

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 47/2021 OF 6<sup>TH</sup> APRIL 2021**  
**BETWEEN**

**GEONET TECHNOLOGIES LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**MINISTRY OF ICT, INNOVATION AND YOUTH AFFAIRS**

**STATE DEPARTMENT OF ICT AND INNOVATION....1<sup>ST</sup> RESPONDENT**

**COM TWENTY ONE LIMITED.....2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer of the Ministry of ICT, Innovation and Youth Affairs, State Department of ICT and Innovation in relation to Tender No. MOICT/SDICT/248/2020-2021 for Provision of Operation and Maintenance of National Optic Fibre Backbone Infrastructure Phase II (NOFBI II) Active and Passive Equipment for Lot 2: Western Region).

**BOARD MEMBERS**

- |                            |              |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa        | -Chairperson |
| 2. Arch. Steven Oundo, OGW | -Member      |
| 3. Ms. Phyllis Chepkemboi  | -Member      |
| 4. Dr. Joseph Gitari       | -Member      |
| 5. Mr. Alfred Keriolale    | -Member      |

## **IN ATTENDANCE**

1. Mr. Philip Okumu

-Acting Board Secretary

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

Ministry of ICT, Innovation and Youth Affairs, State Department of ICT and Innovation (hereinafter referred to as “the Procuring Entity”) invited sealed tenders from eligible tenderers through an advertisement in MyGov Publication Newspaper and the Procuring Entity’s Website on 2<sup>nd</sup> March 2021.

### **Bid Submission Deadline and Opening of Bids**

The Procuring Entity received a total of eleven bids by the bid submission deadline of 17<sup>th</sup> March 2021. The bids were opened by a Tender Opening Committee on the same date of 17<sup>th</sup> March 2021 and recorded as follows: -

<b>S/NO</b>	<b>FIRM NAME</b>	<b>BID BOND COMPANY</b>
1.	Adrian Kenya ltd P.O Box 9808-00100 NRB	Geminia Insurance
2.	Telkom Kenya ltd P.O Box 30301-00100 NRB	KCB Bank
3.	Com Twenty-One P.O Box 15815-00100 NRB	Consolidated Bank
4.	Prime Telkoms ltd P.O Box 8720-00200 NRB	Cooperative Bank
5.	Broad Band Comm ltd P.O Box 10840-00400 NRB	KCB Bank
6.	Geonet Tech ltd P.O Box 8030-00200 NRB	KCB Bank
7.	Techsource Point ltd P.O Box 105087-00101 NRB	Middle East
8.	CCS Kenya ltd and Alternative Comm ltd P.O Box 3679-00505 NRB	Monarch Insurance

<b>S/NO</b>	<b>FIRM NAME</b>	<b>BID BOND COMPANY</b>
9.	Kinde Engineering Works ltd P.O Box 6911-00300 NRB	KCB Bank
10.	Topchoice Surveillance P.O Box 1218-00618 NRB	Sumac Microfinance
11.	Decko Connecting Africa ltd P.O Box 45907-00100	Geminia Insurance

## **Evaluation of Bids**

The Evaluation Committee evaluated bids in the following stages: -

- i. Preliminary Evaluation;
- ii. Technical Mandatory Evaluation;
- iii. Technical Evaluation; and
- iv. Financial Evaluation Stage.

### **1. Preliminary Evaluation**

At this stage, the Evaluation Committee applied the criterion outlined in Clause 2.20.1 (1) of the Appendix to Instructions to Tenderers of the Tender Document. Having subjected all bids to a preliminary evaluation, seven bidders were found responsive, thus eligible to proceed to the next stage of evaluation.

### **2. Technical Mandatory Evaluation**

At this stage, the Evaluation Committee applied the criterion outlined in Clause 2.20.1 (2) of the Appendix to Instructions to Tenderers of the Tender Document based on a YES/NO criteria. At the end of technical mandatory evaluation, four bidders were found responsive, thus eligible to proceed to the next stage of evaluation.

### 3. Technical Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Clause 2.22.1 (2) of the Appendix to Instructions to Tenderers of the Tender Document which comprised of evaluation of technical specifications specified in the said provision. Bidders were also required to achieve an overall technical score of 70% so as to proceed to Financial Evaluation. At the end of Financial Evaluation, two bidders (F1, Adrian Kenya Ltd and F3, Com Twenty-One) attained the pass mark of 70% and proceeded to Financial Evaluation.

### 4. Financial Evaluation

The remaining two bidders were subjected to Financial Evaluation to determine the lowest evaluated bidder. Their prices were recorded as follows: -

S/No	The currency MUST be in Kenya Shillings	Annual Turnover of at least Kshs. 200,000,000	FIRM NAME	Bid Amount	Rank
003	C	C	Com Twenty one limited	203,280,000.00	<b>1</b>
001	C	C	Adrian Kenya limited	203,764,532.30	<b>2</b>

### Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Com Twenty One Limited for being the lowest evaluated tenderer at its tender price of Kshs. 203,280,000.00

### **Professional Opinion**

In a professional opinion dated 23<sup>rd</sup> March 2021, the Procuring Entity's Head of Procurement reviewed the evaluation process and concurred with the Evaluation Committee's recommendation that the subject tender be awarded to M/s Com Twenty One Limited for being the lowest evaluated tenderer at its tender price of Kshs. 203,280,000.00. He thus advised the Procuring Entity's Accounting Officer to award the subject tender to the said bidder. The said professional opinion was approved on 23<sup>rd</sup> March 2021.

### **Notification to Bidders**

In letters dated 23<sup>rd</sup> March 2021, the Procuring Entity notified all bidders of the outcome of their bids.

### **THE REQUEST FOR REVIEW**

M/s Geonet Technologies Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 6<sup>th</sup> April 2021 and filed on even date together with a Statement in Support of the Request for Review sworn on 6<sup>th</sup> April 2021 and filed on even date and a Reply to the 1<sup>st</sup> Respondent's Memorandum of Response, dated 16<sup>th</sup> April 2021 and filed on even date, through the firm of Caroline Oduor & Associates, seeking the following orders: -

- i. An order directing the 1<sup>st</sup> Respondent to furnish the Applicant with the summary of proceedings of the tender's preliminary, technical and financial evaluation; comparison of the tenders and the evaluation criteria used in accordance with the provisions of section 67 (4) as read together with section 68(2) (d) (iii) of the PPADA, at the preliminary and before hearing of the Request for Review herein;***
- ii. An order cancelling and setting aside the 1<sup>st</sup> Respondent's decision contained in its letter dated 23<sup>rd</sup> March 2021 and related notifications to other tenderers;***
- iii. An order annulling the subject procurement proceedings undertaken by the 1<sup>st</sup> Respondent in relation to the technical and financial evaluation on the grounds inter alia, that the Applicant's bid was unfairly evaluated;***
- iv. An order directing the 1<sup>st</sup> Respondent to re-admit the Applicant's bid at the technical evaluation stage and to fairly evaluate the Applicant's bid in accordance with the tender requirements, the law and as may be directed by the Public Procurement Administrative Review Board in exercise of its mandate and powers under section 28 and 173 of PPADA;***
- v. An order directing the 1<sup>st</sup> Respondent to conduct the financial evaluation for all bidders successful at the technical evaluation stage and to make an award in compliance with***

