclusion.***
- 4. Each party shall bear its own costs in the Request for Review.***

REQUEST FOR REVIEW NO. 64 OF 2020

M/s Erdemann Property Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated and filed on 18th May 2020 together

with a Supporting Affidavit sworn and filed on even date and a Supplementary Affidavit sworn and filed on 2nd June 2020, through the firm of Sagana, Biriq& Co. Advocates, seeking the following orders: -

- i. An order allowing the Request for Review;***
- ii. An order annulling the Procuring Entity's letter dated 20th April 2020 purporting to terminate the Procurement process and the Applicant's letter of award for Tender No. RFP/EPZA/01/2019-2020 in its entirety.***
- iii. An order directing the Accounting Officer of the Procuring Entity to engage the Applicant to complete the procurement process by formalizing and signing the contract and the Joint Venture Agreement in respect of Tender No. RFP/EPZA/01/2019-2020 within 14 days.;***
- iv. In the alternative, an order extending the validity period of the tender to enable the Procuring Entity to engage the Applicant to formalize and sign the contract and joint venture agreement within 14 days.***
- v. An order setting a mention date within 14 days to confirm compliance regarding the completion of the procurement process by formalizing and signing the Contract and Joint Venture Agreement.***
- vi. An order directing the Procuring Entity to bear the costs of and/or incidental to this Review;***

vii. Any other orders that the Board may deem just and fit in the circumstances.

In response, the Procuring Entity lodged a Memorandum of Response dated 27th May 2020 and filed on 28th May 2020 through the firm of A.E. Kiprono& Associates Advocates.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged Written Submissions dated and filed on 2nd June 2020 together with a List of Authorities while the Procuring Entity

lodged Written Submissions dated 3rd June 2020 and filed on 4th June 2020 together with a Bundle of Authorities.

BOARD'S DECISION

The Board has considered each of the parties' pleadings and written submissions together with the confidential file submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issues call for determination: -

- I. Whether the Procuring Entity terminated the subject tender pursuant to the conditions set out in section 63 of the Act;***
- II. Whether the Procuring Entity disobeyed the orders of the Board issued on 27th February 2020 in PPARB Application No. 17 of 2020, Afra Holdings Limited v. The Accounting Officer, Export Processing Zone Authority & 2 Others.***
- III. What are the appropriate reliefs to grant in the circumstances?***

In determining the third issue, the Board shall also address the following sub-issues: -

a) Whether the Tender Validity Period of the subject tender existed at the time the Applicant lodged its Request for Review;

Depending on the Board's determination of sub-issue a) of issue III;

b) Whether the Board can extend the tender validity period;

c) Whether the Board can direct the Procuring Entity to sign a contract with the Applicant in the circumstances.

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

Efficient public procurement practices contribute towards sound management of public expenditure. The objective of public procurement is to provide quality goods and services in a system that applies the principles specified in Article 227 (1) of the Constitution, which provides as follows: -

"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"

Further to this, the national values and principles of governance under Article 10 of the Constitution apply to State organs and public entities contracting for goods and services. The said provision states as follows: -

"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a)

(b)

(c) good governance, integrity, transparency and accountability

Good Governance in public procurement provides the assurance that public procurement and asset disposal processes are operating effectively and efficiently. Such processes are underpinned by broader principles including the rule of law, integrity, transparency and accountability. Before the Board is a Request for Review filed with respect to one of the public procurement processes in Kenya, initiated by the Procuring Entity herein for

the Development of Affordable Housing at the Athi River EPZA Site to be undertaken through Joint Venture Partnership.

The Applicant was among four (4) bidders who participated in the subject procurement process, and was the one subsequently awarded the tender by the Accounting Officer of the Procuring Entity, through a letter dated 20th January 2020. The Applicant is however aggrieved by the communication addressed and sent to it by the Procuring Entity in a letter dated 30th April 2020, stating as follows: -

"We refer to the above matter and the award letter dated 20th January 2020 issued to yourselves

We wish to advise that pursuant to Clause 3.11 of the tender document, the validity period of the Tender No. RFP/EPZA/01/2019-2020 is one hundred and twenty (120) days from the date of bid opening. We note that the validity period has since lapsed and contrary to section 135 (3) of the Public Procurement and Asset Disposal Act. No. 33 of 2015, a written contract has not yet been executed. In the circumstances, the tender herein has since lapsed.

