

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 105/2021 OF 23RD JULY 2021
BETWEEN

CONANN COMMUNICATIONS LIMITED

(JV LEAD PARTNER) And on behalf

of LOKHART SIPE LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

COMMUNICATIONS AUTHORITY

OF KENYA RESPONDENT

Review against the decision of the Communications Authority of Kenya in relation to Tender No. CA/PROC/OT/49/2021-2021 For the Supply, Delivery, Installation and Maintenance of Broadcast Loggers

BOARD MEMBERS

- | | |
|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Paul Jilani | -Member |
| 4. Mr. Jackson Awele | -Member |

3. Dr. Joseph Gitari -Member

5. Ms. Isabel Juma -Member

IN ATTENDANCE

1. Mr. Phillip Okumu -Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

Communications Authority of Kenya (hereinafter referred to as “the Procuring Entity”) advertised for an open tender, Tender No. CA/PROC/OT/49/2021-2021 For the Supply, Delivery, Installation and Maintenance of Broadcast Loggers (hereinafter referred to as the “subject tender”), through an advertisement notice in MyGov Publication Newspaper, the Public Procurement Information Portal (PPIP) (<http://www.tenders.go.ke>) and the Procuring Entity’s Website (<http://ca.go.ke/about-us/do-business-with-3/open-tenders/>) on 25th May, 2021.

Tender Submission Deadline and Opening of Tenders

The Procuring Entity received a total of eight (8) tenders by the tender submission deadline of 9th June 2021. Shortly thereafter, the Tender Opening

Committee opened the tenders and recorded the following tenderers as having submitted their respective tenders as follows: -

1. Com Twenty One
2. Next Technologies
3. Jo World Agencies Limited
4. Eastr Solutions Limited
5. Conann Communications
6. Microsan Technologies
7. New Edge Solutions
8. Broadcast Solution International Limited

Evaluation of Tenders

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

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

Preliminary Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause 2.2 – Preliminary Examination for Determination of Responsiveness of Evaluation Criteria of Section III – Evaluation and Qualification Criteria of the

Tender Document. At the end of this stage of evaluation, four (4) tenders were found non-responsive while another four (4) tenders were found responsive, thus eligible to proceed to the next stage of evaluation. The Applicant's tender was among the four (4) tenders that were found responsive and thus proceeded to the next stage of evaluation.

Technical Mandatory Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause Part a and b of Technical Mandatory -Specification Compliance of Clause 2.2.1 Evaluation of Technical Aspects of the Tender of Section III – Evaluation and Qualification Criteria of the Tender Document. Failure to meet any listed requirements in this stage of evaluation was to lead to disqualification of a tender. At the end of this stage of evaluation, three (3) tenders were found non-responsive while one (1) tender was found responsive, thus eligible to proceed to the next stage of evaluation. The Applicant's tender was found non-responsive at this stage.

Technical Capacity Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Technical Capacity Requirements of Section III-Evaluation and Qualification Criteria of the Tender Document. Tenders were required to attain a pass mark of 75% and above out of 100% to be eligible to proceed to the next stage of financial evaluation. Com Twenty One Limited attained a score of 89%, thus proceeded to the Financial Evaluation stage.

Financial Evaluation

At this stage, the Evaluation Committee applied the criteria set out in Evaluation of Commercial Terms and Conditions of the Tender (ITT 33.1(a)) of Section III-Evaluation and Qualification Criteria of the Tender Document.

Recommendation

The Evaluation Committee recommended award of the subject tender to Com Twenty One Limited at its tender sum of Kenya Shillings Seventy Seven Million Four Hundred and Fifty Thousand (Kshs. 77,450,000.00) only for five (5) years inclusive of VAT.

Professional Opinion

In a professional opinion dated 23rd June 2021 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Assistant Director/Procurement reviewed the evaluation process and concurred with the Evaluation Committee's recommendation to award the subject tender to Com Twenty One Limited at its tender sum of Kenya Shillings Seventy Seven Million Four Hundred and Fifty Thousand (Kshs. 77,450,000.00) only for five (5) years inclusive of VAT.