***section 86 (1) (a) of the Public Procurement and Asset Disposal Act No. 33 of 2015;***

- vi. An order directing the 1<sup>st</sup> Respondent to pay the costs of the Review; and***
- vii. Any other orders as are necessary for the ends of justice.***

In response, the 1<sup>st</sup> Respondent lodged a Memorandum of Response dated 9<sup>th</sup> April 2021 and filed on 12<sup>th</sup> April 2021 together with confidential documents pertaining to the subject procurement process, through Mr. Christopher Maina, Deputy Chief State Counsel. On the same date of 12<sup>th</sup> April 2021, the 2<sup>nd</sup> Respondent lodged a Notice of Appointment of the firm of Gerivia Advocates LLP at the Board's offices and was given a physical copy of the Request for Review, Applicant's Statement in Support of the Request for Review and Circular No. 2/2020 dated 24<sup>th</sup> March 2020, detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic.

Having received a list of all bidders who participated in the subject procurement process, the Board addressed letters dated 12<sup>th</sup> April 2021 to all bidders notifying them of the existence of the Request for Review. According to the Board's Dispatch Register, courier services sent these letters through EMS and the Post Office Box on 21<sup>st</sup> April 2021. By this time, the 2<sup>nd</sup> Respondent already filed a Notice of Appointment of the firm of Gerivia Advocates LLP but had not filed a response to the Request for Review. To date, the 2<sup>nd</sup> Respondent has not filed any response to the Request for Review.

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board. Accordingly, the Applicant lodged Written Submissions dated 21<sup>st</sup> April 2021 and filed on even date. The 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent did not file their respective written submissions.

### **BOARD'S DECISION**

The Board has considered each of the parties' pleadings, including the confidential documents submitted by the Respondents pursuant to section 67 (3) (e) of the Act and finds that the following legal issues call for determination: -

- I. Whether the Applicant is entitled to a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, including the evaluation criteria used pursuant to section 67 (4) read together with section 68 (2) (d) (iii) of the Act;**
- II. Whether the Procuring Entity breached section 87 (3) of the Act and Regulation 82 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") and if the answer is in the affirmative,**



whether the Applicant has suffered loss as a result of such breach;

**III. Whether the Procuring Entity evaluated the Applicant's tender at the Technical Evaluation Stage in accordance with section 80 (2) of the Act and Article 227 (1) of the Constitution in the following criterion: -**

**a) NOFBI Maintenance Plans and Methodology (For Fiber and Active Equipment under Clause 2.22.1 (1) of the Appendix to Instructions to Tenderers of the Tender Document;**

**b) Contractors qualifications, experience and past performance on similar projects under Clause 2.22.1 (3) of the Appendix to Instructions to Tenderers of the Tender Document; and**

**c) Qualifications and experience of Key Technical personnel under Clause 2.22.1 (4) of the Appendix to Instructions to Tenderers of the Tender Document in respect of the following: -**

- *Three Transmission Engineers;***
- *Four Optic Fiber Cable Experts; and***
- *Three IP Engineers.***

Before addressing the above issues, the Board would like to dispense with a preliminary aspect in relation to a letter dated 12<sup>th</sup> April 2021 filed by one Mr. Kimani Macharia stating as follows: -

***"(1) WE are cognizant of the fact that the Board are pursuing the Geo-Net Case vs. The State Department of ICT & Innovation, and Com 21 being an enjoined Party***

***First, we profusely congratulate Geo-Net for this bold move. This move will definitely restore professional mannerism and orderliness. Above it all, this shall restore procurement good practices and bring back the much needed etiquette in issues governing public spend by Government.***

#### **UNDENIABLE FACTS**

***a) As per the Evaluation Team, Geo-Net emerged the best evaluated; aggregating the Scores. Actually, Geo-Net beat Com-21 on all critical/technical areas.***

***b) The Head of Supply Chain Management Services at the State Department of ICT & Innovation, a Mr. Andrew Nyamwamu personally supervised the exercise of interfering with the Geo-Net scores. The Com 21 scores were altered upwards, this making Com 21 emerge top. NB: They changed the scores but forgot to change Bid Amounts for the winning firm, which in this case was Geo-Net. Consequently, the Award letters were signed***

***bearing the winning tender amount of Geo-Net but the content and award letter showing Com 21.***

***Our reliable source informs us that the letters were later changed to reflect the changes. We hereby categorically object to the argument that this was a clerical error.***

***c) Ever since the communication of the intended review of the NOFBI II Procurement proceedings by the Public Procurement Review Board substantial coercion both by intimidation and bribery aimed at whipping up the Evaluation Committee members has been in earnest. The ultimate objective in all this is to buy their silence and eventually own the doctored evaluation results as their findings. This, to us is classical Carrot and Stick Affair***

***d) NOFBI Professional Opinion***

***The Procurement laws and regulations require the Head of Procuring Unit to write a Professional Opinion for each procurement case/proceedings. Strangely, a COM 21 member of staff wrote the NOFBI II Professional Opinion. This member of staff at COM 21 undertook internship at the Department of ICT & Innovation up and until late last year. Of interest here is that the said individual had questionable working relationship with the Head of Procuring Unit. The Head of Procuring Unit unlawfully extended his internship tenure after the lapse***

***of the official and lawful time. It is notable that the HRM & D department protested but the Head of Procuring Unit, Mr. Nyamwamu secured his way. COM 21 eventually hired the member of staff after the internship. During the NOFBI II Professional Opinion drafting, this COM 21 staff worked from Mr. Nyamwamu's office and our sources reveal he was involved in drawing up the coveted advice for the Permanent Secretary's signature.***

***e) NEXT TECHNOLOGIES***

***This firm is jointly bidding with COM 21 in the NOFBI ii Project. The firm is heavily favoured at the State Department of ICT & Innovation despite its uninspiring work ethic and corrupt practices.***

***During UHC Project (Part of the Big 4 Agenda) our firms were deliberately ebbed out, most projects awarded to this particular firms. Sadly, they have challenges implementing same projects for the second year running now.***

***In her recent tendering under a Project code name GCCN, the firm colluded with ICT Officers and Nyamwamu's office to gain advantage over other bidders. The firm was awarded the tender at about 590,000,000 KES plus, but failed to implement the project. On investigation, CISCO (An American***