We wish to advise that the failure to enter into a contract within the validity period as required by law has been occasioned by the current pandemic that the country is facing and hence beyond our control.

We further wish to apologize for any inconvenience caused and wish you the best in your future endeavours”

The Applicant had several correspondences with the Procuring Entity, among them, a letter dated 11th May 2020 wherein the Applicant alerts the Procuring Entity that it already signified its acceptance of the award, through a letter dated 27th January 2020. In another letter dated 18th May 2020, the Procuring Entity further responds as follows: -

“The above matter and your letter dated 11th May 2020 refers

We wish to advise that pursuant to the Public Procurement and Asset Disposal Act No. 33 of 2015, the above referenced tender has since lapsed by operation of the law.

As advised before, this has been occasioned by the current Covid-19 pandemic that the entire country is facing and hence beyond our control”

The Board considered parties’ written submissions and notes that according to the Applicant at paragraphs 26 to 40 of its Request for Review and paragraphs 48 to 60 of its Written Submissions, the Procuring Entity terminated the subject tender without complying with the law on termination of a procurement process as set out in section 63 of the Act and that the said termination is illegal, improper, null and void. The

Procuring Entity at paragraphs 8 to 16 of its Written Submissions refutes the Applicant's contention that the subject tender was terminated. According to the Procuring Entity, the letter dated 30th April 2020 addressed to the Applicant never made reference to termination of the subject tender and that the Procuring Entity merely informed the Applicant that the tender validity period had lapsed, hence no contract could be executed as the same would be contrary to section 135 of the Act.

Termination of procurement proceedings is governed by section 63 of the Act. The introductory sentence of that provision provides guidance that termination of procurement or asset disposal proceedings is done before notification of award. The said provision states as follows: -

"An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—"

(a) the subject procurement has been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

- (d) there is evidence that prices of the bids are above market prices;***
- (e) material governance issues have been detected***
- (f) all evaluated tenders are non-responsive;***
- (g) force majeure;***
- (h) civil commotion, hostilities or an act of war; or***
- (i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.***

Section 63 (1) of the Act stipulates that termination of procurement proceedings is only done prior to award of a tender and when any of the scenarios listed in sub-section (a) to (i) exist. The Board observes that the pre-conditions listed in sub-section (a) to (i) never existed before the Applicant was notified of award of the subject tender through the letter dated 20th January 2020. Furthermore, the letter dated 30th April 2020 was issued long after the Applicant had been notified of award of the subject tender in a letter dated 20th January 2020, hence the Procuring Entity did not have leeway to exercise the option under section 63 (1) of the Act.

Be that as it may, the more important question is whether the Procuring Entity terminated the subject tender through the letter dated 30th April 2020, when it no longer had discretion to exercise such an option. The Board having studied the letter dated 30th April 2020 notes that the

Procuring Entity was of the view that the tender validity period of the subject tender had lapsed and that a contract could not be executed pursuant to section 135 (3) of the Act. Further, in the Procuring Entity's view, "its failure to enter into a contract within the validity period as required by law has been occasioned by the current pandemic that the country is facing and hence beyond its control."

The Applicant referred the Board to the decision in **PPARB Application No. 8 of 2014, Sherbiz Supplies Limited v. Kenya Airports Authority**(hereinafter referred to as "the Kenya Airports Authority Case") where the Board held as follows: -

"The Board further notes that at all material times prior to the cancellation of the award, the Procuring Entity and the Applicant had already commenced the necessary steps towards the formation of a valid contract and a consideration had passed. For the Procuring Entity to turn back and allege that the Applicant lacks capacity and terminate the subject tender can only be construed to be acting in bad faith on the part of the procuring entity"

The Board studied the finding in the above decision and notes that the applicant in that case was issued with a letter of award and was subsequently issued with a letter of notification of termination of the procurement proceedings. The letter of termination annulled the award to

the applicant whilst notifying the applicant that the procurement process had been terminated since the applicant had another ongoing project with the procuring entity. In the procuring entity's view, the applicant in that case would not have capacity to execute two projects concurrently with the same procuring entity.