The Procuring Entity's Assistant Director/Procurement thus recommended the director General to consider and award the subject tender to Com Twenty One Limited at its tender sum of Kenya Shillings Seventy Seven Million Four

Hundred and Fifty Thousand (Kshs. 77,450,000.00) only for five (5) years inclusive of VAT. The Professional Opinion was approved by the Director General on 24th June 2021.

Notification to Tenderers

Vide letters dated 9th July 2021, the Respondent notified all tenderers of the outcome of their respective tenders.

REQUEST FOR REVIEW

The Applicant lodged a Request for Review, together with a Statement both dated 23rd July 2021 and filed on even date through the firm of Amadi and Amadi Advocates, seeking the following orders as paraphrased below: -

- a.* An order setting aside and nullifying the Respondent's decision notifying the Applicant that it had not been successful in the subject tender as contained in a letter dated 9th July 2021;
- b.* An order setting aside and nullifying the Respondent's decision awarding the subject tender to Com Twenty One Limited;
- c.* An order declaring that the Respondent failed to evaluate the Applicant's tender at the preliminary/mandatory stage in accordance with Tender Document, the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the "Act") and the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020");

- d.** Consequent to (c) above, the Board be pleased to review all records of the procurement process relating to the subject tender and direct the Respondent to re-admit the Applicant back to the tender process and evaluate its technical proposal and conclude the procurement process to its logical conclusion in accordance with the Tender Document, the Act and the Regulations;
- e.** An order condemning the Respondent to pay the costs of and incidental to these proceedings; and
- f.** Such other or further relief(s) as this Board may deem just and expedient.

In response, the Respondent filed her response dated 27th July 2021 and filed on 28th July 2021 together with attachments in support thereto.

Vide letters dated 29th July 2021, the Acting Board Secretary notified tenderers in the subject tender of the existence of the Request for Review while inviting them to respond to the Request for Review, if they wished to do so. Further, the Acting Board Secretary furnished all tenderers with the Board's Circular No.2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Board's Circular further specified that pleadings and

documents would be deemed as properly filed if they bear the official stamp of the Board.

None of the parties to the Request for Review filed written submissions.

BOARD'S DECISION

The Board has considered each of the parties' pleadings together with confidential documents submitted to the Board by the Respondent pursuant to Section 67 (3) (e) of the Act and finds the following issue crystalizes for determination: -

Whether the Applicant's tender was evaluated in accordance with Section 80(2) of the Act, Regulation 76 of Regulations 2020 read together with Technical Mandatory – Specification Compliance of Clause 2.2.1 Evaluation of Technical Aspects of the Tender of Section III – Evaluation and Qualification Criteria of the Tender Document.

The Applicant contends it was mandatory for tenderers, while submitting their respective tenders, to meet all requirements set out at pages 29-52 of the Tender Document. At paragraph 7 of the Request for Review, the Applicant contends that it was informed of its non-responsive tender vide a letter dated 9th July 2021 on the following grounds:-

- i. The Applicant did not provide a proposal for TV tuner as required, hence it was not possible to evaluate compliance of TV tuner to requirements 4.1, 4.2, 4.3, 4.4 and 4.5.**
- ii. The Applicant did not provide a detailed explanation of how the tuning component will be achieved and configured as input to the Logger as per requirements 4.6 and 5.5.**
- iii. The Applicant did not provide a brochure for a TV Tuner as per requirement 4.7.**
- iv. The Applicant failed to provide detailed explanation on how the logger would be configured to operate as per requirements 4.33 and 5.43.**
- v. The Applicant did not demonstrate the capacity to upload digital fingerprinting of the logger would be configured as per requirement 4.34 and 5.27.**
- vi. The Applicant failed to provide for the generation of fingerprints and media analysis of metadata as per requirement 4.36 and 5.29.**
- vii. The Applicant failed to demonstrate reporting tool for the generation of reports in their proposed logger as per requirements 4.39, 4.40, 4.41 & 4.45 and 5.31, 5.32, 5.33, 5.34 & 5.38.**
- viii. The Applicant did not provide a proposal for FM tuner as required; hence it was not possible to evaluate compliance of TV Tuner to requirements 5.1, 5.2, 5.3, 5.4, 5.5 and 5.6.**