*manufacturing firm whose equipment were to be deployed) ended sacking her staff for gross misconduct that violated her trading policies. NB: This can be confirmed from the CISCO Kenya Office.*

***f) INJUSTICES AT THE STATE DEPARTMENT OF ICT & INNOVATION***

*WE, the business community (Specifically the IT Companies) have been destroyed by actions of the procurement officers at the State Department of ICT & Innovation. The acts of arm-twisting Evaluation Committee team to alter scores and change recommended winning firms is rampant.*

*The idea by CS Hon Mucheru to centralize management of IT equipment and solutions was brilliant but he trusted its core operations (Procurement) on a very unhelpful person who has turned procurement office to a brothel. A ferocious flirt...corrupt and too immoral. Whenever our women employees (some young enough to be his daughters) are sent to his office over key account issues, in addition to flirting with them he baits them to form companies with promises to help them secure IT contracts, so that they can be self-reliant and stop depending on employment. What the said officer (Mr. Nyamwamu) cares not to know is that some of the*

*employees in our firms are either close relatives or persons we have literally invested in right from high school to the current arrangements where they are our employees. Their conscience cannot allow them to betray us.*

***g) CORRUPTION***

*During the 2019/2020, the Head of Procurement (Mr. Nyamwamu), demanded between 500,000KES and 2,000,000KES from contractors under the framework to ostensibly take to Naivasha where a Parliamentary committee on ICT was having a Kamukunji meeting. The purpose of the money was to bribe the Parliamentary committee members for ICT & Innovation to increase its budget. Budget was indeed increased. Surprisingly, when the Framework Contracts lapsed late last year (After their 2-year validity period) and fresh tendering for the same started, Mr. Andrew Nyamwamu by choice, ensured that our firms lost and continue losing despite our bids emerging best at evaluation stage. He instead has brought in firms where he enjoys proxy shareholding, OR his procuring juniors have vested interests. And they are openly campaigning for these firms to secure tenders in other MDAs/Government Agencies. Some of these firms are unable to deliver.*

***BY COPY OF THIS COPY, the copied Agencies should instigate competent investigations to drain the swamp***

***AS THE REVIEW BOARD, we implore you to either award NOFBI II tender to the firm that genuinely won or order re-tendering.***

***Yours Faithfully***  
***[signature affixed]***  
***Kimani Macharia***

**CC**

***EACC***

***PS TREASURY”***

Having studied the contents of the above letter, the Board observes that Mr. Kimani Macharia made allegations on the following: -

- The Applicant was the best evaluated hence ought to have been recommended for award of the subject tender;
- Malpractices at the Procuring Entity’s office by the Head of Supply Chain Management Services; and
- Allegations of collusion between the Procuring Entity and another company (Next Technologies) to give the company favourable treatment over other companies participating in the subject tender.

Pursuant to section 167 (1) of the Act, **a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process.**

Pursuant to section 2 of the Act, the terms "candidate" and "tenderer" are defined as follows: -

***"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity***

***"tenderer" means a person who submitted a tender pursuant to an invitation by a public entity"***

The jurisdiction of the Board is only invoked by candidates and tenderers who participated in a procurement or disposal process by filing a request for review in accordance with the procedure provided under Regulation 203 of Regulations 2020 which reads: -

***"203 (1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations***

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



- (a) state the reasons for the complaint including any alleged breach of the Constitution the Act or these Regulations***
  - (b) be accompanied by such statements as the applicant considers necessary in support of its request***
  - (c) be made within fourteen days of—***
    - (i) the occurrence of the breach complained of where the request is made before the making of an award***
    - (ii) the notification under section 87 of the Act or***
    - (iii) the occurrence of the breach complained of where the request is made after making of an award to the successful bidder***
  - (d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations which shall not be refundable***
- (3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits”***

From the confidential documents submitted to the Board, bidders who participated in the subject tender were all companies and not individuals in their own name as can be seen from the Tender Opening Minutes of 17<sup>th</sup> March 2021 which contained the following details: -

<b>S/NO</b>	<b>FIRM NAME</b>	<b>BID BOND COMPANY</b>
1.	Adrian Kenya Ltd P.O Box 9808-00100 NRB	Geminia Insurance
2.	Telkom Kenya Ltd P.O Box 30301-00100 NRB	KCB Bank
3.	Com Twenty-One P.O Box 15815-00100 NRB	Consolidated Bank
4.	Prime Telkoms Ltd P.O Box 8720-00200 NRB	Cooperative Bank
5.	Broad Band Comm Ltd P.O Box 10840-00400 NRB	KCB Bank
6.	Geonet Tech Ltd P.O Box 8030-00200 NRB	KCB Bank
7.	Techsource Point Ltd P.O Box 105087-00101 NRB	Middle East
8.	CCS Kenya Ltd and Alternative Comm Ltd P.O Box 3679-00505 NRB	Monarch Insurance
9.	Kinde Engineering Works Ltd P.O Box 6911-00300 NRB	KCB Bank
10.	Topchoice Surveillance P.O Box 1218-00618 NRB	Sumac Microfinance
11.	Decko Connecting Africa Ltd P.O Box 45907-00100	Geminia Insurance

Thus, Mr. Kimani Macharia does not satisfy the locus standi of a candidate or tenderer provided under section 2 of the Act to invoke the jurisdiction of the Board under section 167 (1) of the Act.

It is also worth pointing out that section 170 of the Act provides for parties to a Request for Review as: -

- "(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"**

Pursuant to section 170 (a) (b) and (c) of the Act, parties to a request for review are; an applicant (seeking a review), an accounting officer of a procuring entity and a successful tenderer, respectively. Parties to the instant Request for Review include the Applicant, the Accounting Officer of the Procuring Entity herein (1<sup>st</sup> Respondent) and the successful bidder joined as a 2<sup>nd</sup> Respondent.

Further, section 170 (d) of the Act gives the Board discretion to include such other persons as the Board may deem fit, as parties to a request for review. These parties include any other tenderer invited by the Board Secretary to participate in the subject tender by filing a response to the Request for Review. Mr. Kimani Macharia does not fall under section 170 (a), (b), (c) or (d) of the Act, thus is not a party to the Request for Review.

Lastly, one of the functions of the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") under section 9 (h) of the Act is:

***"to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review"***

It therefore follows that any member of the public may lodge complaints with the Authority on procurement and asset disposal proceedings by procuring entities on matters that this Board is not reviewing. Pursuant to section 34 of the Act, a public entity shall provide the National Treasury or the Authority information relating to procurement and asset disposal as may be required in writing. It is therefore the Board's considered opinion that the allegations raised by Mr. Kimani Macharia in his letter dated 12<sup>th</sup> April 2021 can be lodged with the Authority (if he wishes to do so) specifically on aspects that the Board is not reviewing.