The Board in the Kenya Airports Authority Case was dealing with a scenario where a procuring entity terminated a tender, after award of the same to the successful bidder and subsequently issuing the successful bidder with a letter of notification of termination proceedings. The Board found that such termination violated the provisions of section 63 of the Act. However, this is not the scenario that this Board is dealing with in the instant Request for Review.

For this Board to establish that procurement proceedings have been terminated, it studies the reason (s) cited by a procuring entity prior to award of the tender as the reasons for its decision to terminate. The Board further examines whether such reason was justified (i.e. whether there was real and tangible evidence where necessary, for terminating the procurement proceedings pursuant to the reason cited), whether the Head of Procurement function issued a professional opinion advising the accounting officer to terminate the procurement proceedings, whether the accounting officer approved such advice, whether the same was communicated to bidders through a letter citing the reason (s) under

section 63 (1) of the Act within 14 days of such termination (prior to award) and whether a report has been issued to the Public Procurement Regulatory Authority regarding termination of the procurement proceedings.

Having studied the Procuring Entity's confidential file, no documentation points to termination of the subject procurement proceedings by dint of section 63 of the Act. Therefore, the Applicant's allegation that the Procuring Entity terminated the subject tender through the letter dated 30th April 2020 is unfounded because the Procuring Entity simply notified the Applicant that the tender validity of 120 days had lapsed and consequently, the tender had lapsed. Accordingly, the Board finds that the Procuring Entity did not terminate the subject procurement proceedings.

The second issue for determination is on the question whether the Procuring Entity disobeyed the orders of the Board issued on 27th February 2020 in **PPARB Application No. 17 of 2020, Afra Holdings Limited v. The Accounting Officer, Export Processing Zone Authority & 2 Others** (hereinafter referred to as "Review No. 17 of 2020"). Such an issue can only be addressed if we determine what directions were given by the Board upon completing the proceedings in Review No. 17 of 2020.

It is worth noting that, the Board in Review No. 17 of 2020 only addressed its mind on preliminary objections raised before it. The Board having found

that the applicant in Review No. 17 of 2020 failed to join the Accounting Officer of the Procuring Entity, found the Request for Review to be fatally incompetent, upheld the preliminary objections, and never addressed any substantive issues raised by the applicant therein. In particular, the Board issued the following orders: -

- 1. "The Amended Request for Review filed by the Applicant on 20th February 2020 with respect to Tender No. RFP/EPZA/2019-2020 for Development of Affordable Housing at Athi River Under Joint Venture Partnership is hereby struck out.***
- 2. The Request for Review filed by the Applicant on 7th February 2020 with respect to Tender No. RFP/EPZA/2019-2020 for Development of Affordable Housing at Athi River Under Joint Venture Partnership is hereby struck out.***
- 3. The Procuring Entity is at liberty to proceed with the procurement process with respect to Tender No. RFP/EPZA/2019-2020 for Development of Affordable Housing at Athi River Under Joint Venture Partnership to its logical conclusion.***
- 4. Each party shall bear its own costs in the Request for Review."***

The issue in contention before the Board relates to Order No. 3 of Review No. 17 of 2020, wherein the Board directed that *"the Procuring Entity is at liberty to proceed with the procurement process...to its logical conclusion"*.

The Applicant cites its letter of award dated 20th January 2020 and subsequent letter of acceptance of the award, which letter is dated 27th January 2020, to support its submissions that the only transaction left when the Board directed the Procuring Entity to proceed with the procurement process to its logical conclusion, was to sign a written contract and that the delay and unwillingness to formalize a contract with the Applicant was occasioned by the Procuring Entity. According to the Applicant, the Procuring Entity was under a positive obligation to obey the decision of the Board and enter into a contract with the Applicant which it failed to do, therefore leading to blatant disobedience of the orders of this Board. On the Procuring Entity's assertion that the Covid-19 pandemic interfered with its operations, the Applicant urged the Board to take note that Government entities are still operating within Government set directives despite the outbreak of the pandemic.