It is the Applicant's view that the evaluation process was haphazard, unfair and raised suspicion as to the legitimacy and/or *bona fides* of the decision by the Respondent finding the Applicant's tender non-responsive.

In its Statement, the Applicant contends that it met the mandatory and technical requirements for the subject tender and the decision to declare its tender non-responsive was prejudicial and unfair.

The Applicant contends that the Respondent in declaring its tender non-responsive breached Article 227 of the Constitution and Section 3 of the Act requiring entities to establish practices in order: to maximize economy and efficiency; to promote competition and ensure that competitors are treated fairly; to promote the integrity and fairness of those procedures; to increase transparency and accountability in those procedures; and to increase public confidence in those procedures.

In response, the Respondent contends that tenderers were required to comply with all the mandatory requirements, failure to which, a tenderer would be disqualified.

The Respondent contends three (3) out of four (4) tenders were disqualified at the Technical Mandatory Evaluation stage and that the Applicant's tender

was disqualified at the Technical Mandatory Evaluation stage for the following reasons:

No	Grounds for failure as summarized in the Evaluation Report	Detailed Report on areas of failure
1	<p>You did not provide a proposal for TV tuner as required; hence it was not possible to evaluate compliance of TV tuner to requirements 4.1,4.2,4.3,4.4 and 4.5</p>	<p>The bidder did not provide evidence of a TV tuner or a TV card. The Digital Media Logger (DML) whose brochure was provided, is for a logger and not a TV tuner as the brochure indicates that it's compatible with WDM Tuner cards, DVB-T, DVB-S/S2, DVB-C, ATSC, Analog TV.</p> <p>The above consideration shows that DML is not compatible with DVB-T2 as required by the specifications in the tender document.</p>
2	<p>You did not provide a detailed explanation of how the tuning component will be achieved and configured</p>	<p>The bidder's description did not convey how the tuning will be achieved. It only described the Digital media logger.</p>

	as input to the Logger as per requirements 4.6 and 5.5	
3	You did not provide a brochure for a TV Tuner as per requirement 4.7	No brochure for a TV tuner or TV card was provided as required in the tender document.
4	You failed to provide detailed explanation on how the logger would be configured to operate as per requirements 4.33 and 5.43	The bidder referred to the user manual which only shows instructions on how to install the software and not it will be configured.
5	You did not demonstrate the capability to upload digital fingerprinting of their logger as per requirement 4.34 and 5.27	The bidder indicated in the compliance statement that they will provide <i>The @PAR Audience Ingestor</i> to carry out TV and Radio fingerprinting but provided no brochures/data sheets for the said software.
6	You failed to provide for the generation of fingerprints and media analysis of metadata as per requirement 4.36 and 5.29	Without the brochure of <i>The @PAR audience ingestor</i> , it is was not possible to prove fingerprint generation.

7	You failed to demonstrate reporting tool for the generation of reports in their proposed logger as per requirements 4.39, 4.40, 4.41 & 4.45 and 5.31, 5.32, 5.33, 5.34 & 5.38	The bidder indicated that DML will provide the reports required as per the specifications, but in the DML brochure provided, there was no indication of reporting capabilities of the DML.
8	You did not provide a proposal for FM tuner as required; hence it was not possible to evaluate compliance of TV tuner to requirements 5.1,5.2,5.3,5.4, 5.5 and 5.6	The bidder did not provide evidence of an FM tuner or an audio card. The Digital Media Logger (DML) whose brochure was provided, is a logger and not an FM tuner as the brochure indicates that it's compatible with WDM Audio cards and AoIP drivers (Dante Livewire, etc). It should be a FM tuner and not only be compatible with FM and Am tuner cards as indicated in the brochure.