The Board has established that Mr. Kimani Macharia does not have the locus standi of a candidate or tenderer to invoke the jurisdiction of the Board under section 167 (1) of the Act. The Board has also established that Mr. Kimani Macharia is not a party to the Request for Review.

Accordingly, the Board lacks jurisdiction to address the allegations raised in the letter dated 12<sup>th</sup> April 2021 because Mr. Kimani Macharia lacks locus standi before the Board. In any case, the allegations were not raised through a request for review to allow all other parties to respond to the same.

Having dispensed with the above preliminary issue, the Board shall now address the substantive issues in the Request for Review.

On the first issue for determination, the Applicant alleged at paragraph 8 of its Request for Review, that it received its letter of notification of

unsuccessful bid on 25<sup>th</sup> March 2021 via email. According to the Applicant, it addressed a letter to the 1<sup>st</sup> Respondent requesting for a summary of proceedings of the tender's preliminary, technical and financial evaluation, comparison of tenders and the evaluation criteria used but did not receive a response from the Procuring Entity. As a result, the Applicant prayed for the same as part of its prayers in the Request for Review.

In response, the 1<sup>st</sup> Respondent alleged in his Memorandum of Response that the Procuring Entity received the Applicant's letter on the evening of Thursday, 1<sup>st</sup> April 2021, a day before Good Friday at its Legal Department. By the time the letter was received at his office, it was Tuesday, 6<sup>th</sup> April 2021 (a day after the Easter Holiday) and was served by the Request for Review on the same date of 6<sup>th</sup> April 2021.

Having considered parties' pleadings, the Board notes that vide a letter dated 1<sup>st</sup> April 2021 addressed to the 1<sup>st</sup> Respondent, the Applicant's Advocates stated thus:

***"We refer to the above tender and your letter of notification dated 23<sup>d</sup> March 2021 and received by our client via email on 25<sup>th</sup> March 2021.***

***Pursuant to the said letter and the provisions of section 67 (4) of the Public Procurement and Asset Disposal Act No. 33 of 2015, our client requests to be supplied with the following documents and information***

- i. Minutes of Tender Opening Meeting held on 17<sup>th</sup> March 2021;***
- ii. Summary of tender evaluation report in respect of the Preliminary, Technical and Financial Evaluation of the subject tender;***
- iii. The name and financial bid of the successful tenderer as well as reason for their success thereof***

***Your urgent action is necessary as time is of essence”***

The Board is cognizant of the fact that 2<sup>nd</sup> April 2021 was a Good Friday, thus a Public Holiday), Saturday, 3<sup>rd</sup> April 2021 was a non-working day, Sunday, 4<sup>th</sup> April 2021 was Easter Sunday, a non-working day and 5<sup>th</sup> April 2021, was Easter Monday, thus a Public Holiday. It therefore follows that the earliest the 1<sup>st</sup> Respondent could respond to the Applicant’s letter on the next official working day which was Tuesday, 6<sup>th</sup> April 2021.

However, 6<sup>th</sup> April 2021 was the same day the Applicant filed its Request for Review. The 1<sup>st</sup> Respondent confirms having received the Request for Review on the same date of 6<sup>th</sup> April 2021. This led to an automatic suspension of procurement proceedings pursuant to section 168 of the Act which provides as follows: -

***“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”***

It therefore follows that the Procuring Entity could not proceed with the subject procurement proceedings in any way and this included communication to bidders.

Even assuming proceedings in the subject tender were not suspended, section 67 (4) read together with section 68 (2) (d) (iii) of the Act provides as follows: -

**"67 (1) .....**

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

**(3) .....**

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

**68 (1) .....**

**(2) *The records for a procurement shall include—***

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

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

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

**(d) *for each tender, proposal or quotation that was submitted***

- (i) .....
- (ii) .....
- (iii) **a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed'**

According to the foregoing provisions, it is only an applicant seeking a review that is entitled to a summary of the proceedings of the opening of tenders, a summary of evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used. At the time the Applicant wrote to the 1<sup>st</sup> Respondent through a letter dated 1<sup>st</sup> April 2021, it was not an applicant seeking a review because it had not filed a request for review pursuant to section 167 (1) of the Act, and thus was not entitled to a summary of the proceedings of the opening of tenders, a summary of evaluation and comparison of the tenders, proposals or quotations including the evaluation criteria used, as specified in section 68 (2) (d) (iii) of the Act.

Pursuant to section 78 (8) of the Act, ***"the accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender"***. This therefore means that as at 1<sup>st</sup> April 2021, the Applicant was entitled to a copy of the tender opening register for the bids opened on 17<sup>th</sup> March 2021 and specific reasons for the outcome of its bid pursuant to section 87 (3) of the Act cited hereinbefore.



It is not lost to the Board that at paragraph 1 of the prayers in its Request for Review, the Applicant sought for the following: -

***"At the preliminary and before hearing of the Request herein, the 1<sup>st</sup> Respondent be directed to furnish the Applicant with a summary of the proceedings of the tender's preliminary, technical and financial evaluation, comparison of tenders and evaluation criteria used in accordance with the provisions of section 67 (4) as read together with section 68 (2) (d) (iii) of the Act"***

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions. As a result, the instant Request for Review was canvassed by way of written submissions thus, the Board did not conduct a physical hearing to hear parties' cases on the Applicant's prayer cited hereinbefore.

The Board observes that the Applicant is entitled to: (i) a summary of the proceedings of the opening of tenders, a summary of evaluation and comparison of the tenders, including the evaluation criteria used pursuant to section 67 (4) read together with section 68 (2) (d) (iii) of the Act. Accordingly, the Board shall make appropriate orders for the Applicant to be furnished with the foregoing documents in the final orders herein.

On the second issue for determination, the Board observes section 87 (3) of the Act provides that: -

***"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"***

On its part, Regulation 82 of Regulations 2020 provides as follows: -

***"(1) The notification to the unsuccessful bidder under section 87(3) of the Act shall be in writing and shall be made at the same time the successful bidder is notified***

***(2) For greater certainty the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids***

***(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86 (1) of the Act"***

Notification to bidders of the specific reasons regarding the outcome of their bids gives effect to the right to fair administrative action specified in Article 47 (2) of the Constitution which provides that: -

**"47 (1). Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2). If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"**

The Applicant's letter of notification of unsuccessful bid dated 23<sup>rd</sup> March 2021 contains the following details: -

***"The tender above in which you participated refers  
This is to notify you that you were not successful in the above  
named tender due to the following reasons:***

***You did not attain the required pass mark of 70% in the  
Technical Stage. Tender has been awarded to Com Twenty  
One Ltd at a cost of 203,280,000.00***

***Please arrange to collect your bid bond from Postal Annex  
Building 2<sup>nd</sup> Floor. Thank you for showing interest in working  
with us"***

The Board studied the Tender Document applicable in the subject tender and notes that the Technical Evaluation Criteria under Clause 2.20.1 of the Appendix to Instructions to Tenderers had several parameters for evaluation. Pursuant to Clause 2.22.1 of the Appendix to Instructions to Tenderers of

the Tender Document, bidders were required to achieve an overall technical score of 70% so as to proceed to Financial Evaluation. It therefore follows that a bidder that has failed to meet this cut-off score ought to have been informed of the specific parameters where it lost marks to enable such bidder to challenge those reasons, if it wishes to do so.