In its Response to the Request for Review, the Procuring Entity refers the Board to section 135 of the Act to support its submissions that the Accounting Officer has a duty under section 135 (2) of the Act to execute a contract with the successful bidder in accordance with the conditions set therein, including, signing a contract within the tender validity period. In

the Procuring Entity's view, the filing of Review No. 17 of 2020, the outbreak of Covid-19 pandemic and eventual lapse of the tender validity period were events beyond the Procuring Entity's control, that resulted in failure to execute a contract with the Applicant. The Procuring Entity further submits that Covid-19 was declared a pandemic in Kenya in early March 2020, and such declaration brought confusion and challenges on how affairs would be conducted and especially in light of the Ministry of Health's advice on social and physical distancing.

Having considered parties' written submissions, it is important at this point to address our minds on what action a procuring entity is required to take when directed by this Board to proceed with a procurement process to its logical conclusion.

The Board observes that the Applicant cited the decision in **Civil Appeal No. 24 of 2017, Rentco East Africa Limited and Another v. The Public Procurement Administrative Review Board ex parte Kenya Electrical Generating Company Limited [2017] eKLR** where the Court held as follows: -

"The phrase "...at liberty to proceed with the procurement process to its logical conclusion in accordance with the law" must be read to mean a directive to the 2nd Respondent to conclude the transaction with the Appellant

"Not a single transgression was found against the Interested Party. No flaws were found in the procurement process and procedure for the ultimate award of the tender to warrant the cancellation of the entire procurement process as suggested by the 2nd Respondent. The phrase... at liberty to proceed with the procurement process herein to its logical conclusion in accordance with the law' must mean a directive to the 2nd Respondent to conclude the transaction with the appellant ...because the 2nd Respondent, in the circumstances explained, could not terminated the tender"

The Board considered the Court of Appeal's finding in Civil Appeal No. 24 of 2017 and notes that notification letters had been issued to the successful bidder and unsuccessful bidders in that case. Secondly, KENGEN purported to terminate the tender after notification of award was already made to bidders and during the pendency of Judicial Review proceedings before the High Court. Fourthly, the Court of Appeal in its judgement took the circumstances of the case before it into account to find that no circumstances called for termination of the tender.

In PPARB Consolidated Application No. 99 & 100 of 2019, CMC Motors Group Limited & Another v. The Principal Secretary, State Department of Interior, Ministry of Interior and Coordination of National Government, the Board held as follows: -

"The Board makes an observation that there are many ways of concluding a procurement process. On one hand, it may include notification of award and execution of a contract in accordance with section 135 (3) of the Act, but subject to the stand-still period of fourteen days imposed under that section to protect the right to administrative review under section 167 (1) of the Act.

On the other hand, concluding a procurement process may include termination or cancellation of such process pursuant to section 63 (1) of the Act.

In both scenarios, if the circumstances warranting logical conclusion of a procurement process are satisfied, then the jurisdiction of this Board would be ousted. This means, to the extent of this Board's jurisdiction, logical conclusion either means execution of a contract in accordance with section 135 (3) of the Act, or in the alternative, terminating the procurement process in accordance with section 63 of the Act."

Having considered the finding in the above cases, this Board observes that firstly, proceeding with a procurement process alerts a procuring entity to ask itself of the stage at which the procurement process has reached prior to a Request for Review being filed before this Board. This is because, once

a procuring entity is notified of the existence of a Request for Review, such a notification prevents a procuring entity from taking the next step it was supposed to take in the procurement proceedings. Once the procuring entity identifies the stage it had reached before the filing of a Request for Review, then it ought to ask itself, what is the next step required to be undertaken in law.

As already noted, the circumstances before this Board did not permit the Procuring Entity to terminate the subject tender and this option was never exercised therefore logical conclusion of the subject tender by termination was not an option available after 27th February 2020 when the Board rendered a decision in Review No. 17 of 2020.

In the Board's view, procurement proceedings are concluded before the tender validity period of a tender lapses. This is because, once the tender validity period lapses, conclusion of a procurement process through termination of the tender, is meaningless, secondly, conclusion of a procurement process through award of a tender and subsequently signing a contract also would render such award and contract, null and void.