It is the Respondents contention that the Procuring Entity conducted the procurement process in a fair manner and complied with the provisions of the Constitution, the Act and Regulations 2020.

The issue in contention relates to evaluation of the Applicant's tender at the Technical Mandatory Evaluation stage. Specifically, the Applicant challenges the manner in which the Evaluation Committee evaluated its tender at the Technical Mandatory Evaluation Stage.

In addressing this issue, the Board is alive to the provisions of Article 227(1) of the Constitution on procurement of public goods and services which provides as follows:

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

Section 80(2) of the Act provides the manner in which an Evaluation Committee is required to evaluate tenders. Section 80(2) of the Act provides as follows:-

Section 80(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory

instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

Regulation 76 of Regulations 2020 prescribes the manner in which technical evaluation is to be conducted and reads as follows:-

- (1) Upon completion of the preliminary evaluation under regulation 74, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the goods, works or services in the tender document.***
- (2) The evaluation committee shall reject tenders which do not satisfy the technical requirements under paragraph (1).***

From the aforementioned provisions of the law, an evaluation committee while evaluating tenders at the technical evaluation stage, is required *inter alia*, to do so fairly by comparing each tender to the technical requirements of goods, works or services in a tender document using the criteria set out in the tender document. Further, an evaluation committee is required to reject tenders which do not satisfy the technical requirements set out in a tender document.

The Board has studied the Tender Document and notes that tenders were required to comply with all the mandatory requirements set out in Technical Mandatory – Specification Compliance of Clause 2.2.1 Evaluation of Technical Aspects of the Tender of Section III – Evaluation and Qualification Criteria of the Tender Document, failure to which a tender would be found non-responsive at the Technical Mandatory Evaluation stage. Further at the end of the criteria for evaluation at the Technical Mandatory Evaluation stage are notes in the tender Document that read as follows:-

- i. **The equipment brochures and technical datasheets must be provided for verification of compliance with these specifications failure of which will lead to disqualification.**
- ii. **Bidders can visit CA Centre at normal working hours from 9.00am to 4.30 pm to appreciate the existing logger for purposes of understanding the operating environment.**

It is the board's understanding that a tender needed to satisfy the mandatory requirements set out at the Technical Mandatory Evaluation criteria of the Tender Document by providing brochures and datasheets that verify such compliance with specifications at the Technical Mandatory Evaluation stage failure to which a tender would be disqualified. The Board notes the reasons given for disqualification of the Applicant's tender made reference to requirements numbered 4.1 to 4.45, 5.1 to 5.43. However, the requirements set out in the Tender Document with respect to the Technical Mandatory

Evaluation criteria were not numbered. Upon perusal of the Evaluation Report dated 22nd June 2021, the Board notes that though the requirements set out at the Technical Mandatory Evaluation criteria of the Tender Document were not numbered, the Evaluation Committee chose to number these same requirements perhaps for ease of reference while evaluating tenders in its Evaluation Report. The board will now address the reasons cited for finding the Applicant's tender non-responsive as communicated to the Applicant vide a letter dated 9th July 2021.

You did not provide a proposal for TV tuner as required, hence it was not possible to evaluate compliance of TV tuner to requirements 4.1, 4.2, 4.3, 4.4 and 4.5

At page 4 of the Request for Review, the Applicant states that its technical submission documents contained a response to the TOR aforementioned specifically on the issue of TV Broadcast Logger Specifications whereby the Applicant issued specific commitments. The said commitments were made under the specification compliance in Section 4 of the Applicant's technical proposal.

