REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 57/2021 OF 15th APRIL 2021

BETWEEN

SPECICOM TECHNOLOGIES LIMITED.....APPLICANT

AND

PRINCIPAL SECRETARY, MINISTRY OF ICT, INNOVATION & YOUTH AFFAIRS.....RESPONDENT

COPIER FORCE KENYA LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer of the Ministry of ICT, Innovation and Youth Affairs in relation to Tender No. MOICT/SDICT/204/2020-2021 for Framework Contracts for Supply and Delivery of Tablet Computer – Type 1, As and When Required, for Financial Years 2020/2021 and 2021/2022.

BOARD MEMBERS

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

IN ATTENDANCE

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

BACKGROUND TO THE DECISION

The Bidding Process

The Ministry of ICT, Innovation and Youth Affairs (hereinafter referred to as "the Procuring Entity") invited sealed tenders for Tender No. MOICT/SDICT/204/2020-2021 for Framework Contracts for Supply and Delivery of Tablet Computer – Type 1, As and When Required, for Financial Years 2020/2021 and 2021/2022 (hereinafter referred to as "the subject tender") through an advertisement published in MyGov Newspaper and the Procuring Entity's Website on 19th January 2021.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of five (5) bids by the bid submission deadline of 3rd February 2021. The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders' representatives and recorded as follows: -

S/No	Firm Name And Address	Bid Bond Company	Bid Bond Amount	Tender Amount	Remarks
1.	Com Twenty One limited	Family Bank	7,659.09	323,340.00	Flash Disk Attached
2.	Copier force Kenya Ltd	Rafiki Microfinance	50,000.00	316,796.00	Flash Disk Attached
3.	Specicom Technologies Limited	Consolidated Bank Of Kenya	6,000.00	240,900.00	Flash Disk Attached
4.	Shonitel Limited	Family Bank	100,000.00	300,892.61	Flash Disk Attached
5.	Computerways limited	Consolidated Bank Of Kenya limited	300,000.00	320,247.00	Flash Disk Attached

Evaluation of Bids

An Evaluation Committee appointed by the Procuring Entity's Principal Secretary evaluated bids in the following stages: -

i. Preliminary Evaluation;

ii. Technical Evaluation; and

iii. Financial Evaluation.

1. Preliminary Evaluation

This stage of evaluation involved examination of pre-qualification conditions set out on the Tender Document as follows:

S/N	Parameters/Requirements
1.	A copy of Certificate of Registration/ Incorporation
2.	A copy of CR12 (where applicable)
3.	A copy of valid Tax Compliance Certificate
4	A valid Trade License/Single Business Permit
5.	Confidential Business Questionnaire (duly filled, signed and stamped)
6.	Duly Filled and signed form of tender (with Bid validity-120 days).
7.	Price Schedule form fully filled and signed (enclosed in the financial proposal)
8.	The Tender Security shall be; Bid Security in the amount not less than 2 per cent of the tender price from a reputable bank or insurance company valid for an additional 30 days beyond the Tender validity period.
9.	Submit audited accounts for the last 2 years and bank statement for the last 6 months preceding tender opening date.
10.	Filled and Signed self-declaration Forms (SD1 and SD2)
11.	Warranty and Manufacturer's authorization: a) ***A certified copy of valid manufacturer's authorization covering all items the tenderer has tendered.*** b) ***A duly signed original statement by the manufacturer indicating that: -*** i. ***The Tenderer is authorized to offer and supply goods that are manufactured by the manufacturer*** ii. ***The Original Manufacturer's Authorization (MA) MUST be on Letter Head of the manufacturer, duly signed, stamped, (from the Manufacturer) and should be tender and item specific.***
12.	A sworn affidavit from an advocate of the High Court of Kenya stating that: a) The firm has not been debarred from participating in any public procurement by PPRA. b) No person related to the firm has any spouse or children working at MoICT c) The firm has not been engaged in any unethical, corrupt, collusive or fraudulent activities in public procurement matters. d) The firm has not been declared bankrupt, insolvent or under receivership. e) The firm is not guilty of any violation of fair employment law practices. f) Declaration that the firm will not engage in any corrupt or fraudulent practice.

At the end of Preliminary Evaluation, all the five (5) bidders were found responsive, thus proceeded to the Technical Evaluation stage.

2. Technical Evaluation

Technical Evaluation was carried out in the two stages outlined hereinbelow:

2.1. Mandatory Technical requirements.

Bidders were required to attach detailed specifications, drawings and catalogues of the equipment to be supplied. The following aspects were evaluated in addition: -

- Bidder's qualifications, experience and past performance on similar services;
- Proposed Delivery Timelines;
- Annual SLA Support during the Warranty period (After sales service plan)

2.2. Recommended Minimum Specifications (C-Compliant, NC-Non Compliant)

In addition to the parameters evaluated under Clause 2.1 above, the to the technical specifications provided in the Table on page 33 of the Tender Document were considered. These technical specifications included:

Tablet Computer Type 1		
	Feature	**Details**
1	Processor & Logic	Octa-core (2.5 GHz) CPU; 8- Core GPU
2	Memory	1TB internal storage; 6GB RAM
3	Type	WiFi + Cellular Tablet
4	Display Size	11 –inch, Liquid Retina Multitouch display with IPS technology
6	Resolution	2388-by-1668-pixel resolution
7	Camera	Wide: 12MP, ƒ/1.8 aperture; Ultra-Wide: 10MP, ƒ/2.4 aperture
8	Video Recording	4K video recording
9	Audio	Four speaker audio; Quality microphones for calls, video recording, and audio recording
11	Cellular and wireless	WI-FI 802.11ax; Bluetooth 5.0 technology; UMTS/HSPA/HSPA+/DC-HSDPA, GSM/EDGE, Gigabit-class LTE

Tablet Computer Type 1		
	Feature	**Details**
13	Sim Card	Nano Sim
14	Location	Built-in GPS/GNSS, Digital compass
15	Sensors	Face ID, LiDAR Scanner, Three-axis gyro, Accelerometer, Barometer, Ambient light sensor
16	Power and Battery	Built-in 28 Whr rechargeable lithium-polymer battery
17	Operating System	Latest IOS
18	Language Support	English
19	Warranty	One (1) Year warranty
20	Accessories	Leather sleeve
		Compatible Smart Keyboard
		USB-C Digital AV Multiport Adapter
		USB-C Power Adapter
		Digital Pencil (2nd Generation or later)
		USB-C Charge Cable (1 meter)
21	**Original detailed and highlighted brochures MUST be submitted**	

At the end of Technical Evaluation, three (3) bidders (Bidders F1, F2 and F5 were found responsive and eligible to proceed to the Financial Evaluation Stage.

3. Financial Evaluation

At this stage, the Evaluation Committee noted that page 31 of the Tender Document stated that bidders with an average turnover of less than Kshs. 5 Million would not to be considered for an award. The prices quoted by bidders was recorded as follows: -

Bidder No	Firm Name	Quoted Amount	Kshs 5 Million Turnover	Serial Attached	Rank
1	Com Twenty One limited	323,340.00	YES	F1	3
1.	Copier force Kenya Ltd	316,796.00	YES	F2	1
2.	Computerways limited	320,247.00	YES	F5	2

Recommendation

The Evaluation Committee recommended award of the subject tender to **M/s Copier Force Kenya Ltd** at a unit cost of Three Hundred and Sixteen

Thousand Seven Hundred and Ninety-Six Shillings Only **(Kshs 316,796.00)** having submitted the lowest evaluated tender price.

Professional Opinion

In a professional opinion dated 10th March 2021, the Procuring Entity's Head of Supply Chain Management Services, outlined the manner in which the subject procurement process was undertaken including evaluation of bids. He concurred with the Evaluation Committee's recommendation, thus advised the Accounting Officer to approve award of the subject tender to **M/s Copier Force Kenya Ltd** at a unit cost of Three Hundred and Sixteen Thousand Seven Hundred and Ninety-Six Shillings Only **(Kshs 316,796.00)** having submitted the lowest evaluated tender price. This professional opinion was approved on the same date of 10th March 2021.

Notification to Bidders

In letters dated 23rd March 2021, the Accounting Officer notified all bidders of the outcome of their respective bids.

THE REQUEST FOR REVIEW

M/s Specicom Technologies Limited lodged a Request for Review dated 15th April 2021 and filed on even date together with a Supporting Affidavit sworn on 15th April 2021 and filed on even date and a Further Affidavit sworn on 30th April 2021 and filed on 3rd May 2021, through the firm of Mwaniki Gachuba Advocates, seeking the following orders: -

a) ***An order annulling the technical evaluation of the Applicant's tender;***

b) ***An order annulling the award of Tender No. MOICT/SDICT/204/2020-2021 for Framework Contracts for Supply and Delivery of Tablet Computer – Type 1, As and When Required, for Financial Years 2020/2021 and 2021/2022 to M/s Copier Force Kenya Limited;***

c) ***An order annulling the notification of award dated 23rd March 2021;***

d) ***An order directing the Respondent to cause the re-admission and re-evaluation of the Applicant's tender in accordance with the law and the Tender Document; and***

e) ***An order awarding costs of the application.***

In response, the Respondent lodged a Replying Affidavit sworn on 23rd April 2021 and filed on 26th April 2021 through its Deputy Chief State Counsel, Mr. Christopher Maina while the Interested Party lodged a Notice of Preliminary Objection dated 15th April 2021 and filed on 30th April 2021 together with a Replying Affidavit sworn on 30th April 2021 and filed on even date through Kiyuki & Kayika Advocates.

Pursuant to the Board's Circular No. 2/2020 dated 24th 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. 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 Interested Party lodged Written Submissions on its Preliminary Objection, dated 30th April 2021 and filed on even date.

BOARD'S DECISION

After careful consideration of the parties' pleadings and written submissions, the documents and authorities in support thereof and confidential documents submitted to the Board pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") the Board finds that the following issues crystallize for determination: -

I. **Whether the Board has jurisdiction to entertain the Request for Review;**

Depending on the outcome of the above issue: -

II. **Whether the Procuring Entity fairly evaluated the Applicant's tender at the Technical Evaluation Stage on the following technical specifications outlined in Clause 5.2. Recommended Minimum Technical Specifications found under the Technical Evaluation Criteria of Section V. Technical Specifications at page 33 of the Tender Document:**

   a) **Resolution;**

   b) **Camera;**

   c) **Video Recording; and**

d) Sim Card.

III. Whether the Applicant's allegation that the Evaluation Committee members failed to evaluate the Applicant's bid at the Technical Evaluation Stage in an objective and independent manner, has been substantiated.

The Interested Party lodged a Notice of Preliminary Objection dated 30th April 2021 and filed on even date raising the following grounds: -

> **"1. The Request for Review has been filed contrary to the express provisions of section 167 (1) of the Public Procurement and Asset Disposal Act, 2015 and Regulation 203 (2) (c) of the Public Procurement and Asset Disposal Regulations, 2020.**
>
> **2. The Request for Review is fatally defective, misconceived, bad in law and an abuse of the Board process and it is only fair, just and proper that the Board strikes it.**
>
> **3. This Honourable Board lacks jurisdiction to hear and determine this request for review"**

In its Replying Affidavit, the Interested Party alleges that it received notification from the Respondent on 23rd March 2021. In the Interested Party's view, the Applicant equally received notification on the same date of 23rd March 2021. In its Written Submissions, the Interested Party cited the provisions of section 167 (1) of the Act and Regulation 203 (2) (c) of the Public Procurement

and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") to support its position that since notification was made to the Applicant on 23rd March 2021, 23 days have lapsed from that date up to 15th April 2021 when the Applicant filed its Request for Review. In the Interested Party's view, this period is clearly outside the mandatory period of 14 days provided in section 167 (1) of the Act for an aggrieved tenderer to file its Request for Review.

At paragraph 10 of its Replying Affidavit, the Respondent depones that the Applicant was notified of the outcome of its bid without stating the date when this notification was made. On the other hand, the Applicant deponed in its Supporting Affidavit that it received its letter of notification on 1st April 2021, protested against the outcome thereof, on 9th April 2021 through a letter addressed to the Procuring Entity.

It is a well settled principle that jurisdiction is everything. In the case of **Peter Gichuki King'ara v. Independent Electoral and Boundaries Commission & 2 others (2013) eKLR**, the Court expressed itself thus, on the question of jurisdiction:-

> ***"It is our considered view that passage or lapse of time does not and cannot confer jurisdiction; jurisdiction is a continuum, jurisdiction cannot lack today and by passage or lapse of time exist tomorrow. Jurisdiction is either present ab initio or absent forever."***

The jurisdiction of this Board flows from section 167 of the Act, which provides as follows: -

> ***(1) Subject to the provisions of this Part, <u>a candidate or a tenderer</u>, 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 <u>within fourteen days of notification of award</u> or <u>date of occurrence of the alleged breach at any stage of the procurement process, or disposal process</u> as in such manner as may be prescribed...

Regulation 203 (2) of Regulations 2020 further states that: -

"(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"

Section 167 (1) of the Act read together with Regulation 203 (2) (c) of Regulations 2020, provide that a request for review is filed 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.

Having considered parties' arguments, the Board notes that the letter of notification of unsuccessful bid dated 23rd March 2021 addressed to the Applicant 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 provide resolution, camera, video recording feature and Sim card.***
>
> ***Therefore, the tender was awarded to Copier Force Kenya Limited at a cost unit of Kshs 316,796.00.***
>
> ***Please arrange to collect your bid bond from postal Annex Building 2nd Floor. Thank you for showing interest in working with us."***

In a letter dated 9th April 2021 attached to the Request for Review, the Applicant stated thus:

> ***"We are writing in regard to the above referenced tender and your regret letter on the same dated 23rd March 2021 but***

emailed to us on 1st April 2021 and therefore that being the effective day of communication.

In the regret letter you have stated that we did not provide the resolution for the camera, video recording feature and sim card.

We would like to state clearly that we offered a technical brochure for iPad Pro 11 inch with all the features clearly shown and where there is need for highlighting we did so. The brochure clearly shows the features for this model and where there is more than one feature we have marked clearly what we are offering.

We are therefore requesting for a review of this award and it be awarded to us as the lowest evaluated bidder. We totally believe that the firm awarded was also offering the same model but the price difference between us and them is over Kshs. 75,000.00 which is not value for money for the client and for all of us as tax payers.

Therefore, treat this letter as our first step in appealing this award. If this award decision is not rescinded by the Ministry of ICT, we will therefore move to the Appeals Review Board"

Section 87 of the Act gives responsibility to the Respondent on notifying bidders of the outcome of their bids. This provisions states that: -

"(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity

shall notify in writing the person submitting the successful tender that his tender has been accepted

(2) .....;

(3) 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"

In effect, the Respondent being the person responsible for notifying bidders of the outcome of their bids, should provide evidence of the date letters of notification were dispatched to all bidders. The confidential documents submitted to the Board do not contain any documentation demonstrating the manner in which bidders were notified, neither did the Respondent attached any documents in its Replying Affidavit to that effect.

The Interested Party on the other hand, merely attached its letter of notification of award to its Replying Affidavit, without any evidence of the date it received its notification. Furthermore, the Interested Party is alleging it was notified on 23rd March 2021 and that the Applicant was notified on the same date, without any evidence to support this allegation.

In **Civil Appeal No. 53 Of 2021, Eunice Wayua Munyao V Mutilu Beatrice & 3 Others [2017] eKLR,** the court considered the burden of proof

as provided in the Evidence Act, Chapter 80 of the Laws of Kenya in the sections outlined hereinbefore as follows:

"Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya clearly captures these aspects and they provide as follows:-

107. Burden of proof

(1) whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

Further, the Supreme Court in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** held that:

"The person who makes an allegation <u>must lead evidence to prove the fact</u>. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, <u>the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden.</u> "The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."

In the instant case, the Interested Party is the party alleging the Applicant was notified on 23rd March 2021, thus bears the legal burden of proving that the Applicant was indeed notified of the outcome of its bid on 23rd March 2021. This legal burden has not been discharged throughout these proceedings because no evidence was provided by the Interested Party to support its allegation. Further, the Respondent, being the party that notifies bidders of the outcome of their bids was silent on this issue and did not provide any evidence of the date notification letters were dispatched to bidders.

The evidentiary burden of proof is a shifting one and is required as a response to an already discharged initial burden of proof. Having failed to discharge its burden of proof, this legal burden cannot shift to the Applicant. The Board is only required to determine the date when the Applicant was notified of the outcome of its bid, on a balance of probabilities.

The Applicant stated that it received its letter of notification on 1st April 2021; an assertion that was not controverted by any party to the Request for Review. On 9th April 2021, the Applicant addressed a letter to the Procuring Entity wherein the Applicant stated it received its letter of notification by email on 1st April 2021. Again, this assertion was not controverted by the Respondent who did not respond to the said letter or at least, the Respondent did not provide evidence of having responded to the Applicant's letter wherein it would have stated the date when the Applicant was notified, if it felt the Applicant's assertion was untrue. Even before this Board, the Respondent has not controverted the Applicant's assertion of having been notified on 1st April 2021.

In the absence of proof to the contrary and having noted the Applicant's assertion is uncontroverted, the Board finds that the Applicant was notified of the outcome of its bid on 1st April 2021.