In the instant case, the Procuring Entity could not exercise the option to terminate the subject tender and in actual sense as the Board has already found, the Procuring Entity did not terminate the procurement proceedings of the subject tender. On the other hand, award of the tender had already

been made to the Applicant. This Board must therefore determine whether the tender validity period had already lapsed by the time the Procuring Entity addressed the letter dated 30th April 2020 to the Applicant, therefore preventing the Procuring Entity from completing the procurement proceeding herein within the tender validity period.

In determining the date when the tender validity period of the subject tender was supposed to lapse, the Board observes that all parties are in agreement that Clause 3.11.1 of Section III. Instructions to Tenderers of the Tender Document provided for the tender validity period of the subject tender as follows: -

"The bid shall remain valid and open for acceptance for a period of One Hundred Twenty (120) days from the date of Bid Opening or from the extended date of bid opening"

Further to this, the Procuring Entity and the Applicant both confirm in their pleadings that tenders received in the subject tender were opened on 20th December 2019. This position is also stated in the Tender Opening Minutes dated 20th December 2019. This means, at the first instance, the tender validity period of the subject tender would have lapsed on 18th April 2020, but for an intervening factor that created a stand-still period that is, the existence of Review No. 17 of 2020 before this Board.

Section 168 of the Act provides that: -

“Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed”

The Court in **Judicial Review No. 540 of 2017, Republic v. Public Procurement Administrative Review Board & Others, ex parte Transcend Media Group Limited(2018) eKLR**(hereinafter referred to as “the Transcend Media Case”) had occasion to interrogate the import of section 168 of the Act where it held as follows: -

“The question that needs to be answered by this Court is whether the Respondent correctly interpreted the provisions of the law on the effect of the litigation before it on the tender validity period. The Respondent in this respect held that a notice by the Secretary of the Review Board and any stay order contained therein can only affect the procurement process from proceeding further but cannot act as an extension of the tender validity period, nor can it stop the tender validity period from running. In this respect, it relied on its previous decisions on this interpretation, which are not binding

on this Court, and which were decided before the Public Procurement and Asset Disposal Act of 2015 was enacted.

I find that this position is erroneous for three reasons, Firstly, section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time-specific and time-bound.

Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point, at least for any deadlines defined by reference to a period of time, which in this case included the tender validity period. It would also be paradoxical and absurd to find that

procurement proceedings cannot proceed, but that time continues to run for the same proceedings.”

From the foregoing case, suspension of procurement proceedings pursuant to section 168 of the Act includes suspension of the running of the tender validity period. The Board interrogated the sequence of events in this tendering process and notes the following: -

Tender Advertisement	5 th November 2019	
Closing/Opening of Tenders	20 th December 2019	Tender Validity Period (Total 120 days from date of tender opening (clause 3.11.1 of the Tender Document
	21 st December 2019	Tender Validity period started running
Request for Review No. 17 of 2020	Filed on 7 th February 2020	Tender validity period stopped running
	21st December 2019 to 6th February 2020= 48 days spent	
Decision of the Review Board in Review No. 17 of 2020	27 th February 2020	
	7th February to 27th February 2020= Stand Still period	
	28th February 2020-tender validity period started running again	
Letter dated 30 th April 2020 received by the Applicant on 4 th May 2020	4 th May 2020	
	28th February to 4th May 2020- total of 115 days spent (i.e. 48+67=115)	
	9 th May 2020	120 days of the tender validity period spent

From the foregoing, the Board notes that by the time the Procuring Entity addressed a letter dated 30th April 2020, received by the Applicant on 4th May 2020, the tender validity period of the subject tender had run for 115 days, and five (5) days of the tender validity period were remaining. In essence, the tender validity period would lapse on 9th May 2020. This therefore means, the Procuring Entity's reason that it could not execute a contract with the Applicant as at 4th May 2020, was erroneous and had no force of law to support it.

The Procuring Entity further submitted that its failure to execute a contract pursuant to section 135 of the Act has been occasioned by the current pandemic facing the country and hence beyond its control. The Applicant on the other hand, took the view that it is within public knowledge that public entities are still operational despite the outbreak of the pandemic.