At page 4 of the Request for Review, the Applicant avers that it is therefore a misrepresentation of facts that it did not provide a proposal for TV tuner as it used the Respondent's document in its strict sense by demonstrating how it would achieve the intended outputs. Further, the Applicant avers that its demonstration can be found under its technical proposal document

(Section 4.2) and supported by appendices 2 and 5 which are the DML Video Brochure and DML Video User Manual.

In response, at paragraph 2.1 of her Response, the Respondent contends that as stipulated in the Tender Document under the mandatory evaluation criteria, tenderers were required to comply with all the mandatory requirements, failure to which, a tenderer would be disqualified, and at the technical mandatory evaluation stage, tenders were subjected to evaluation on a pass/fail basis as stipulated in the tender document.

The Respondent contends that the Applicant did not provide evidence of a TV tuner or a TV card. The Digital Media Logger (DML) whose brochure was provided by the Applicant, is for a logger and not a TV tuner as the brochure indicates that it's compatible with WDM Tuner cards, DVB-T, DVB-S/S2, DVB-C, ATSC, Analog TV which shows DML is not compatible with DVB-T2 as required by the specifications in the tender document.

The Board notes the Tender Document, at Clause 2.2.1 titled "*Evaluation of Technical Aspects of the Tender*" provides as follows:-

The Procuring Entity shall evaluate the Technical aspects of the Tender to determine compliance with the Procuring Entity's requirements under Section V 'Schedule of Requirement' and

whether the Tenders are substantially responsive to the Technical Specifications and other Requirements.

A. TECHNICAL MANDATORY-SPECIFICATION COMPLIANCE

a. TV BROADCAST LOGGER SPECIFICATIONS

<i>Parameters</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
<i>Ingest</i>	<i>Concerned with the capturing of TV signals (tuning) which are transmitted over the air (radio signals) in order to act as input or feeds (ingests) to the logger</i>	
<i>Tuning Range</i>	<i>Digital TV Band 470-694 MHz</i>	
<i>Standard</i>	<i>DVB-T2</i>	
	<i>In Nairobi: 32 TV Channels (Stations) tuned simultaneously i.e. multi-</i>	

Parameters	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
Number of Channels	channel tuning and output to logger	
Number of Channels	In Mombasa: 8 TV Channels (Stations) tuned simultaneously i.e. multi-channel tuning and output to logger	
TV Tuner	<p>Device capable of capturing off air 32 DVB-T2 TV channels in Nairobi and 8 DVB-T2 TV channels in Mombasa.</p> <p>The device must have capability for remote configuration and monitoring.</p>	

<i>Parameters</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
	<i>Must attach appropriate brochures.</i>	
<i>*****</i>	<i>*****</i>	<i>*****</i>

Upon careful perusal of the Evaluation Report submitted by the Respondent, we observe that the Evaluation Committee at the Technical Mandatory Stage **assigned numbers (clauses/codes)** to the above criteria and went on to evaluate the Applicant's tender as follows:-

<i>No</i>	<i>Parameters</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
	<i>Ingest</i>	<i>Concerned with the capturing of TV signals (tuning) which are transmitted over the air (radio signals) in order to act as input or feeds (ingests) to the logger</i>	

No	Parameters	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures	
4.1	<i>Tuning Range</i>	<i>Digital TV Band 470-694 MHz</i>	X	
4.2	<i>Standard</i>	<i>DVB-T2</i>	X	
4.3	<i>Number of Channels</i>	<i>In Nairobi: 32 TV Channels (Stations) tuned simultaneously i.e. multi-channel tuning and output to logger</i>	X	
4.4		<i>In Mombasa: 8 TV Channels (Stations) tuned simultaneously i.e. multi-channel tuning and output to logger</i>	X	
4.5	<i>TV Tuner</i>	<i>Device capable of capturing off air 32 DVB-T2 TV channels in Nairobi and 8 DVB-</i>	X	

No	Parameters	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures	
		<i>T2 TV channels in Mombasa.</i>		

The Board has noted that these numbering is not available in the Tender Document as communicated to the Applicant.

The Evaluation Committee proceeded to make the following observations on the Applicant's evaluated tender:-

Reasons for Failing
<i>The bidder did not provide a proposal for TV tuner as required, hence it was not possible to evaluate compliance of TV tuner to requirements 4.1,4.2,4.3,4.4 and 4.5</i>

Upon perusal of the Applicant's original tender, at page 39 thereof, the Board notes the Applicant submitted the following in satisfaction of the subject criteria: -

<i>Parameters</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
<i>Ingest</i>	<i>Concerned with the capturing of TV signals (tuning) which are transmitted over the air (radio signals) in order to act as input or feeds (ingests) to the logger</i>	<i>We propose to supply the Digital Media Logger (DML) which has the capability of capturing TV signals (tuning) which are transmitted over the air (radio signals) in order to act as input or feeds (ingests) to the logger</i>
<i>Tuning Range</i>	<i>Digital TV Band 470-694</i>	<i>The DML tuning range for digital TV band 470-694 MHz</i>
<i>Standard</i>	<i>DVB-T2</i>	<i>Our Loggers are compatible with WDM Tuner Cards, DVB-T2, DVB-S/S2, DVB-C, ATSC, analog TV</i>

<i>Parameters</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
		<i>(See page 1, DML Video brochure, Appendix 2)</i>
<i>Number of Channels</i>	<i>In Nairobi: 32 TV Channels (Stations) tuned simultaneously i.e. multi-channel tuning and output to logger</i>	<i>The DML will provide for 32 TV Channels (stations) in Nairobi tuned simultaneously i.e. multi-channel tuning and output to logger. It will have an expansion capacity to 64 channels</i>
	<i>In Mombasa: 8 TV Channels (Stations) tuned simultaneously i.e. multi-channel tuning and output to logger</i>	<i>The DML will provide for 8 TV Channels (Stations) in Mombasa tuned simultaneously i.e. multi-channel tuning and output to logger. It will have an expansion capacity to 64 channels</i>

<i>Parameters</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
<i>TV Tuner</i>	<p><i>Device capable of capturing off air 32 DVB-T2 TV channels in Nairobi and 8 DVB-T2 TV channels in Mombasa.</i></p> <p><i>The device must have capability for remote configuration and monitoring.</i></p> <p><i>Must attach appropriate brochures.</i></p>	<p><i>The DML engine is capable of capturing off air 32 DVB-T2 TV channels in Nairobi and 8 DVB-T2 TV channels in Mombasa. With a double expansion capacity.</i></p> <p><i>The logger system has an enabled remote system Configuration and monitoring from any LAN or internet connected PC. (see page 2, DML –video brochure, Appendix 2)</i></p> <p><i>See Appendix 2</i></p>

<i>Parameters</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
.....

The Board further notes that the Applicant submitted in its tender, at Appendix 2, titled "The DML-Video brochure", and Appendix 2.1 titled "The DML Audio & Video brochure". The brand name identified in the "brochures" is AxelTech.

The Board has perused the Digital Media Logger brochure provided by the Applicant and finds that the same is for a logger and not a TV tuner hence the Procuring Entity could not evaluate the Applicant's tender with respect to a TV tuner.

You did not provide a detailed explanation of how the tuning component will be achieved and configured as input to the Logger as per requirements 4.6 and 5.5.

The Applicant contends that the cited requirements are not available in the Terms of Reference (hereinafter referred to as 'TOR') of the Tender

Document for referencing, however, as per TV broadcast logger specifications in the technical mandatory – specification compliance section (2.2.1) of the tender document, the Applicant provided a detailed commitment to this under section 4.2 of its technical proposal and provided more details in appendix (2.1) and DML video user manual appendix (5).