Section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which deals with computation of time specified in written law states that: -

> ***"(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done"***

Section 57 (a) of the Interpretation and General Provisions Act provides that the day an event happens is <u>excluded</u> when computing the time taken for doing an act or thing. This means, 1st April 2021, being the date when the Applicant received its letter of notification is excluded from computation of time. If this date is considered, then the Applicant had up to 15th April 2021 to

file a Request for Review. The Applicant filed its Request for Review on 15th April 2021, thus the same is within the statutory period of 14 days specified in section 167 (1) of the Act.

Accordingly, the Board finds that it has jurisdiction to entertain the Applicant's Request for Review. The effect of this finding is that the Interested Party's Notice of Preliminary Objection dated 30th April 2021 fails.

The second issue for determination relates to evaluation of the Applicant's bid at the Technical Evaluation Stage. Evaluation of bids at the Technical Evaluation Stage was based on a **"YES/NO"** criteria. According to the introductory paragraph on page 31 of the Tender Document, bidders were informed that:

> ***"The evaluation in this stage shall adopt YES/NO approach to evaluate on whether the bidder is responsive in all the technical aspects as per the specifications given. Bidders are required to attach detailed specifications, drawings and catalogues of the equipment to be supplied.***
>
> ***The following aspects will be evaluated in addition to the technical specifications (as per the table below);***
>
> ***(a) Bidder's qualifications, experience and past performance on similar services***
>
> ***(b) Proposed Delivery Timelines***
>
> ***(c) Annual SLA Support during Warranty period (After sales service plan)"***

On the same page 31 of the Tender Document, an explanation of the manner in which the three (3) parameters listed hereinbefore would be evaluated is

given. Having interrogated the Tender Document, the Board notes that reference to the **"table below"** on page 31 of the Tender Document, relates to a table on page 33 of the Tender Document under the title **"Particulars-Specifications, Recommended Minimum Specifications"**. This table has the following details: -

Tablet Computer Type 1		
	Feature	**Details**
1	Processor & Logic	Octa-core (2.5 GHz) CPU; 8- Core GPU
2	Memory	1TB internal storage; 6GB RAM
3	Type	WiFi + Cellular Tablet
4	Display Size	11 –inch, Liquid Retina Multitouch display with IPS technology
6	Resolution	2388-by-1668-pixel resolution
7	Camera	Wide: 12MP, ƒ/1.8 aperture; Ultra-Wide: 10MP, ƒ/2.4 aperture
8	Video Recording	4K video recording
9	Audio	Four speaker audio; Quality microphones for calls, video recording, and audio recording
11	Cellular and wireless	WI-FI 802.11ax; Bluetooth 5.0 technology; UMTS/HSPA/HSPA+/DC-HSDPA, GSM/EDGE, Gigabit-class LTE
13	Sim Card	Nano Sim
14	Location	Built-in GPS/GNSS, Digital compass
15	Sensors	Face ID, LiDAR Scanner, Three-axis gyro, Accelerometer, Barometer, Ambient light sensor
16	Power and Battery	Built-in 28 Whr rechargeable lithium-polymer battery
17	Operating System	Latest IOS
18	Language Support	English
19	Warranty	One (1) Year warranty
20	Accessories	Leather sleeve
		Compatible Smart Keyboard
		USB-C Digital AV Multiport Adapter
		USB-C Power Adapter
		Digital Pencil (2nd Generation or later)
		USB-C Charge Cable (1 meter)
	Original detailed and highlighted brochures MUST be submitted	

According to the letter of notification dated 23rd March 2021, the Applicant was informed that it did not provide: **"resolution, camera, video recording feature and sim card."**

The Board studied the Applicant's original bid to ascertain the manner in which the Applicant responded to this criterion and we note that at page 191 of its original bid, the Applicant duly completed the Table on page 33 of the Tender Document whilst providing an additional column summarizing the technical specifications of the **"iPad Pro 11-inch (2nd Generation), 1TB"** Tablet it would be supplying to the Procuring Entity.

Regarding the specific areas under which the Applicant was found non-responsive, the Board notes that: -

- **Resolution**
  - ✓ At page 193 of its original bid, the Applicant indicated under display, that the **"iPad Pro 11-inch (2nd Generation), 1TB"** Tablet would have **2388-by-1688-pixel resolution at 264 pixels per inch (ppi).**
- **Camera**
  - ✓ At page 194 of its original bid, the Applicant indicated under camera features that the **"iPad Pro 11-inch (2nd Generation), 1TB"** Tablet would have **Wide: 12MP, ƒ/1.8 aperture; Ultra Wide: 10MP, ƒ/2.4 aperture, and 125 field of view**
- **Video Recording**
  - ✓ At page 194 of its original bid, the Applicant indicated under Video Recording features that the **"iPad Pro 11-inch (2nd**

Generation), 1TB" Tablet would have **4K video recording at 24 fps, 30fps, or 60fps (Wide); 60fps (Ultra Wide)**

- **SIM CARD**
  - ✓ At page 195 of its original bid, the Applicant indicated under SIM CARD that the **"iPad Pro 11-inch (2nd Generation) 1TB" Tablet** would have **Nano-Sim (supports Apple SIM[6]) eSIM[6]**

Having compared the features provided by the Applicant for the **"iPad Pro 11-inch (2nd Generation)** Tablet, to the technical specifications provided in the table outlined hereinbefore, the Board finds that the Applicant satisfied the said technical specifications. It was therefore untrue for the Procuring Entity to state in the Applicant's notification letter of 23rd March 2021 that the Applicant did not provide **"resolution, camera, video recording feature and sim card"** for the **"iPad Pro 11-inch (2nd Generation) 1TB"** Tablet to be supplied to the Procuring Entity.

The Board observes that at paragraphs 5 to 9 of his Replying Affidavit, the Respondent deponed that one of the conditions of the tender required bidders to submit a highlighted brochure to indicate that the devices offered by the bidder met the minimum specifications set out in the tender document. According to the Respondent, the Applicant only highlighted some of the specifications required and missed out on some critical attributes of the devices that were required in the Tender Document. Further, the Respondents allege that the Evaluation Committee was unable to discern whether the devices proposed by the Applicant conformed to the technical specifications in the Tender Document.

On its part, the Interested Party deponed at paragraph 5 of its Replying Affidavit that the specifications relating to resolution, camera, video recording and sim card formed part of the recommended minimum technical specifications as provided for under paragraph 5.2 of the Tender Document. In the Interested Party's view, the Applicant did not provide the same.

In response to these submissions, the Applicant deponed at paragraph 10 of its Further Affidavit that it has now emerged the Applicant's bid was found non-responsive for submitting a partially highlighted brochure. In the Applicant's view, the Evaluation Committee extolled form over substance because they concentrated on highlighting as opposed to the technical specifications provided by the Applicant.

The Cambridge English Dictionary, 7th Edition, describes the word "highlight" as:

"to attract attention to or emphasize something important"

This therefore means, the purpose of highlighting is to draw attention to some technical specifications of the Tablet being supplied and in instances where there are several features, one would highlight to show the importance features, or the features that stand out.

Having considered the rival arguments exhibited by the parties to the Request for Review, the Board observes that the Applicant provided the minimum technical specifications regarding **"resolution, camera, video recording feature and sim card"** for the **"iPad Pro 11-inch (2nd Generation) 1TB"** Tablet to be supplied to the Procuring Entity as already established hereinbefore. On further interrogation of the contents of the Applicant's

original bid, the Board did not find any other model of tablet to be supplied by the Applicant. The **"iPad Pro 11-inch (2nd Generation) 1TB"** Tablet is the only tablet the Applicant proposed to supply to the Procuring Entity.

Further, at pages 193 to 196 of its original bid, the Applicant provided a photograph of the **"iPad Pro 11-inch (2nd Generation), 1TB"** Tablet, whilst highlighting some technical specifications of the said tablet. For example, regarding capacity of the **"iPad Pro 11-inch (2nd Generation), 1TB"** Tablet, the Applicant's bid at page 193 cited; (a) 128GB, 6GB RAM, (b) 256 GB, 6GB RAM, (c) 512 GB, 6 GB RAM and (d) **ITB, 6GB RAM**. Given there are several features on the Random Access Memory of an **"iPad Pro 11-inch (2nd Generation), 1TB"** Tablet, the Applicant highlighted the feature of **"ITB, 6GB RAM"** in yellow.

In instances where the Applicant did not highlight some features, one can evidently see that for each technical specification referred to in the Tender Document, the Applicant provided a list of the technical specifications required in the Tender Document against what the **"iPad Pro 11-inch (2nd Generation), 1TB"** Tablet contains.

This in the Board's view, demonstrates the Applicant complied "in substance" by providing the technical specifications required in the Tender Document, but did not give so much regard to the "form". Instances where highlighting was not done by the Applicant does not mean the technical specifications were not provided because they are clearly stated in the Applicant's bid. Furthermore, the Board has compared the table at page 191 of the Applicant's original bid to the technical specifications on page 193 to 196 of its original bid and notes

that the Applicant already outlined the technical specifications of the **"iPad Pro 11-inch (2nd Generation), 1TB"** Tablet against what was required in the Tender Document, which could have been used by the Evaluation Committee as a guide when checking the technical specifications at pages 193 to 196 of the Applicant's bid. The said table appears as follows:

Tablet Computer Type 1			
	Feature	**Details**	**Specicom Offer (iPad Pro 11-inch (2nd Generation)**
1	Processor & Logic	Octa-core (2.5 GHz) CPU; 8- Core GPU	Octa-core (2.5 GHz) CPU; 8-Core GPU
2	Memory	1TB internal storage; 6GB RAM	1TB internal storage; 6GB RAM
3	Type	WiFi + Cellular Tablet	WiFi + Cellular Tablet
4	Display Size	11 –inch, Liquid Retina Multitouch display with IPS technology	11 –inch, Liquid Retina Multitouch display with IPS technology
6	**Resolution**	**2388-by-1668-pixel resolution**	**2388-by-1668-pixel resolution**
7	**Camera**	**Wide: 12MP, ƒ/1.8 aperture; Ultra-Wide: 10MP, ƒ/2.4 aperture**	**Wide: 12MP, ƒ/1.8 aperture; Ultra-Wide: 10MP, ƒ/2.4 aperture**
8	**Video Recording**	**4K video recording**	**4K video recording**
9	Audio	Four speaker audio; Quality microphones for calls, video recording, and audio recording	Four speaker audio; Quality microphones for calls, video recording, and audio recording
11	Cellular and wireless	WI-FI 802.11ax; Bluetooth 5.0 technology; UMTS/HSPA/HSPA+/DC-HSDPA, GSM/EDGE, Gigabit-class LTE	WI-FI 802.11ax; Bluetooth 5.0 technology; UMTS/HSPA/HSPA+/DC-HSDPA, GSM/EDGE, Gigabit-class LTE
13	**Sim Card**	**Nano Sim**	**Nano Sim**
14	Location	Built-in GPS/GNSS, Digital compass	Built-in GPS/GNSS, Digital compass
15	Sensors	Face ID, LiDAR Scanner, Three-axis gyro, Accelerometer, Barometer, Ambient light sensor	Face ID, LiDAR Scanner, Three-axis gyro, Accelerometer, Barometer, Ambient light sensor
16	Power and Battery	Built-in 28 Whr rechargeable lithium-polymer battery	Built-in 28 Whr rechargeable lithium-polymer battery
17	Operating System	Latest IOS	Latest IOS
18	Language Support	English	English
19	Warranty	One (1) Year warranty	One (1) Year warranty
20	Accessories	Leather sleeve	Leather sleeve
		Compatible Smart Keyboard	Compatible Smart Keyboard
		USB-C Digital AV Multiport Adapter	USB-C Digital AV Multiport Adapter
		USB-C Power Adapter	USB-C Power Adapter

Tablet Computer Type 1			
	Feature	**Details**	**Specicom Offer (iPad Pro 11-inch (2nd Generation)**
		Digital Pencil (2nd Generation or later)	Digital Pencil (2nd Generation or later)
		USB-C Charge Cable (1 meter)	USB-C Charge Cable (1 meter)

Having found the Applicant provided the technical specifications of the **"iPad Pro 11-inch (2nd Generation), 1TB"** Tablet to be supplied to the Procuring Entity, the Board finds that the Procuring Entity unfairly evaluated the Applicant's bid in regard to the technical specifications on **"resolution, camera, video recording and sim card"** outlined in Clause 5.2. Recommended Minimum Technical Specifications found under the Technical Evaluation Criteria of Section V. Technical Specifications.

On the third issue for determination, the Applicant alleged at paragraph 10 of its Supporting Affidavit that the Evaluation Committee members did not objectively and independently evaluate the Applicant's tender hence the reason why the missed the Applicant's technical specifications at page 193, 194 and 195 of the Applicant's original bid, thus failed to moderate their independent findings. In response to this allegation, the Respondent deponed at paragraph 13 of his Replying Affidavit that the Evaluation Committee was singularly minded in their evaluation of the Applicant's bid and that the Applicant's allegation lacks basis.

In addressing this issue, the Board observes that pursuant to section 67 (1) (c) of the Act, **information relating to the evaluation, comparison or clarification of tenders, proposals or quotations** forms part of the confidential documents in a procuring entity's custody and the same should not disclosed by a procuring entity, employee or agent of the procuring entity, member of a board, commission or committee of the procuring entity.

However, pursuant to 67 (3) of the Act, disclosure of confidential information can be done if:

> ***(a) the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;***
>
> ***(b) the disclosure is for the purpose of law enforcement;***
>
> ***(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;***
>
> ***(d) the disclosure is pursuant to a court order; or***
>
> ***(e) the disclosure is made to the Authority [Public Procurement Regulatory Authority] or Review Board [Public Procurement Administrative Review Board***
>
> **[Emphasis by the Board]**

The Applicant made an assumption that the Evaluation Committee did not carry out independent evaluation of its bid by assuming that the absence of an independent evaluation is the reason why the Evaluation Committee "missed the Applicant's technical specifications at page 193, 194 and 195 of the Applicant's original bid". The Board observes that this assertion was not backed by any evidence. Even if the Applicant was certain that no independent evaluation was undertaken, then the Applicant would be in breach of section 67 (1) (c) of the Act because **information relating to the evaluation, comparison or clarification of tenders, proposals or quotations** is confidential in nature and the same is not disclosed to bidders.

Pursuant to section 67 (4) and 68 (2) (d) (iii) of the Act, an applicant seeking a review can only be furnished with a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used. The Applicant in the instant case did not apply for the same before this Board. Even if it were to make such an application, the same is only made after filing a request for review. In essence, the Applicant has not substantiated its allegation that no independent evaluation was undertaken in the subject tender.

In the circumstances, the Board finds that the Applicant's allegation that the Evaluation Committee members failed to evaluate the Applicant's bid at the Technical Evaluation Stage in an objective and independent manner, has not been substantiated.

The Applicant alleged that award of the subject tender to the Interested Party at Kshs. 316,786.00 was not fair, competitive and cost-effective the award of the subject tender. The Applicant states that award of the subject tender to the Interested Party was Kshs. 75,896.00 much higher than the Applicant's quoted price of Kshs. 240,900.00.

It is worth noting that award of a tender in an open tender where the Request for Proposal method of tendering has not been used, is made to the lowest evaluated tenderer and not the bidder with the lowest tender amount at tender opening. Bidders are first subjected to eligibility and mandatory requirements evaluation including technical specifications, before a consideration of price is made at the Financial Evaluation Stage. In essence, responsiveness to

eligibility and mandatory requirements evaluation including technical specifications serves as the first hurdle that bidders have to overcome before their bids are evaluated based on price so as to arrive at the lowest evaluated tender price. There is therefore no guarantee to bidders who quoted the lowest price at tender opening that they would automatically be awarded a tender, even though they have not reached the Financial Evaluation Stage.

The principle of cost-effectiveness under Article 227 (1) of the Constitution is not the only principle that guides public procurement procedures because the said provision requires state organs and public entities to promote competition and fairness in a procurement process. The Applicant's bid can only be subjected to Financial Evaluation after it qualifies for evaluation at that stage at the end of Technical Evaluation where it could compete with other bidders for award of the subject tender.

Having found the Applicant's bid was unfairly evaluated at the Technical Evaluation Stage, the Board finds that 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/204/2020-2021 for Framework Contracts for Supply and Delivery of Tablet Computer – Type 1, As and When**

Required, for Financial Years 2020/2021 and 2021/2022 dated 23rd March 2021 addressed to the Applicant herein 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 an Award of Tender No. MOICT/SDICT/204/2020-2021 for Framework Contracts for Supply and Delivery of Tablet Computer – Type 1, As and When Required, for Financial Years 2020/2021 and 2021/2022 dated 23rd March 2021 addressed to the Interested Party, 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 re-instate the Applicant's tender together with all other tenders that qualified for Technical Evaluation, at the Technical Evaluation Stage and conduct a re-evaluation at the Technical Evaluation stage in accordance with Clause 5.2. Recommended Minimum Technical Specifications found under the Technical Evaluation Criteria of Section V. Technical Specifications found at page 33 of the Tender Document in respect of the following specific areas only:

   (a) Resolution;

   (b) Camera;

   (c) Video Recording; and

   (d) Sim Card.

4. **Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to complete the subject procurement proceedings including the making of an award and issuance of letters of notification to all bidders in accordance with section 87 of the Act and Regulation 82 of Regulations 2020 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 concluded, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 5th day of May 2021

.....	.....
CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**