The **Court in Civil Appeal No. 80 of 2015 Kipkebe Limited v Peterson Ondieki Tai [2016] eKLR** while citing the decision in **Susan Mumbiv. KefalaGrebedhin (Nairobi HCCC No.332 of 1993)** held as follows: -

"The question of the court presuming adverse evidence does not rise in civil cases. The position in civil cases is that whoever alleges has to prove. From the reading of the court

proceedings, the plaintiff did not prove negligence and or breach of duty as alleged in his statement of claim or plaint.”

The Board observes that the Procuring Entity never provided evidence demonstrating the challenges it is facing as a result of the outbreak of Covid-19 pandemic, and how those challenges prevented the signing of a contract with the Applicant by 4th May 2020. Further to this, the Procuring Entity never refuted the Applicant’s submissions that government entities are still operational despite the outbreak of Covid-19 pandemic. Indeed, this Board is an example of a public institution currently undertaking operations despite the Covid-19 outbreak having issued Circular No. 1 of 2020 and Circular No. 2 of 2020, detailing an administrative and contingency plan to mitigate the spread of Covid-19 pandemic when handling Request for Review applications.

The Board is therefore not persuaded by the Procuring Entity’s allegation that it could not sign a contract in the subject tender due to the outbreak of Covid-19 noting that as at 4th May 2020, the tender validity period of the subject tender was still in existence. The Board is of the considered view that the Procuring Entity was capable of proposing ways of mitigating the Covid-19 pandemic in its administration in so far as the subject tender is concerned.

Having established that the tender validity period had lapsed on 9th May 2020, it is worth noting that the Procuring Entity based its argument on an erroneous calculation to arrive at the conclusion that by the time it addressed the letter dated 30th April 2020 to the Applicant, the tender validity period had already lapsed. It is also worth noting that the Applicant never approached the Board seeking extension of the tender validity period even though it knew the same would lapse at the end of 120 days from the date of tender opening.

In essence, one party (i.e. the Procuring Entity) erroneously calculated the tender validity period and felt it could no longer conclude the subject procurement proceedings, whereas the other party (i.e. the Applicant) sat on its right to approach this Board seeking extension of the tender validity period to enable completion of this procurement proceeding. The Applicant just like all other bidders obtained the Tender Document and was well aware that the tender validity period would run for 120 days from the date of tender opening and as admitted at paragraph 21 of its Request for Review, the Applicant knew that a stand-still period existed when Review No. 17 of 2020 was pending before this Board. This leads the Board to conclude that the Applicant knew that the tender validity period of the subject tender would lapse on 9th May 2020 as demonstrated in the table that is at page 32 of this decision.

The Board in its decision dated 27th February 2020 did not provide a time frame within which the Procuring Entity was required to complete the procurement process to its logical conclusion and due to an erroneous calculation of the tender validity period, the Procuring Entity felt the tender validity period had already lapsed when it addressed a letter dated 30th April 2020 to the Applicant. Had there been a specific time-frame provided by the Board which time-frame had not been adhered to by the Procuring Entity, then the Board would have faulted the Procuring Entity for failure to conclude the subject procurement proceedings within that period. However, the circumstances in the instant Request for Review were different.

On the third issue, the Board notes that from the table at page 32 of this decision, the tender validity period of the subject tender lapsed on 9th May 2020, a fact that was well known to the Applicant herein but the Applicant never approached this Board seeking orders for extension of the tender validity period before the lapse of that period. By the time the Applicant lodged its Request for Review on 18th May 2020, the tender validity period of the subject tender had already lapsed.

The importance of the tender validity period has been the subject of proceedings before this Board and the Courts. In **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Higawa Enterprises Limited [2017] eKLR** the Court held as follows: -

"The tender validity period goes to the root of the award of the tender and the signing of a contract. This period is a critical factor in determining whether a tender is validly awarded or not, and whether a contract can be executed."