In response, the Respondent contends that the Applicant *did not convey how the tuning will be achieved but only described the Digital Media Logger*”.

The Board notes the Tender Document, at Clause 2.2.1 titled *“Evaluation of Technical Aspects of the Tender”* provides as follows: -

<i>Parameter s</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
<i>Ingest</i>	<i>Concerned with the capturing of TV signals (tuning)</i>	<i>which are transmitted over the air (radio signals) in order to act as input or feeds (ingests) to the logger</i>
.....		

Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
Equipment Description	<i>Detailed explanation of how the tuning component will be achieved and configured as input to the Logger</i>	
	<i>Attach Appropriate brochures</i>	
.....		
a) FM BROADCAST LOGGER SPECIFICATIONS		
Equipment Description	<i>Detailed explanation of how the tuning component will be achieved and configured as input to the Logger</i>	

Upon careful perusal of the Evaluation Report, we observe that the Evaluation Committee at the Technical Mandatory Stage **assigned**

numbers (clauses/codes) to the above criteria and went on to evaluate the Applicant's tender as follows:-

No.	Parameters	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures	
	<i>Ingest</i>	Concerned with the capturing of TV signals (tuning) which are retransmitted over the air (radio signals) in order to act as input or feeds (ingests) to the logger		
4.6	Equipment Description	<i>Detailed explanation of how the tuning component will be achieved and configured as input to the Logger</i>	X	
		<i>Attach Appropriate brochures</i>	X	
a) FM BROADCAST LOGGER SPECIFICATIONS				

No.	Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures	
5.5	Equipmen t Descriptio n	<i>Detailed explanation of how the tuning component will be achieved and configured as input to the Logger</i>	X	

The Evaluation Committee proceeded to make the following observation on the Applicant's evaluated tender:-

Reasons for Failing
<i>The bidder did not provide a detailed explanation of how the tuning component will be achieved and configured as input to the Logger as per requirements 4.6 and 5.5</i>

Upon perusal of the Applicant's original tender, at page 39 thereof, the Board notes the Applicant submitted the following with respect to the subject criteria:-

Parameter s	Specification s	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
<i>Ingest</i>	<i>Concerned with the capturing of TV signals (tuning) which are transmitted over the air (radio signals) in order to act as input or feeds (ingests) to the logger</i>	
.....		
Equipment Description	<i>Detailed explanation of how the tuning component will be achieved and configured as input to the Logger</i>	<i>The DML is a Long-Lasting centralized recording solution for multiple audio visual signals with archiving, visualization tools, remote processing and extraction of clips. It is suitable for the documentation required by the publishing guarantor for archiving large quantities of audio and video content, for legal audiovisual documentation.</i>

<i>Parameter s</i>	<i>Specification s</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
	<i>Attach Appropriate brochures</i>	<i>See Appendix 2.1 and 5</i>

We further note that the Applicant provided at its Appendix 2.1 a “The DML Audio & Video Brochure” and at Appendix 5, “The DML Video User Manual”.

From the above equipment description as provided by the Applicant, the Board notes that the same is with respect to describing the DML and not explaining how tuning will be achieved, thus the Applicant’s tender did not conform to this specification.

You did not provide a brochure for a TV Tuner as per requirement 4.7.

The Applicant alleges that the cited requirements are not available in the TOR of the tender document for referencing, however, as per TV broadcast logger specifications in the technical mandatory – specification compliance section (2.2.1) of the tender document, the Applicant provided a detailed commitment to this under section 4.2 of its technical proposal (with an option

of double the required capacity) and provided more details in page 2 appendix (2) and DML video user manual appendix (5).

In response, the Respondent contends at paragraph 2.1 of her response that no brochure for a TV tuner or TV card was provided as required in the tender document.

Upon perusal of the Applicant's tender the Board did not find any brochure for a TV tuner or TV card as required under this specification.