That notwithstanding, the Board observes that at paragraph 5 of his Memorandum of Response, the 1<sup>st</sup> Respondent outlined the reasons why the Applicant's bid was found non-responsive at the Technical Evaluation Stage. Having perused the 1<sup>st</sup> Respondent's Memorandum of Response, the Applicant responded to each reason provided by the 1<sup>st</sup> Respondent, in a Reply to the Memorandum of Response filed by the Applicant. Evidently, the Applicant got the opportunity to challenge the reasons why its bid was found non-responsive.

Accordingly, the Board finds that even though the 1<sup>st</sup> Respondent was in breach of section 87 (3) of the Act read together with Regulation 82 of Regulation 2020 for failure to disclose the specific reasons why the Applicant's bid failed to attain the 70% mark at the Technical Evaluation Stage, the Applicant did not suffer prejudice in the instant circumstances as a result of the Procuring Entity's breach because the specific reasons were disclosed during the pendency of the instant Request for Review and the Applicant had an opportunity to respond to each and every reason.

Having noted the Applicant had an opportunity to respond to the specific reasons why its bid was found non-responsive, the Board shall now address

the question whether the Applicant's bid was fairly evaluated at the Technical Evaluation Stage as the last issue for determination.

Clause 2.20.1 of the Appendix to Instructions to Tenderers of the Tender Document provided the stages for evaluation in the subject tender as follows: -

- Preliminary Mandatory Evaluation;
- Technical Mandatory Evaluation;
- Technical Evaluation; and
- Financial Evaluation.

Having studied the Evaluation Report dated 22<sup>nd</sup> March 2021, the Board observes that the Applicant's bid was found non-responsive at the end of the third stage of evaluation known as Technical Evaluation. From the parties' pleadings before this Board, the three broad areas in contention considered during evaluation of the Applicant's bid fell under the Technical Evaluation Stage and include; **NOFBI Maintenance Plans and Methodology (For Fiber and Active Equipment), Contractors qualifications, experience and past performance on similar projects, Qualifications and experience of Key Technical personnel.** The Board shall now address the same as follows: -

#### **A. NOFBI Maintenance Plans and Methodology (For Fiber and Active Equipment)**

Clause 2.22.1 (1) of the Appendix to Instructions to Tenderers of the Tender Document provided for this criterion in the following terms: -

***"NOFBI Maintenance Plans and Methodology (For Fiber and Active Equipment) (Each 4 Marks)***

- ***Provide sample preventive, corrective and permanent restoration procedures/activities when responding to service interruption due to Optic Fiber breakage. (Gantt chart) with clearly defined timelines***
- ***Provide sample preventive, corrective and permanent restoration procedures/activities when responding to service interruption due to active equipment malfunction/faults. (Gantt chart) with clearly defined timelines***
- ***Provide team composition (Management and technical) for undertaking tasks***

In response to this criterion, the Applicant provided for the following: -

**i. Sample preventive, corrective and permanent restoration procedures/activities when responding to service interruption due to Optic Fiber breakage. (Gantt chart) with clearly defined timelines**

- At page 305 of its original bid, the Applicant provided Gantt Chart Due service interruption due to Optic Fibre Breakage indicating several activities and their respective timelines for example "Receive a ticket-72 hours, Access to Site-24 hours"

**ii. Sample preventive, corrective and permanent restoration procedures/activities when responding to service interruption due to active equipment malfunction/faults. (Gantt chart) with clearly defined timelines**

- At page 306 of its original bid, the Applicant provided Gant Chart Due Service interruption due to Active equipment, indicating several activities and their respective timelines for example “Event Detected-1 Minute, Incident Identification- 3 Minutes”

**iii. Team composition (Management and technical) for undertaking tasks**

- At page 311 of its original bid, the Applicant provided a Team Structure Geonet NOFBI 2 Maintenance and Technical Team Structure together with Regional Management Team of the Applicant situated in Nairobi, Eastern, Western, South Rift, Central, Nyanza and North Rift regions
- The Applicant demonstrated in its Team Structure Geonet NOFBI 2 Maintenance and Technical Team Structure, the corresponding titles of personnel in its organization

The Board observes that the 1<sup>st</sup> Respondent alleged that the Applicant did not provide timelines for the 1<sup>st</sup> and 2<sup>nd</sup> category of this criterion. However, the Board has found the Applicant’s Gant Charts had several activities and each activity had its timelines

On Team composition, the 1<sup>st</sup> Respondent alleged that the Applicant did not indicate the tasks for its personnel. The Board observes that the Applicant’s

Team Structure Geonet NOFBI 2 Maintenance and Technical Team Structure did not have corresponding tasks for its personnel.

From the foregoing, the Board notes that this criterion had 3 categories. Each category was allocated a score of 4 marks leading to a total of 12 marks for the entire criterion. The Applicant was unfairly evaluated in the 1<sup>st</sup> and 2<sup>nd</sup> category of this criterion despite having provided timelines for the Activities to be undertaken in the subject tender, because it lost some marks for each Gant Chart (under category 1 and 2), yet it provided timelines for the same.

Having found the Applicant provided timelines in the Gant Charts for the 1<sup>st</sup> and 2<sup>nd</sup> category of this criterion, the Board finds that the Applicant's bid was not fairly evaluated under this criterion.

**B. Contractors qualifications, experience and past performance on similar projects**

Clause 2.22.1 (3) of the Appendix to Instructions to Tenderers of the Tender Document provided for this criterion in the following terms: -

***"Provide two similar projects in the last 10 years from the closing date of this tender. Similarity being in complexity and scope. This must involve supporting and maintenance of an Optic Fiber Cable Network, transmission equipment and other associated equipment.***

***The bidder should provide completion certificate/ LPOs/contract."***



In response to this criterion, the Applicant provided the following in its original bid: -

### **1<sup>st</sup> Project**

- *At pages 0312 to 0314, the Applicant provided extracts of a contract with Huawei Technologies (Kenya) Limited which indicates that the contract is to establish a Management service cooperation relationship between the two parties and that the subcontractor (the Applicant herein) shall provide service as stipulated in the Agreement and any other relevant commission letter to Huawei; and*
- *At pages 315 to 332, Purchase Orders and Engineering Service Completion Certificates between Huawei Technologies and the Applicant for Monthly Preventive and Corrective Maintenance Services.*

### **2<sup>nd</sup> Project**

- *At page 0333, a Letter of Award dated 24<sup>th</sup> April 2017 addressed to the Applicant from Safaricom Limited for Provision of Fibre Roll Out & Maintenance Service; and*
- *At pages 335 to 359, Purchase Orders and Operational Acceptance and Final Acceptance Certificates for Fibre Roll Out & Maintenance Service Implementation Project*

The Board studied the Evaluation Report of 17<sup>th</sup> March 2021 and notes that whereas the Procuring Entity instructed bidders to provide 2 projects which

would carry a total score of 30 marks, the Evaluation Committee awarded scores to the Applicant under this criterion as; **"7.5, 0, 7.5 and 0"**. It is not clear how these scores were awarded. Furthermore, if bidders were instructed to provide 2 projects totaling to 30 marks, then the logical conclusion is that each project carried a total of 15 marks. Section 80 (2) and (3) (a) of the Act provides that: -

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

***80 (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—***

***(a) the criteria shall, to the extent possible, be objective and quantifiable"***

Section 80 (2) of the Act requires an evaluation committee to confine itself to the procedures and criteria set out in the Tender Document. In doing so, the criteria used must be objective and quantifiable. Bidders were instructed to provide 2 projects under this category totaling to 30 marks, thus they had a legitimate expectation that each project would be evaluated against a score of 15. This, in the Board's view makes the criteria used objective and quantifiable and promotes fairness to bidders who already knew the contents of the Tender Document and knew what was required of them in responding to this criterion.

The Tender Document had stated each project would be evaluated against 10 marks (that is 2 projects, 10 marks each) despite the total being 30 marks.

It is also worth noting that the Procuring Entity did not issue any addendum before the tender submission deadline of 17<sup>th</sup> March 2021 requesting bidders to provide 3 projects (instead of 2 projects) so that evaluation would be carried out against 10 marks for each project. The Procuring Entity is bound by the Tender Document, thus cannot request bidders to provide 3 projects after bidders relied on the requirement to provide only 2 projects and opted to participate in the subject tender.

The award of the marks in this criterion was not objective because if bidders are required to provide 2 projects and the total score is 30 marks, then the logical conclusion is that each project would be evaluated against a score of 15 marks.

Having noted the 1<sup>st</sup> Respondent did not provide justifiable reasons on the manner in which scores were awarded on this criterion, it is the Board's considered finding that the Applicant's bid was unfairly evaluated.

### **C. Qualifications and experience of Key Technical personnel**

Clause 2.22.1 (4) of the Appendix to Instructions to Tenderers of the Tender Document provided for this criterion in the following terms: -

<p><b>Qualifications and experience of Key Technical Personnel (Attach Curriculum Vitae and Copies of Certificates)</b>  <b>Total 58 Marks</b></p>
<p><b>i One Project Manager (3mks)</b></p> <ul style="list-style-type: none"> <li>• Degree in Engineering/ICT</li> <li>• At least 3 Years' Experience in Project management</li> <li>• Certification in Project management</li> </ul>
<p><b>ii Three Transmission Engineers (9mks)</b></p> <ul style="list-style-type: none"> <li>• Degree in ICT or related field</li> <li>• At least 3 Years' Experience in Optical Networks implementation/maintenance with a bias in handling <u>transmission equipment</u></li> <li>• Certification in telecommunication equipment.</li> </ul>

<b>iii Four Optic Fiber Cable Experts (16Mks)</b> <ul style="list-style-type: none"> <li>• Diploma in ICT or related field</li> <li>• At least 3 Years' Experience in Optical Networks implementation/maintenance</li> <li>• Certification in Optical cable</li> </ul>
<b>iv Three IP Engineers (12Mks)</b> <ul style="list-style-type: none"> <li>• Degree in ICT or related field</li> <li>• At least 3 Years' Experience in IP equipment configurations/maintenance</li> <li>• Certification in IP Equipment</li> </ul>
<b>v Two NOC Personnel (6Mks)</b> <ul style="list-style-type: none"> <li>• Degree in ICT or related field</li> <li>• At least 3 Years' Experience in NOC operations</li> </ul>
<b>vi Three Power Engineer (12Mks)</b> <ul style="list-style-type: none"> <li>• Degree in Electrical Engineering or related</li> <li>• At least 3 Years' Experience in Electrical works</li> <li>• Registered with Engineer's Board of Kenya.</li> </ul>

The areas under consideration before the Board are; **Three Transmission Engineers, Four Optic Fiber Cable Experts and Three IP Engineers** where the Applicant responded as follows: -

**i. Three Transmission Engineers**

1<sup>st</sup> proposed personnel (Mr. Hosea Rotich)

- At pages 372 to 374 of its original bid, Curriculum Vitae of Hosea Rotich with over 10 years' experience in transmission planning and engineering but has worked with the Applicant as transmission engineer from February 2020

- Page 376, Bachelor of Science and Electronic Engineering Degree Certificate issued by University of Nairobi in 2008
- Page 377, Certificate in Optical Multi Service Node Operation Maintenance issued by Alcatel-Lucent University in Germany for a course undertaken between 17<sup>th</sup> March 2010 to 23<sup>rd</sup> March 2010
- Page 378, Certificate issued on 29<sup>th</sup> April 2016 by Nokia to Hosea Rotich after successful completion of a Technical Project Manager Course
- Page 379, Certificate issued after successful completion of Light Manager, Operation and Maintenance Course undertaken between 8<sup>th</sup> March 2010 and 12<sup>th</sup> March 2010
- Page 380, Certificate issued by Nokia on 29<sup>th</sup> April 2016 after completing a course on Ethical Business Training
- Page 381, Certificate issued by Nokia on 12<sup>th</sup> May 2016 after completing a course on Network Change Principles
- Page 382, Certificate issued by Alacatel-Lucent University for a course on 1850TSS-320/5C & 1350MS-EML/SDH O & M undertaken between 24<sup>th</sup> September to 11<sup>th</sup> October 2013
- Page 383, Certificate issued by Nokia on 12th May 2016 for completing TTI30117W\_V1.1: End-to-End Alert Management-How to Guide
- Page 384, Certificate issued by Nokia on 16th May 2016 for completing TTI40000W\_v2.0: Network Touch Management for Technical Support and Deployment Activities
- Page 385, Certificate issued by Nokia on 12th May 2016 for completing TTI30116W\_V1.1: Network Change Principles-How to Guide

## 2<sup>nd</sup> Proposed Personnel (Samuel Cherutich)

- Page 386 to 388, Curriculum Vitae citing his role as Transmission Engineer and stating that he has over 10 years' experience in network transmission planning and engineering having worked in the following capacity
  - March 2019, transmission engineer of the Applicant
  - 2016-2019, regional transmission engineer in various countries
  - 2007-2015, customer support with Ericsson
- Page 389, Bachelor of Science in Electrical and Electronics Engineering Degree Certificate issued by University of Nairobi on 1<sup>st</sup> September 2006
- Page 390, Certificate of Completion of GCM BSC Operation at Ericson Academy, Group Function People issued on 15<sup>th</sup> February 2008
- Page 391, Certificate of Completion of LTE Onboarding to 5G-Session 3 at Ericson Academy, Group Function People issued on 11<sup>th</sup> July 2019
- Page 392, Certificate of Completion of WCDMA AN EVO-C 8200 Configuration at Ericson Academy, Group Function People issued on 5<sup>th</sup> February 2020
- Page 393, Certificate of Completion of Baseband Radio Note-Operation and Configuration at Ericson Academy, Group Function People issued on 7<sup>th</sup> February 2020

## 3<sup>rd</sup> Proposed Personnel (Agnes Limo)

- Pages 394 to 397, Curriculum Vitae citing her role as Senior Transmission Network Engineer of the Applicant since April 2020
- Page 398, Bachelor of Science in electrical and Electronic Engineering Degree Certificate issued by University of Nairobi on 14<sup>th</sup> October 2005
- Page 399, Certificate issued on 13<sup>th</sup> August 2010 by Fibre Optic Association showing she is a certified Fibre Optic Technician
- Pages 400 to 413, Certificates issued on successful completion of trainings in:
  - Fibre Optic Network Planning and Design
  - PNMSj General Operation and Maintenance
  - Operation and Maintenance of iPASOLINK
  - OPTIX iManager T200 Monitoring and Administration Training
  - Operation, Maintenance, Network Planning and Design Training
  - GPON/FTTx Training
  - CCNA (ICD1 & ICDN2) Training
  - Training Modules on Atoll
  - Fall Arrest Technical Course
  - Professional Interview Preparation Seminar in-House training
  - Women in Leadership Code Program
  - Microwave transmission theory and technology
  - TEMS Investigation 8 training

According to the 1<sup>st</sup> Respondent, despite the Applicant alleging Hosea Rotich has 10 years' experience, the certificates attached do not support this allegation. In the 1<sup>st</sup> Respondent's view, the certificates of Hosea Rotich were

with respect to short courses and not certification on transmission equipment.

Further, the 1<sup>st</sup> Respondent alleged that Samuel Cherutich did not give evidence of certification in transmission but gave certificates on short courses attended. Lastly, Agnes Limo did not give evidence of certification in transmission but gave certificates on short courses attended as alleged by the 1<sup>st</sup> Respondent. In response, the Applicant alleged in its Reply that the certificates it provided for the aforementioned personnel met the specific criteria for each category.

Having considered parties' rival cases, the Board observes that the Applicant was awarded a score of 5 marks out of the total score of 9 marks under this criterion. The Evaluation Committee has the mandate of carrying out an evaluation in accordance with the criteria set out in the Tender Document. When reviewing a procuring entity's decision, the Board does not award marks to a bidder but determines whether the evaluation was undertaken in a fair manner, bearing in mind that the Evaluation Committee has the technical expertise to understand what was required of Transmission Engineers vis-à-vis the certifications provided by the Applicant for its proposed personnel.

In the circumstances, the Board is not persuaded that the Applicant was unfairly evaluated under this criterion having noted the Applicant was awarded some marks as opposed to a score of zero.



## **ii. Four Optic Fiber Cable Experts**

### 1<sup>st</sup> Proposed Personnel (Nyamongo Oira Peter)

- Page 415 to 417, Curriculum Vitae showing he has worked with the Applicant for 3 years as slicing technician dealing with network building and testing, client connection in FTTH projects, customer engagement
- Page 418, Results Slip issued by Kenya National Examination Council for examination undertaken in:
  - Diploma in Electrical and Electronics Engineering (Telecommunication Option)
  - Information Communication Technology, Communication Skills and Entrepreneurship
  - Physical Science, Mechanical Science and Electrical Principles
  - Engineering Mathematics 1
  - Engineering Drawing, Materials and Workshop Technology
  - Electrical and Solar Installation
  - Electrical and Measurements and Analogue Electronics
- Pages 419 to 423, Certifications issued in the following: -
  - Basic Fall Arrest Technician
  - Radio Frequency Awareness
  - Fallproc Securope User
  - 3 Certificates on Ceragon Certified Rollout Professional

### 2<sup>nd</sup> Proposed Personnel (Ismael Kibiwott Kurui)

- Pages 424 to 427, Curriculum Vitae showing he has 8 years' experience as Team Leader, Fibre Engineer but has been Team Leader, Fibre Engineer of the Applicant since January 2015
- page 428, Bachelor of Science in Electrical and Electronics Engineering issued by Dedan Kimathi University of Technology on 25<sup>th</sup> April 2015
- page 429, Certification on completing Fibre Optic Technician Training

### 3<sup>rd</sup> Proposed Personnel (Victor Muchiri Nderitu)

- Page 430 to 432, Curriculum Vitae showing he has 5 years' experience as Team Leader, Fibre Engineer but has been Team Leader, Fibre Engineer with the Applicant since May 2017
- Page 433, Result slip for Diploma Course in Telecommunication Engineering issued by Kenya National Examination Counsel for the following: -
  - Mathematics
  - Data Communication
  - Microprocessor systems
  - Control Systems
  - Industrial Organization and Management
  - Communication Systems
  - Trade and Entrepreneurship
- Page 434 to 438, Certifications in: -
  - Fibre Optic Technician Training
  - Basic Fall Arrest Technician
  - Fibre Optics and Copper

- Basic First Aid and Fire Safety Course
- Safety training course for contractors

#### 4<sup>th</sup> Proposed Personnel (Sammy Kemboi)

- Page 439 to 442, Curriculum Vitae showing he has 7 years' experience as Team Leader, Fibre Engineer but has been Team Leader, Fibre Engineer with the Applicant since January 2015
- Page 443 to 444, Results slip issued by Kenya National Examination Council on undertaking examination for the diploma in Information Technology
- Page 445, Certification for completing Fibre Optic Technician Training

The Board observes that with respect to Nyamongo Oira Peter, there was no diploma certificate in ICT or related field but a result slip was attached. Further, the 1<sup>st</sup> Respondent alleged that there was no certification on Optic Fibre Cable for Ismael Kibiwott Kurui. With respect to this personnel, the Board notes that a certification on Fibre Optic Technician Training was attached. Victor Muchiri Nderitu did not have a diploma certificate in ICT or related field but a result slip was attached. Lastly, Sammy Kemboi did not have a diploma certificate in ICT or related field but a result slip was attached.

The Applicant was awarded a score of 7 marks out of the total score of 16 marks under this criterion. The Evaluation Committee has the mandate of carrying out an evaluation in accordance with the criteria set out in the Tender Document. When reviewing a procuring entity's decision, the Board

does not award marks to a bidder but determines whether the evaluation was undertaken in a fair manner, bearing in mind that the Evaluation Committee has the technical expertise to understand what was required of Optic Fiber Cable Experts vis-à-vis the certifications provided by the Applicant for its proposed personnel. It is also evident that 3 of the Applicant's personnel did not have degree certificates and/or diploma certificates required in the Tender Document.

In the circumstances, the Board is not persuaded that the Applicant was unfairly evaluated under this criterion having noted the Applicant was awarded some marks as opposed to a score of zero.

### **iii. Three IP Engineers**

#### 1<sup>st</sup> Proposed Personnel (Zadock Cheruiyot)

- Pages 447 to 450, Curriculum Vitae showing he has 1-year experience as maintenance engineer and has been IP engineer with the Applicant from January 2020
- Page 451, Bachelor of Technology in Electrical and Communications Engineering Degree Certificate issued on 19<sup>th</sup> December 2008 by Moi University
- Page 452, Certificate of Registration as Graduate Engineer issued by Engineers Board of Kenya on 14<sup>th</sup> February 2017
- Pages 453 to 455, Certifications on:
  - Data Center Facility
  - Network Energy Sales Specialist

- Allot Certified Technical Engineer

### 2<sup>nd</sup> Proposed Personnel (Paul Gichiri)

- Pages 456 to 459, Curriculum Vitae showing he has 5 years' experience as IP Engineer but has been IP engineer with the Applicant from January 2020
- Page 460, Bachelor of Science in Computer Science Degree Certificate issued by Masinde Muliro University of Science and Technology on 16<sup>th</sup> December 2016
- Pages 461 to 463, Certifications in
  - Cisco Certified Network Associate Routing and Switching valid till 25<sup>th</sup> October 2020
  - Juniper Network Certified Associate  
Valid till June 11<sup>th</sup> 2020

### 3<sup>rd</sup> Proposed Personnel (Charity Cherotich)

- Pages 464 to 467, Curriculum Vitae showing he has 5 years' experience in the telecommunications industry but has been IP engineer with the Applicant from March 2020
- Page 468, Bachelor of Engineering in Electrical and Telecommunications Engineering Degree Certificate issued on 16<sup>th</sup> December 2016 by Moi University

- Page 469, Certificate of Registration as Graduate Engineer issued by Engineers Board of Kenya on 5<sup>th</sup> December 2017
- Pages 470 to 471, Certifications on:
  - Routing and Switching
  - Cisco Certified Network Associate Routing and Switching

The Board observes that the certifications provided by Paul Gichiri already expired on 25<sup>th</sup> October 2020 and 11<sup>th</sup> June 2020 given the tender was advertised on 2<sup>nd</sup> March 2021.

The Applicant was awarded a score of 9 marks out of the total score of 12 marks under this criterion. The Evaluation Committee has the mandate of carrying out an evaluation in accordance with the criteria set out in the Tender Document. When reviewing a procuring entity's decision, the Board does not award marks to a bidder but determines whether the evaluation was undertaken in a fair and objective manner, bearing in mind that the Evaluation Committee has the technical expertise to understand what was required of IP Engineers vis-à-vis the certifications provided by the Applicant for its proposed personnel. It is also evident that the Applicant provided certification documents for Paul Gichiri which had already expired before the subject tender was advertised.

In the circumstances, the Board is not persuaded that the Applicant was unfairly evaluated under this criterion having noted the Applicant was awarded some marks as opposed to a score of zero.

The upshot of the foregoing findings is that the Procuring Entity did not evaluate the Applicant's bid at the Technical Evaluation Stage in accordance

with section 80 (2) of the Act and the principle of fairness provided in Article 227 (1) of the Constitution in the following specific areas: -

- Clause 2.22.1 (1) of the Appendix to Instructions to Tenderers of the Tender Document on NOFBI Maintenance Plans and Methodology (For Fiber and Active Equipment) in the following specific areas: -
  - ✓ Provide sample preventive, corrective and permanent restoration procedures/activities when responding to service interruption due to Optic Fiber breakage. (Gantt chart) with clearly defined timelines; and
  - ✓ Provide sample preventive, corrective and permanent restoration procedures/activities when responding to service interruption due to active equipment malfunction/faults. (Gantt chart) with clearly defined timelines
- Clause 2.22.1 (3) of the Appendix to Instructions to Tenderers of the Tender Document on Contractors qualifications, experience and past performance on similar projects.

In totality, the Request for Review succeeds in terms of 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 Accounting Officer of the Procuring Entity's Letters of Notification of Unsuccessful bid in Tender No. MOICT/SDICT/248/2020-2021 for Provision of Operation and Maintenance of National Optic Fibre Backbone Infrastructure Phase II (NOFBI II) Active and Passive Equipment for Lot 2: Western Region) addressed to the Applicant and all other unsuccessful bidders, be and are hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. MOICT/SDICT/248/2020-2021 for Provision of Operation and Maintenance of National Optic Fibre Backbone Infrastructure Phase II (NOFBI II) Active and Passive Equipment for Lot 2: Western Region) addressed to the 2<sup>nd</sup> Respondent herein, be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby ordered to furnish the Applicant with a summary of the proceedings of the opening of tenders, a summary of evaluation and comparison of the tenders including the evaluation criteria used, pursuant to section 67 (4) read together with section 68 (2) (d) (iii) of the Act.**



**4. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to reinstate the Applicant's tender at the Technical Evaluation Stage and conduct a re-evaluation of the Applicant's tender together with the tenders of all other bidders that made it to the Technical Evaluation Stage in accordance with section 80 (2) of the Act with respect to the following criteria only: -**

**a) Clause 2.22.1 (1) of the Appendix to Instructions to Tenderers of the Tender Document on NOFBI Maintenance Plans and Methodology (For Fiber and Active Equipment) in the following specific areas: -**

**✓ Provide sample preventive, corrective and permanent restoration procedures/activities when responding to service interruption due to Optic Fiber breakage. (Gantt chart) with clearly defined timelines; and**

**✓ Provide sample preventive, corrective and permanent restoration procedures/activities when responding to service interruption due to active equipment malfunction/faults. (Gantt chart) with clearly defined timelines**

**b) Clause 2.22.1 (3) of the Appendix to Instructions to Tenderers of the Tender Document on Contractors qualifications, experience and past performance on similar projects.**

- 5. Further to Order No. 4 above, the Accounting Officer of the Procuring Entity is hereby directed to complete the procurement proceedings in Tender No. MOICT/SDICT/248/2020-2021 for Provision of Operation and Maintenance of National Optic Fibre Backbone Infrastructure Phase II (NOFBI II) Active and Passive Equipment for Lot 2: Western Region) to its logical conclusion, including the making of an award within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this Review.**
- 6. Given that the subject procurement proceedings have not been completed, each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 26<sup>th</sup> day of April 2021**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**