In **Judicial Review Application No. 67 of 2018, Republic v Public Procurement Board Administrative Board; Simba Pharmaceuticals Limited & another (Interested Parties) Ex parte Kenya Ports Authority [2018] eKLR**, the court dealt with the effect of a contract signed outside the tender validity period when it held as follows:-

"For the foregoing reasons, this Court cannot disregard a decision that is irrational, illogical or fraught with procedural impropriety..., the illegality of the contract has been brought to attention of the Court. This Court should not enforce an illegal tender contract that was signed outside the tender validity period by the procuring entity and the successful bidder. The parties failed to take the tender validity period into account and the contract that was signed outside that period amounts to nothing"

From the foregoing, the Board observes that the tender validity period serves as an important aspect that enables award of a tender and execution of a contract. However, once the tender validity period has lapsed, a contract executed after the lapse of that period is null and void.

This Board has only extended the tender validity period if it exists as at the time the Request for Review is filed. The Court in the Transcend Media Case found that this Board has power to extend the tender validity period. However, such a power is discretionary and must be exercised lawfully (i.e. only when the tender validity period exists when a Request for Review has been lodged). In **PPARB Application No. 133 of 2019, Med Marine KilavuzlukVeRomorkorHizmetleri Ins. San. Ve Tic. A.S v. The Accounting Officer, Kenya Ports Authority & Another**, (hereinafter referred to as “the Med Marine Case”) 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"

The Board in the Med Marine Case only extended the tender validity period because the same had not lapsed by the time the applicant in that case lodged its Request for Review. 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 before the Applicant filed this Request for Review. This Board cannot therefore purport to breathe life to the subject tender by extending the tender validity period as such an order would be meaningless.

Having found that the Board cannot issue orders extending a tender that no longer exists, the Board is cognizant that the Applicant was awarded the subject tender through a letter dated 20th January 2020 within the tender validity period as required by section 87 (1) of the Act which provides that:-

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

It is also not lost to the Board that the Applicant signified its acceptance of award of the subject tender on 27th January 2020, which was within the tender validity period. In the Applicant's view, by signifying its acceptance, it entered into legal obligations with the Procuring Entity therefore had legitimate expectations to begin implementation of works in the subject tender.

The Board observes that the preconditions for the existence of a binding obligation between a procuring entity and a successful bidder in so far as a procurement contract is concerned are governed by section 135 of the Act which provides as follows:-

- "(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.***
- (2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.***
- (3) 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.***
- (4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.***
- (5)***

(6);

(7) A person who contravenes the provisions of this section commits an offence."

In so far as public procurement proceedings governed by the 2015 Act is concerned, a procurement contract is confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer. Further to this, a procurement contract must be entered into within the tender validity period.

The Court in **Civil Appeal No. 35 of 2018, Edermann Property Limited v. Lordship Africa Limited & 2 others [2019] eKLR**, 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"

From the Court of Appeal's finding in the above case, any contract executed outside the tender validity period would go against the provisions of section 135 (3) of the Act and sub-section 7 thereof which makes it an offence to contravene the provisions of the said section. The Board is cognizant of section 88 (1) of the Act, which gives the Procuring Entity the option to extend the tender validity period. The said section states:-

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

According to section 88 (1) of the Act, a procuring entity can exercise the option to extend the tender validity period once for a further period of 30 days. Once such option is used, the Procuring Entity cannot exercise the option a second time. This is why the Applicant or the Procuring Entity have the right to approach the Board before the lapse of the tender validity

period seeking orders for extension of the tender validity period. However, this right was never exercised by any of the parties.

As a result, the tender validity period of the subject tender died a natural death and the same cannot be resuscitated by the Board. The Board has only exercised its discretion to extend the tender validity period when the same exists by the time a Request for Review is lodged before it. However, those are not the circumstances in the instant Request for Review where the subject tender died a natural death on 9th May 2020. This Board cannot encourage an illegality by directing the Procuring Entity to execute a contract with the Applicant when the tender validity period has already lapsed since such an order would be against public policy, more so the provisions of section 135 of the Act. The most appropriate relief in the circumstances is for the Board to dismiss the Request for Review.

In totality, the Request for Review fails and the Board proceeds to issue 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 Request for Review filed by the Applicant on 18th May 2020 with respect to Tender No. RFP/EPZA/01/2019-2020**

for the Development of Affordable Housing at the Athi River EPZA Site to be undertaken through Joint Venture Partnership, be and is hereby dismissed.

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

Dated at Nairobi this 8th day of June 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB