

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 87/2021 OF 23RD MAY 2021
BETWEEN

GEONET TECHNOLOGIES LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

MINISTRY OF ICT, INNOVATION AND YOUTH AFFAIRS

STATE DEPARTMENT OF ICT & INNOVATION 1ST RESPONDENT

COM TWENTY ONE LIMITED 2ND RESPONDENT

Review against the decision of the Accounting Officer of the Ministry of ICT, Innovation and Youth Affairs, State Department of ICT & 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

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|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Arch. Steven Oundo, OGW | -Member |

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| 3. Ms. Phyllis Chepkemboi | -Member |
| 4. Dr. Paul Jilani | -Member |
| 5. Mr. Alfred Keriolale | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Philemon Kiprop | -Acting Board Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Ministry of ICT, Innovation and Youth Affairs, State Department of ICT & 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 2nd March 2021.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of eleven (11) bids by the bid submission deadline of 17th March 2021. The bids were opened by a Tender Opening Committee on the same date of 17th March 2021 and recorded as follows: -

S/NO	FIRM NAME	BID BOND COMPANY
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 Technologies 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

Evaluation of Bids

The Procuring Entity's Evaluation Committee (hereinafter referred to as the "Evaluation Committee") evaluated bids in the following stages: -

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

Preliminary Mandatory Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause 2.20.1 (1) Preliminary Mandatory Evaluation of the Appendix to Instructions to Tenderers of the Tender Document. The Applicant's and the 2nd Respondent's tenders were among seven (7) tenders found responsive at this stage, thus eligible to proceed to the next stage of evaluation.

2. Technical Mandatory Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause 2.20.1 (2) Technical Mandatory Evaluation of the Appendix to Instructions to Tenderers of the Tender Document based on a YES/NO criteria. The Applicant's and the 2nd Respondent's tenders were among four (4) tenders found responsive at this stage, thus eligible to proceed to the next stage of evaluation.

3. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause 2.22.1 Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document comprising of evaluation of technical specifications specified in the said provision. Tenders required to achieve an overall technical score of 70% so as to proceed to Financial Evaluation. The outcome of the evaluation at this stage was captured as follows:

TOTAL SCORE (100)	M/s Adrian Kenya Ltd	M/s Broad Band Comm Ltd	Applicant	2 nd Respondent
% Score (70)	78	68	65	79.5

At the end of Technical Evaluation, Adrian Kenya Ltd's and the 2nd Respondent's tenders attained the pass mark of 70% and proceeded to Financial Evaluation. The Applicant's tender was found non-responsive at this stage for failing to attain an overall technical score of 70%.

4. Financial Evaluation

Adrian Kenya Ltd's and the 2nd Respondent's tenders were subjected to Financial Evaluation to determine the lowest evaluated responsive tender. Their tender 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	2 nd Respondent	203,280,000.00	1
001	C	C	Adrian Kenya limited	203,764,532.30	2

Recommendation

The Evaluation Committee recommended award of the subject tender to the 2nd Respondent for having submitted the lowest evaluated responsive tender at its tender price of Kshs. 203,280,000.00 as captured in the Evaluation Committee's Evaluation Report executed on 22nd March 2021 (hereinafter referred to as the "1st Evaluation Report").

Professional Opinion

In a professional opinion dated 23rd March 2021 (hereinafter referred to as the "1st Professional Opinion"), the Procuring Entity's Head of Procurement reviewed the evaluation process and concurred with the Evaluation Committee's recommendation to award the subject tender to the 2nd

Respondent for submitting the lowest evaluated tender at its tender price of Kshs. 203,280,000.00. The Procuring Entity's Head of Procurement thus advised the 1st Respondent to award the subject tender to the 2nd Respondent. The said professional opinion was approved by the 1st Respondent on 23rd March 2021.

Notification to Bidders

In letters dated 23rd March 2021, the 1st Respondent notified all tenderers of the outcome of their respective tenders.

REQUEST FOR REVIEW NO. 47 OF 2021

The Applicant lodged a Request for Review dated 6th April 2021 and filed on even date through the firm of Caroline Oduor & Associates, seeking the following orders: -

- i. An order directing the 1st 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 1st Respondent's decision contained in its letter dated 23rd March 2021 and related notifications to other tenderers;***
- iii. An order annulling the subject procurement proceedings undertaken by the 1st 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 1st 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 1st 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 1st Respondent to pay the costs of the Review; and***
- vii. Any other orders as are necessary for the ends of justice.***

The Board considered each of the parties' pleadings and written submissions together with confidential documents filed by the Procuring Entity in

accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and rendered a decision dated 26th April 2021 in **PPARB Application No. 47 of 2021, Geonet Technologies Limited v. The Accounting Officer, Ministry of ICT, Innovation and Youth Affairs, State Department of ICT & Innovation & Another** (hereinafter referred to as "Review No. 47 of 2021") in terms of the following orders:

- 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 2nd 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.

RE-EVALUATION OF TENDERS

Technical Evaluation

According to the Evaluation Committee's Evaluation Report executed on 3rd May 2021 (hereinafter referred to as the 2nd Evaluation Report) and pursuant to the Orders of the Board of 26th April 2021, the Evaluation Committee reinstated the tenders submitted by M/s Adrian Kenya Ltd, M/s Broad Band

Comm Ltd, the Applicant and the 2nd Respondent at the Technical Evaluation Stage. The Evaluation Committee conducted a re-evaluation of the said tenders at the Technical Evaluation Stage.

At the end of Technical Evaluation, the aforementioned tenders attained the following overall technical scores against the minimum technical score of 70% required to proceed to Financial Evaluation:

TOTAL SCORE (100)	M/s Adrian Kenya Ltd	M/s Broad Band Comm Ltd	Applicant	2 nd Respondent
% Score (70)	68.5	60.5	53	72

At the end of re-evaluation at this stage, it is only the 2nd Respondent who qualified for Financial Evaluation having attained an overall technical score of 72% against the minimum technical score of 70% required to proceed to the Financial Evaluation Stage.

Financial Evaluation

At this stage, the Evaluation Committee recorded the tender price of the 2nd Respondent's tender as follows Kshs.203,280,000.00.

Recommendation

The Evaluation Committee recommended award of the subject tender to the 2nd Respondent for submitting the lowest evaluated responsive tender at its tender price of Kshs. 203,280,000.00.

Professional Opinion

In a professional opinion executed on 4th May 2021 (hereinafter referred to as the 2nd Professional Opinion), the Procuring Entity's Head of Supply Chain Management Services reviewed the manner in which the Evaluation Committee undertook re-evaluation of bids and concurred with their recommendation on award of the subject tender. The Head of Supply Chain Management Services thus advised the 1st Respondent to award the subject tender to the 2nd Respondent for submitting the lowest evaluated responsive tender at its tender price of Kshs. 203,280,000.00. The 1st Respondent approved the 2nd Professional Opinion on 5th May 2021.

Notification to Bidders

In letters dated 5th May 2021, the 1st Respondent notified tenderers of the outcome of their respective tenders.

REQUEST FOR REVIEW NO. 69 OF 2021

The Applicant lodged Request for Review dated 11th April 2021 and filed on even date through the firm of Caroline Oduor & Associates, seeking the following orders: -

- i. An order cancelling and setting aside the 1st Respondent's decision contained in its letter dated 5th May 2021 and related notifications to other tenderers;***
- ii. An order annulling the subject procurement proceedings undertaken by the 1st Respondent in relation to re-evaluation at the Technical Evaluation stage in respect of "contractors' qualifications and past performance on similar projects" on grounds inter alia that the Applicant's bid was unfairly and unlawfully re-evaluated;***
- iii. An order directing the 1st Respondent to admit the Applicant herein to the subject tender's Financial Evaluation Stage and conclude the tender award in accordance with the law upon fairly re-evaluating the Applicant's bid at the Technical Evaluation stage in accordance with the tender requirements, the law and as directed by the Public Procurement Administrative Review Board in exercise of its mandate and powers under section 28 and 173 of PPADA;***
- iv. An order directing the 1st Respondent to pay costs of the Review; and***

v. Any other orders as are necessary for the ends of justice.

The Board considered each of the parties' pleadings and written submissions together with confidential documents filed by the Procuring Entity in accordance with section 67 (3) (e) of the Act and rendered a decision dated 31st May 2021 in **PPARB Application No. 69 of 2021, Geonet Technologies Limited v. The Accounting Officer, Ministry of ICT, Innovation and Youth Affairs, State Department of ICT & Innovation & Another** (hereinafter referred to as "Review No. 69 of 2021") in terms of the following orders:-

- 1. The Accounting Officer of the Procuring Entity's Letters of Notification 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) dated 5th May 2021 and 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 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) dated 5th May 2021 and addressed to the 2nd Respondent, be and is hereby cancelled and set aside.

3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to reinstate the Applicant's tender together with the tenders of all other bidders that made it to the Technical Evaluation Stage, at the Technical Evaluation Stage and conduct a re-evaluation at the Technical Evaluation Stage in accordance with section 80 (2) & 3 (a) of the Act with respect to the following criteria only: -

a) 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.

4. Further to Order No. 3 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.

7. Given that the subject procurement proceedings have not been completed, each party shall bear its own costs in the Request for Review.

RE-EVALUATION OF TENDERS

Technical Evaluation

According to the Evaluation Committee's Evaluation Report executed on 11th June 2021 (hereinafter referred to as the 3rd Evaluation Report) and pursuant to the Orders of the Board of 31st May 2021, the Evaluation Committee reinstated the tenders submitted by M/s Adrian Kenya Ltd, M/s Broad Band Comm Ltd, the Applicant and the 2nd Respondent at the Technical Evaluation Stage. The Evaluation Committee conducted a re-evaluation of the said tenders at the Technical Evaluation Stage.

At the end of Technical Evaluation, the aforementioned tenders attained the following overall technical scores against the minimum technical score of 70% required to proceed to Financial Evaluation:

TOTAL SCORE (100)	M/s Adrian Kenya Ltd	M/s Broad Band Comm Ltd	Applicant	2 nd Respondent

% Score (70)	76	68	67	79.5
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At the end of re-evaluation at this stage, it is only M/s Adrian Kenya Ltd's and the 2nd Respondent's tenders that qualified for Financial Evaluation having attained an overall technical score of 76% and 79.5% respectively against the minimum technical score of 70% required to proceed to the Financial Evaluation Stage.

Financial Evaluation

Adrian Kenya Ltd's and the 2nd Respondent's tenders were subjected to Financial Evaluation to determine the lowest evaluated responsive tender. Their tender 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	2 nd Respondent	203,280,000.00	1
001	C	C	Adrian Kenya limited	203,764,532.30	2

Recommendation

The Evaluation Committee recommended award of the subject tender to the 2nd Respondent for submitting the lowest evaluated responsive tender at its tender price of Kshs. 203,280,000.00.

Professional Opinion

In a professional opinion executed on 11th June 2021 (hereinafter referred to as the 3rd Professional Opinion), the Procuring Entity's Head of Supply Chain Management Services reviewed the manner in which the Evaluation Committee undertook re-evaluation of bids and concurred with their recommendation on award of the subject tender. The Head of Supply Chain Management Services thus advised the 1st Respondent to award the subject tender to the 2nd Respondent for submitting the lowest evaluated responsive tender at its tender price of Kshs. 203,280,000.00. The 1st Respondent approved the 3rd Professional Opinion on 11th June 2021.

Notification to Bidders

In letters dated 11th June 2021, the 1st Respondent notified tenderers of the outcome of their respective tenders.

REQUEST FOR REVIEW NO. 87 OF 2021

The Applicant lodged the subject Request for Review dated 22nd June 2021 together with a Statement in Support of the Request for Review and a Verifying Affidavit sworn by Patrick Kiplagat Changwony, the Finance Manager of the Applicant, on 22nd June 2021 and filed on 23rd June 2021 and an Applicant's Reply to 1st Respondent's Affidavit in Response to Request for Review dated 6th July 2021 filed on even date through the firm of Caroline Oduor & Associates, seeking the following orders: -

- i. An order annulling the subject procurement proceedings undertaken by the 1st Respondent in relation to the re-evaluation at the technical evaluation stage on grounds inter alia, that the Applicant's bid was unfairly evaluated.***
- ii. An order cancelling and setting aside the 1st Respondent's decision contained in its letter dated 11th June 2021 and related notifications to other tenderers;***
- iii. An order finding that the Applicant fully complied with the requirements of Clause 2.22.1 (3): Appendix to Tenderers of the Tender document;***
- iv. An order finding and holding that the Applicant's initial score in respect of the criterion on Contractors qualifications, experience and past performance on similar project was 7.5 marks out of 10 marks awarded per project which is equivalent to 75% of the score for each project and thus ought to be proportionately adjusted against the score of 30 marks awardable under the criterion in line with Board's***

finding in Review No.69 of 2021; thus earning the Applicant 22.5 marks under this criterion;

v. An order further to (iv) above and pursuant to section 173(c) of the Act substituting the Board's decision with that of the 1st Respondent with respect to technical evaluation proceedings of the tender herein and further an order directing that the Applicant be admitted to the tender's financial stage evaluation for a decision by the 1st Respondent within 14 days from the date hereof in accordance with the law;

vi. An order directing the 1st Respondent to pay costs of the Review; and

vii. Any other orders as are necessary for the ends of justice.

In response, the 1st Respondent lodged an Affidavit in Response to the Request for Review Application, sworn by Pius Muchai Kaua, the Assistant Director of ICT of the Procuring Entity, on 29th June 2021 and filed on 30th June 2021 through Mr. Christopher Maina, Deputy Chief State Counsel at the Procuring Entity's Ministry.

The 2nd Respondent did not file a Response to the subject Request for Review despite being notified of the Request for Review through a letter signed by the Acting Secretary to the Board dated 1st July 2021 sent to the 2nd Respondent via email on Thursday 1st July 2021.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, detailing administrative and contingency plan to mitigate the spread of Covid-19 pandemic, 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 Board's Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

The Applicant filed written submissions dated 7th July 2021 together with its list and bundle of authorities on 8th July 2021. However, the 1st and 2nd Respondents did not file any written submissions.

BOARD'S DECISION

The Board has considered each of the parties' pleadings, written submissions, list and bundle of authorities together with confidential documents submitted to it by the 1st Respondent pursuant to section 67 (3) (e) of the Act and finds that the following issue calls for determination: -

Whether the Procuring Entity re-evaluated the Applicant's tender at the Technical Evaluation Stage in accordance with 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 taking

into consideration the findings of the Board as contained in the Board's decision dated 31st May 2021 in Review No. 69 of 2021.

At paragraph 16 read together with paragraph 19 of its Request for Review, the Applicant avers *inter alia* it is aggrieved by the Evaluation Committee's failure to award it the much needed marks at the Technical Evaluation stage on account of a new criterion that was not expressly provided under clause 2.22.1 (3) of the Appendix to Instructions to Tenderers of the Tender Document and failure by the Evaluation Committee to take into account the Applicant's qualifications and past performance and experience despite having installed, commissioned and operated next generation transmission networks involving fibre optics and IP Networks with Huawei's Backhaul Solution ATN 950; connecting government offices, private companies and individual consumers through Safaricom Network. According to the Applicant, the Evaluation Committee acted unfairly and unlawfully in awarding the Applicant a score of 7.5 out of 15 marks for each of the two similar projects it provided in its original tender in respect of **"contractors qualifications and past performance on similar projects"** despite the Board's findings as contained in the Board's decision dated 31st May 2021 ordering the 1st Respondent to direct the Evaluation Committee to proportionally adjust the score of 7.5 out of 10 marks for each project in the circumstances of 15 marks for each of the two similar projects provided in the Applicant's original tender. In the Applicant's view, the initial score of 7.5 out of 10 marks per project if proportionally adjusted to out of 15 marks for

each project would have ensured the Applicant attains a total score of 22.5 out of 30 marks for the two projects instead of 15 out of 30 marks for the two projects it provided in satisfaction of the criterion set out under clause 2.22.1 (3) of the Appendix to Instructions to Tenderers of the Tender Document. Consequently, the Applicant's tender would achieve approximately an overall score of 75% at the Technical Evaluation stage thus qualifying to proceed to the Financial Evaluation Stage.

In response, the 1st Respondent depones *inter alia* at paragraph 8 of his Affidavit in Response to the Request for Review that the project the Applicant undertook with Safaricom Ltd was limited to passive component of fibre roll-out only yet the subject tender required tenderers to provide two similar projects where similarity was to be in complexity and in scope which entailed active and passive components. He further deponed the Applicant's IPRAN Node (ATN) in contention did not meet a specific threshold and was not one of the equipment listed in the Tender Document and that Safaricom infrastructure active devices are supported internally by their OEMs. According to the 1st Respondent, Safaricom only sub-contracts for support of passive elements in their network. Further, the Evaluation Committee scored the Applicant's tender objectively and quantifiably because the Applicant only provided support on the passive devices for the two projects it submitted with no support on active devices. In conclusion, the 1st Respondent prayed for the dismissal of the subject review with costs to it.

Having considered parties' rival cases, the Board studied the confidential documents submitted to it to establish to what extent the 1st Respondent complied with the orders and findings of the Board as contained in the Board's decision dated 31st May 2021. In that regard, the Board notes the 3rd Evaluation Report shows that the Evaluation Committee re-instated the tender of M/s Adrian Kenya Ltd, M/s Broad Band Comm Ltd, the Applicant and the 2nd Respondent at the Technical Evaluation Stage. The Evaluation Committee proceeded to conduct a re-evaluation of the said tenders at the Technical Evaluation Stage with respect to the following criteria:

- **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.**

At the end of Technical Evaluation, the aforementioned four tenders attained the following overall technical scores against the minimum technical score of 70% required to proceed to Financial Evaluation:

TOTAL SCORE (100)	M/s Adrian Kenya Ltd	2 nd Respondent	M/s Broad Band Comm Ltd	Applicant
% Score (70)	76	79.5	68	67

From the foregoing, it is only M/s Adrian Kenya Ltd's and the 2nd Respondent's tenders that qualified for Financial Evaluation having attained

an overall technical score of 76% and 79.5% respectively against the minimum technical score of 70% required to proceed to the Financial Evaluation Stage. At the end of Financial Evaluation, the Evaluation Committee recommended award of the subject tender to the 2nd Respondent for submitting the lowest evaluated responsive tender at its tender price of Kshs. 203,280,000.00. In a professional opinion executed on 11th June 2021, the Procuring Entity's Head of Supply Chain Management Services reviewed the manner in which the Evaluation Committee undertook re-evaluation of tenders, concurred with their recommendation on award of the subject tender and thus, advised the 1st Respondent to award the subject tender to the 2nd Respondent for submitting the lowest evaluated responsive tender at its tender price of Kshs. 203,280,000.00. Subsequently thereafter, the 1st Respondent notified tenderers of the outcome of their respective tenders in letters dated 11th June 2021.

The Board notes the issue in contention relates to re-evaluation of the Applicant's tender at the Technical Evaluation stage. Specifically, the Applicant challenges the manner in which the Evaluation Committee evaluated and scored the Applicant's tender on the criterion of **Clause 2.22.1 (3) of the Appendix to Instructions to Tenderers of the Tender Document** which provides as follows:

3	Contractors qualifications, experience and past performance	30
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	<p>on similar projects: (Each project 10 Marks)</p> <p>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 .</p>	
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It is worth noting that the Board has not been furnished with any information and its neither aware of any judicial review proceedings at the High Court challenging its decision dated 31st May 2021 in Review No.69 of 2021 and dated 26th April 2021 in Review No.47 of 2021. As such, the Board's decision dated 31st March 2021 and 26th April 2021 in Review No.69 of 2021 and Review No.47 of 2021 respectively are final and binding to all parties therein pursuant to section 175(1) of the Act. Accordingly, any action, by a party to Review No.69 of 2021 and Review No.47 of 2021, contrary to the decisions of the Board dated 31st March 2021 and 26th April 2021 in Review No.69 of 2021 and Review No.47 of 2021 respectively would be in disobedience of the Board's decisions, in breach of the Act and thus null and void pursuant to section 175(6) of the Act.

Before addressing our minds on the manner in which the Applicant's tender was re-evaluated under 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, the Board would like to outline the salient findings in Review No. 69 of 2021 in relation to re-evaluation of the Applicant's tender under 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.

At pages 22 to 29 of the decision in Review No. 69 of 2021, the Board held as follows:

- *Page 22-23,Page 9 of the Evaluation Report shows that the Applicant achieved a score of zero (0) on the criteria found in under Clause 2.22.1 (3) of the Appendix to Instructions to Tenderers of the Tender Document. On page 12 of the Evaluation Report, the Evaluation Committee noted as follows:*

"The two projects provided for contractors' qualification, experience and past performance on similar projects did not involve the component of supporting and maintaining of transmission equipment and other associated equipment as required (ACTIVE)"

In Review No. 47 of 2021, the Board noted at page 33 of its decision that the Applicant provided the following in its original bid in response to the criterion under consideration:

"1st 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.***

2nd Project

- ***At page 0333, a Letter of Award dated 24th 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"***

- *Page 24-25, Clause 2.22.1 (3) of the Appendix to Instructions to Tenderers of the Tender Document did not state that failure to demonstrate either active or passive devices components would lead to an automatic score of zero and applying this, in the Board's view is tantamount to introducing a new criterion to the detriment of bidders who were never informed that failure to demonstrate either active or passive devices components would lead to an automatic score of zero.....The criterion in question did not instruct bidders that failure to demonstrate either active or passive devices components would lead to an automatic score of zero. As a result, the Evaluation Committee had an obligation of confining itself to the criteria as stated in Clause 2.22.1 (3) of the Appendix to Instructions to Tenderers of the Tender Document in relation to the components outlined hereinbefore.*
- *Page 26, Given there was no further breakdown on how the 15 marks would be awarded on each of the two components of the criterion provided in Clause 2.22.1 (3) of the Appendix to Instructions to Tenderers of the Tender Document, then there ought to have been a proportional adjustment of the scores according to the documentation to demonstrate their technical capacity.*
- *Page 28, The 1st Respondent admitted at paragraph 17(a) of its Affidavit in Response to the Request for Review that the initial evaluation was evaluated out of 10 marks per project and that pursuant to the findings of the Board in Review No.47 of 2021, the*

criterion under consideration was re-evaluated against a score of 15 marks per project. In the initial evaluation, the Procuring Entity awarded a score of 7.5, 0, 7.5, 0 without explaining how these scores were distributed for the two projects required. Having established in Review No.47 of 2021 that the criterion under consideration ought to be evaluated against a score of 15 marks per project, then the score awarded in this criterion ought to be proportionally adjusted in the circumstances of 15 marks per project depending on the level of technical capacity demonstrated by a bidder.

- *Page 28-29, In this case, the Evaluation Committee acted unfairly by introducing a new criterion and using the new criterion to deny the Applicant a score under the criterion provided in Clause 2.22.1 (3) of the Appendix to Instructions to Tenderers of the Tender Document even though the Applicant provided documentation to demonstrate its technical capacity. We say so, having established the Evaluation Committee introduced a new criterion to the effect that failure to provide any of the components of the equipment (i.e. active or passive equipments) would lead to a score of zero, yet this was not a criterion for evaluation known to bidders.*

From the foregoing, the Board in Review No.69 of 2021 held that (a) failure to provide any of the components of the equipment (i.e. active and passive devices) was a new criteria not provided under 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, (b) the score of 7.5 out of 10 marks per project awarded to the Applicant's tender with respect to the criterion under 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 ought to proportionally be adjusted in the circumstances of 15 marks per project depending on the level of technical capacity demonstrated by a bidder.

The Board notes from the 3rd Evaluation Report, the Evaluation Committee scored the Applicant's tender a score of 7.5 out of 15 marks for each of the two projects the Applicant provided in its original tender document in satisfaction of the criterion outlined in 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 on grounds that the said two projects did not involve the component of supporting and maintaining of transmission equipment and other associated equipment as required (Active). The Evaluation Committee did this in total disregard of the findings of the Board as contained in the Board's decision dated 31st May 2021 in Review No. 69 of 2021 in which the Board held that passive and active requirements of the equipment was not set out as a requirement in 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. Accordingly, such a ground is null and void as the same is contrary to the findings of the Board in Decision dated 31st May 2021 in Review No.69 of 2021.

Proportional adjustment of a score of 7.5 out of 10 marks per project in the circumstances of out of 15 marks per project would be a score of 11.25 out of 15 marks per project and a total score of 22.5 out of 30 marks for the two projects combined. Once again, the Evaluation Committee did not proportionally adjust the scoring of the Applicant's tender as held in the findings of the Board's decision dated 31st May 2021 in Review No.69 of 2021. Accordingly, the total score of 15 out of 30 marks for the two projects allocated to the Applicant's tender under 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 is null and void.

In the circumstances, the Board finds that if the 1st Respondent ensured the Applicant's tender is re-evaluated taking into consideration the Board's findings in Decision dated 31st May 2021 in Review No.69 of 2021, the Applicant would have attained a score of 22.5 out of 30 marks for two projects it provided under 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 and consequently, an aggregate score of 74.5% at the end of the Technical Evaluation stage to be eligible to proceed to the Financial Evaluation Stage.

Accordingly, the Board finds the Procuring Entity did not re-evaluated the Applicant's tender at the Technical Evaluation Stage in accordance with 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 taking into consideration the findings of the Board as contained in the Board's Decision dated 31st May 2021 in Review No. 69 of 2021.

The Board having found that if the Evaluation Committee re-evaluated the Applicant's tender at the Technical Evaluation stage taking into consideration the Board's findings in the Board's decision dated 31st May 2021 in Review No.69 of 2021, the Applicant's tender would be eligible to proceed to the Financial Evaluation stage, it is incumbent for the Board to make a determination of the orders to be issued in the circumstances.

The High Court in **Republic v Public Procurement Administrative Review Board & 2 Others Ex parte Numerical Machining Complex Ltd** held as follows regarding the exercise of the power of the Board under section 173 (c) of the Act: -

"...the provisions of section 173 (c) of the 2015 Act cannot be read in isolation to the other provisions of the Act and that the power to substitute the decision of the Procuring Entity cannot be unlimited. It must be exercised lawfully. That power can only be exercised

with respect to what the Procuring Entity was lawfully permitted to undertake both substantively and procedurally.

The Supreme Court of South Africa in **Gauteng Gambling Board v Silverstar Development Ltd and Others (80/2004) [2005] ZASCA 19 (29 March 2005)** addressed the meaning of section 8(1)(c)(ii) (aa) of the Promotion of Administrative Justice Act 3. of 2000 of South Africa which contains an almost similar discretionary power the Board has under Section 173(c) of the Act enumerated as follows: -

The Review Court may undertake any of the following-

'set aside the procurement decision and remit it for reconsideration or, in exceptional cases, substitute the procurement decision or correct a defect resulting from it.'

In that case, the Supreme Court of South Africa explained the term 'exceptional' as applied in the aforementioned legislation as follows: -

'Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the

constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.'

From the above authorities, the Board finds that the subject review before it is one of the exceptional circumstances where the duty imposed upon the Procuring Entity to determine the eligibility of the Applicant's tender to proceed to the Financial Evaluation need not be left upon it, since it is obvious that the Procuring Entity has failed to re-evaluate the Applicant's tender at the Technical Evaluation stage with respect to 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 taking into consideration the Board's findings in the Board's Decision of 31st May 2021 in Review No.69 of 2021. In the circumstances, the subject review is one where the Board should substitute its decision for that of the 1st Respondent and direct that the Applicant's tender proceeds for evaluation at the Financial Evaluation stage together with all other tenders that made it to the Financial Evaluation stage.

In totality, the Request for Review is merited and 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 1st Respondent's Letter 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 dated 11th June 2021 and addressed to the 2nd Respondent, be and is hereby cancelled and set aside.**
- 2. The 1st Respondent's Letters of Notification 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 dated 11th June 2021 and addressed to the Applicant and all other unsuccessful tenderers, be and are hereby cancelled and set aside.**
- 3. The 1st Respondent is hereby ordered to direct the Evaluation Committee to reinstate the Applicant's tender together with the tenders that made it to the Financial Evaluation Stage, at the Financial Evaluation Stage and conduct a re-evaluation at the Financial Evaluation Stage in accordance with Article 227(1), Section 80 (2) of the Act read together with the criteria set out in the Tender Document.**

4. Further to Order No. 3 above, the 1st Respondent 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.

5. 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 14th day of July 2021.

CHAIRPERSON

SECRETARY

PPARB

PPARB