

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 69/2021 OF 11<sup>th</sup> MAY 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 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

<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.

## **REQUEST FOR REVIEW NO. 47 OF 2021**

M/s Geonet Technologies Limited lodged a Request for Review dated 6<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.***

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 26<sup>th</sup> 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 and 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 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.**

## **RE-EVALUATION OF BIDS**

### **Technical Evaluation**

According to the Evaluation Report executed on 3<sup>rd</sup> May 2021, the Evaluation Committee re-instated the bid of M/s Adrian Kenya Ltd, M/s Com Twenty One Limited, M/s Broad Band Comm Ltd and M/s Geonet Technologies Limited at the Technical Evaluation Stage. The Evaluation Committee

conducted a re-evaluation of the said bids at the Technical Evaluation Stage in the following criteria:

**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.**

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

TOTAL SCORE (100)	F1 M/s Adrian Kenya Ltd	F3 M/s Com Twenty One Limited	F5 M/s Broad Band Comm Ltd	F6 M/s Geonet Technologies Limited
<b>% Score (70)</b>	<b>68.5</b>	<b>72</b>	<b>60.5</b>	<b>53</b>

From the foregoing, it is only Bidder No. F3, M/s Com Twenty One Limited 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 price of M/s Com Twenty One Limited 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>

### 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 executed on 4<sup>th</sup> May 2021, 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. He thus advised the Accounting Officer of the Procuring Entity to award 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. The Accounting Officer approved the said professional opinion on 5<sup>th</sup> May 2021.

### **Notification to Bidders**

In letters dated 5<sup>th</sup> May 2021, the Accounting Officer notified bidders of the outcome of their respective bids.

### **REQUEST FOR REVIEW NO. 69 OF 2021**

M/s Geonet Technologies Limited (hereinafter referred to as “the Applicant”) lodged another Request for Review dated 11<sup>th</sup> May 2021 and filed on even date together with a Statement in Support of the Request for Review sworn on 11<sup>th</sup> May 2021 and filed on even date, a Verifying Affidavit sworn on 11<sup>th</sup> May 2021 and filed on even date and a Reply to the 1<sup>st</sup> Respondent’s Affidavit in Response to the Request for Review, sworn on 28<sup>th</sup> May 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 1<sup>st</sup> Respondent’s decision contained in its letter dated 5<sup>th</sup> May 2021 and related notifications to other tenderers;***
- ii. An order annulling the subject procurement proceedings undertaken by the 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> Respondent to pay costs of the Review; and***

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

In response, the 1<sup>st</sup> Respondent lodged an Affidavit in Response to the Request for Review, sworn on 24<sup>th</sup> May 2021 and filed on even date through Mr. Christopher Maina, Deputy Chief State Counsel. The 2<sup>nd</sup> Respondent did not file a Response to the Request for Review despite being notified of the Request for Review through a letter dated 11<sup>th</sup> May 2021 sent to the 2<sup>nd</sup> Respondent via email on 13<sup>th</sup> May 2021.

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020, detailing an administrative and contingency 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. However, none of the parties filed written submissions.

### **BOARD'S DECISION**

The Board has considered each of the parties' pleadings and confidential documents submitted by the 1<sup>st</sup> Respondent pursuant to section 67 (3) (e) of the Act and finds that the following issue calls for determination: -

**Whether the Procuring Entity 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 read together with Section 80 (2) and (3) (a) of the Act and Article 227 (1) of the Constitution in light of the orders of the Board issued on 26<sup>th</sup> 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 and Innovation & Another.**

The Board now proceeds to address the above issue as follows:

At paragraph 16 of its Request for Review, the Applicant avers that it is aggrieved by the 1<sup>st</sup> Respondent's failure to take into account the Applicant's qualifications and past performance on similar projects duly provided in the Applicant's original bid. According to the Applicant, the 1<sup>st</sup> Respondent acted unfairly and unlawfully in awarding the Applicant a score of zero in respect of **"contractors qualifications and past performance on similar projects"** despite having awarded the Applicant a score of 7.5 marks for each project out of a score of 10 during the first evaluation process. In the Applicant's view, the initial score of 7.5 marks for each project would have ensured the Applicant achieves an overall score of 75% and proceed to the Financial Evaluation Stage. The Applicant further contended that Clause 2.22.1 of the Appendix to Instructions to Tenderers of the Tender Document provided that the criterion of Contractors qualifications, experience and past performance on similar projects carrying a full score of 30 marks would be evaluated against a score of 10 marks per project and not 15 marks per project.

In response, the 1<sup>st</sup> Respondent depones at paragraph 9 of his Affidavit in Response to the Request for Review that the Procuring Entity carried out a re-evaluation at the Technical Evaluation Stage on the specific areas directed by the Board in Review No. 47 of 2021 that is, Clause 2.22.1 (1) of the Appendix to Instructions to Tenderers of the Tender Document on NOFBI Maintenance Plans and Methodology (12 marks) and Clause 2.22.1 (3) of the Appendix to Instructions to Tenderers of the Tender Document which deals with Contractors qualifications, experience and past performance on similar projects. While outlining the manner in which Technical Evaluation was

conducted on the Applicant, the 1<sup>st</sup> Respondent deponed that the two projects provided by the Applicant for contractors' qualification, experience and past performance on similar projects did not include the component of supporting and maintaining of transmission equipment as required. According to paragraph 15 (d) of the 1<sup>st</sup> Respondent's Response, the criteria under Clause 2.22.1 (1) (ii) of the Appendix to Instructions to Tenderers of the Tender Document carried full marks or none at all if one of the components were missing. In the 1<sup>st</sup> Respondent's view, the criterion of Contractors qualifications, experience and past performance on similar projects required bidders to demonstrate BOTH active and passive devices components. The Applicant's projects lacked the active devices components hence the reason why it was awarded a score of zero. While concluding his submission, the 1<sup>st</sup> Respondent deponed that both active and passive components are critical to the subject tender to the effect that the absence of any of the two components would automatically render maintenance of the tender impractical. The 1<sup>st</sup> Respondent cited page 35 of the decision of the Board in Review No. 47 of 2021 to support his view that the criterion of Contractors qualifications, experience and past performance on similar projects was evaluated against 15 marks for each project as opposed to 10 marks initially allocated in the Tender Document.

Having considered parties' rival cases, the Board studied the confidential documents submitted to it to establish whether the Accounting Officer directed 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 that regard, the Board notes that the Evaluation Report executed on 3<sup>rd</sup> May 2021 shows that the Evaluation Committee re-instated the bid of M/s Adrian Kenya Ltd, M/s Broad Band Comm Ltd, the Applicant and the 2<sup>nd</sup> Respondent at the Technical Evaluation Stage. The Evaluation Committee conducted a re-evaluation of the said bids at the Technical Evaluation Stage in the following criteria:

- **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.**

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

TOTAL SCORE (100)	F1 M/s Adrian Kenya Ltd	F3 M/s Com Twenty One Limited	F5 M/s Broad Band Comm Ltd	F6 M/s Geonet Technologies Limited
<b>% Score (70)</b>	<b>68.5</b>	<b>72</b>	<b>60.5</b>	<b>53</b>

From the foregoing, it is only the 2<sup>nd</sup> 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. At the end of Financial Evaluation, 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. In a professional opinion executed on 4<sup>th</sup> May 2021, 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. He thus advised the 1<sup>st</sup> Respondent to award the subject tender to the 2<sup>nd</sup> Respondent being the lowest evaluated tenderer at its tender price of Kshs. 203,280,000.00. Subsequently thereafter, the 1<sup>st</sup> Respondent notified bidders of the outcome of their respective bids in letters dated 5<sup>th</sup> May 2021.

The Board notes that the issue in contention relates to re-evaluation of the Applicant's bid at the Technical Evaluation stage. Specifically, the Applicant challenged the manner in which the 1<sup>st</sup> Respondent's Evaluation Committee

evaluated the Applicant's bid 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	<p><b>Contractors qualifications, experience and past performance on similar projects: (Each project 10 Marks)</b></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>	30
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Before addressing our minds on the manner in which the Applicant's bid was re-evaluated on the criterion outlined hereinbefore, the Board would like to outline the salient findings in Review No. 47 of 2021 in relation to the criterion under consideration. At pages 32 to 35 of the decision in Review No. 47 of 2021, the Board held as follows:

- *Page 33, the Board studied the Evaluation Report dated 17<sup>th</sup> March 2021 and observed that whereas bidders were instructed to provided 2 projects which would carry a total of 30 marks, the Applicant was awarded scores of "7.5,0,7.5 and 0";*
- *Page 34, the Board noted that it was not clear how the scores of 7.5,0,7.5 and 0" were awarded;*

- *Page 34, the Board observed that 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;*
- *Page 35, the Board found that the Procuring Entity did not issue any addendum before the tender submission deadline of 17th 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;*
- *Page 35, the Board found that the Procuring Entity is bound by the Tender Document, thus cannot request bidders to provide 3 projects after bidders relied on the requirement of providing only 2 projects;*
- *Page 35, the Board found that the award of the marks under the criterion of **Clause 2.22.1 (3) of the Appendix to Instructions to Tenderers of the Tender Document** 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; and*
- *Page 35, having noted the 1<sup>st</sup> Respondent did not provide justifiable reasons on the manner in which scores were awarded on this criterion, the Board found that the Applicant's bid was unfairly evaluated.*

It is worth pointing out that the Applicant contended that Clause 2.22.1 of the Appendix to Instructions to Tenderers of the Tender Document which carries a total score of 30 marks would be evaluated against a score of 10 marks per project and not 15 marks per project. The Board was not furnished with any information either from the Applicant or the Respondents in relation

to Judicial Review proceedings at the High Court challenging the decision of the Board in Review No. 47 of 2021. Having failed to challenge the Board's decision in Review No. 47 of 2021, the same is final and binding to all parties to Review No. 47 of 2021 pursuant to section 175 (1) of the Act and thus, any action by a party to Review No. 47 of 2021 contrary to the decision of the Board in Review No. 47 of 2021 will be in disobedience of the Board's decision, in breach of the Act and such action shall be null and void in accordance with section 175 (6) of the Act. As a result, the Applicant is estopped from alleging that the criteria under Clause 2.22.1 of the Appendix to Instructions to Tenderers of the Tender Document should be evaluated against a score of 10 marks per project and not 15 marks per project. This is because the Applicant never challenged the Board's decision where the Board found that each project should be evaluated against a score of 15 marks because bidders were required to provide 2 projects carrying a total score of 30 marks.

It now behooves upon this Board to determine the manner in which the Applicant's bid was re-evaluated at the Technical Evaluation stage specifically in relation to the findings in Review No. 47 of 2021 that the Evaluation Committee ought to have taken into consideration when evaluating the criteria under Clause 2.22.1 of the Appendix to Instructions to Tenderers of the Tender Document.

According to the Evaluation Report executed on 3<sup>rd</sup> May 2021, the Applicant achieved an overall technical score of 52% against the minimum technical score of 70% required to proceed to the Financial Evaluation stage. 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 provide the following in its original bid in response to the criterion under consideration:

**"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”***

During the initial evaluation, the Evaluation Committee awarded the Applicant a score of “7.5, 0, 7.5, 0” under this criterion. The Board noted in Review No. 47 of 2021 that it was not clear how the Evaluation Committee awarded the scores of “7.5, 0, 7.5, 0”. This is because, there were two components under this criterion yet, the scores as indicated appeared as “7.5, 0, 7.5, 0”. That notwithstanding, the Applicant’s overall score for this criterion was 15 marks.

Further, the Board found that evaluating this criterion against a score of 10 marks for each project was not objective because if bidders were 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 studied the criterion under consideration, the Board notes that bidders were instructed to provide two similar projects in the last 10 years

from the closing date of the subject tender. By similarity, the Procuring Entity was referring to complexity and scope of the projects. Further, the projects should involve supporting and maintenance of an Optic Fiber Cable Network, Transmission Equipment and other Associated Equipment. To demonstrate the projects, bidders were instructed to provide completion certificates, LPOs or contracts.

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. 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.

Section 80 (2) of the Act provides that **"the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents"**. 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.

At this point, the Board would like to address its mind on the importance of allocating scores at the Technical Evaluation Stage. Section 80 (3) (a) of the Act provides as follows:

***"Section 80 (1)....."***

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

**(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”***

Regulation 68 (4) of the Public Procurement and Asset Disposal Regulations 2020 further states that:

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

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

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

**(4) *Pursuant to section 70 (4) of the Act the accounting officer of a procuring entity shall prepare the tender document clearly indicating the technical and financial evaluation criteria to be applied which shall be quantifiable, measurable and objective in line with the provisions of section 80 (3) of the Act in consultation with the user department and other relevant departments”***

Having considered the foregoing provisions, the Board observes that the main purpose of technical evaluation is to assess the technical capacity of bidders to execute a project. Technical Evaluation of bids ought to be

objective, measurable and quantifiable. In a procurement process where a procuring entity applies the scoring method, it is incumbent upon an evaluation committee to assess the technical capacity of bidders by awarding marks to bidders in areas where they have provided the required information. This therefore means, if a bidder provides some information as opposed to all the required information, such a bidder should be awarded some marks, if not the full marks, as opposed to a score of zero.

The Tender Document stated that the criterion under consideration carried a total score of 30 marks. The Board found that if bidders were 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.

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. For example, a bidder who has provided documentation regarding two projects for supporting and maintenance of an Optic Fiber Cable Network, transmission equipment and other associated equipment, should earn some marks for each of the projects. If the technical capacity demonstrated by a bidder does not earn him a full score of 15 marks per project, then the bidder ought to be awarded some marks for the extent of his technical capacity. This, in the Board's view gives bidders the opportunity

to assess how they can strengthen their technical capacity at a future time when the same services are re-advertised by a procuring entity so as to achieve a better score during Technical Evaluation. Furthermore, bidders would be better placed to make a decision whether or not to participate in other tenders advertised by a procuring entity knowing their strengths or weaknesses in relation to their technical capacity to execute a tender.

The instant case reminds this Board of a student who attends school, is informed of the requirements of study, the scores to be awarded during examinations and the likelihood of being rewarded for their hard work or for their level of competence in school. The student prepares for their examination the way bidders prepare their bids to be evaluated by a procuring entity's evaluation committee. During the student's examination, he or she is well aware of the scores to be achieved so as to succeed in that examination just like bidders who are informed of the scores that would apply during Technical Evaluation. In due time, the student is informed of the outcome of their examination, just like bidders who are notified of the outcome of their bids. The student, just like bidders, learns of their level of competence (in this case, a bidder's technical capacity) thus giving them an opportunity to assess their strengths or weaknesses so as to identify areas of improvement for future examination (in this case, to assess their strengths or weaknesses so as to identify areas of improvement for future procurement processes).

Article 227 (1) of the Constitution requires State organs and other public entities to contracts for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The principle

of fairness applies during evaluation such that bidders are treated fairly. Therefore, a bidder should not be denied marks if they have demonstrated their technical capacity. 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.

It is the Board's considered view that the Applicant ought to have earned some marks under this criterion noting further that the Applicant was initially awarded a score of 15 marks out of the total score of 30 marks. In effect, the Evaluation Committee ought to have ensured there is a proportional adjustment of the scores so that the Applicant is made aware of the manner in which scores were distributed amongst the two projects required under Clause 2.22.1 (3) of the Appendix to Instructions to Tenderers of the Tender Document. 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 communicated to bidders.

Accordingly, the Board finds that the Procuring Entity failed to evaluate 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 read together with Section 80 (2) and (3) (a) of the Act and Article 227 (1) of the Constitution.

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 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 5<sup>th</sup> 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 5<sup>th</sup> May 2021 and addressed to the 2<sup>nd</sup> 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.**

**Dated at Nairobi this 31<sup>st</sup> day of May 2021**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**