You failed to provide detailed explanation on how the logger would be configured to operate as per requirements 4.33 and 5.43.

The Applicant alleges that the cited requirements are not available in the TOR of the tender document for referencing, however, as per TV broadcast logger specifications in the technical mandatory – specification compliance section (2.2.1) of the Tender Document, the Applicant provided a detailed commitment to this under section 4.2 of their technical proposal and provided more details under DML video user manual in appendix (5).

In response, the Respondent contends that The Applicant referred to the user manual which only shows instructions on how to install the software and not it will be configured.

The Board notes that the Tender Document, at Clause 22.1 titled "*Evaluation of Technical Aspects of the Tender*" provides as follows:-

<i>Parameter s</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
<i>Logger</i>	<i>Concerned with Recording & Playback of Tuned T V Signal</i>	
.....		
<i>Equipment Description</i>	<i>Detailed explanation of how the Logger will be configured to operate. Attach Appropriate brochures</i>	
....
<i>Logger</i>	<i>Concerned with Recording & Playback of Tuned FM Audio Signal</i>	

Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
....
Equipment Description	<i>Detailed explanation of how the Logger will be configured to operate.</i>	
.....		

Upon perusal of the Evaluation Report, we note that the Evaluation Committee at the Technical Mandatory Stage **assigned numbers (clauses/codes)** to the above criteria and went on to evaluate the Applicant's tender as follows:-

No.	Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
	Logger	Concerned with Recording & Playback of Tuned TV Signal	
		<i>B5</i>

No.	Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures	
4.33	Equipment Description	<i>Detailed explanation of how the Logger will be configured to operate. Attach Appropriate brochures</i>	X	
....	
	Logger	Concerned with Recording & Playback of Tuned FM Audio Signal		
....	
5.43	Equipment Description	<i>Detailed explanation of how the Logger will be configured to operate.</i>	X	
.....				

The Evaluation Committee proceeded to make the following observations on the Applicant's evaluated tender:-

Reasons for Failing
<i>4. The bidder failed to provide detailed explanation on how the logger would be configured to operate as per requirements 4.33 and 5.43</i>

Upon perusal of the Applicant's original tender, at page 39 thereof, the Board notes the Applicant submitted the following with respect to the subject criteria:-

<i>Parameter s</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
<i>Logger</i>	<i>Concerned with Recording & Playback of Tuned T V Signal</i>	
<i>.....</i>		

Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
Equipment Description	Detailed explanation of how the Logger will be configured to operate. Attach Appropriate brochures	<u>Detailed explanation is provided for in the user manual (appendix 5)</u>
****
Logger	Concerned with Recording & Playback of Tuned FM Audio Signal	
****
Equipment Description	Detailed explanation of how the Logger will be configured to operate.	<u>The DML is a Long-lasting centralized recording solution for multiple audiovisual signals with archiving, visualization tools, remote processing and extraction of clips.</u>

Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
		<p><u>It is suitable for the documentation required by the publishing guarantor for archiving large quantities of audio and video content, for legal audiovisual documentation.</u></p> <p><u>See Appendix 2.1 and 5</u></p>
<p>.....</p>		

The Board notes the Applicant provided at its Appendix 2.1 a “The DML Audio & Video Brochure” and at Appendix 5, “The DML Video User Manual.” However, the user manual only showed instructions on how to install the software and not how it will be configured to operate as required under this specification.

You did not demonstrate the capability to upload digital fingerprinting of the logger would be configured as per requirement 4.34 and 5.27.

The Applicant alleges that the cited requirements are not available in the TOR of the tender document for referencing, however, as per TV broadcast logger specifications in the technical mandatory – specification compliance section (2.2.1) of the tender document, the Applicant submits that it provided a detailed commitment to digital fingerprinting, digital fingerprinting generation and media analysis under section 4.2 of its technical proposal and provided more details under Television and Radio Digital Finger Printing process flow, section (5.2.a.1).

In response, the Respondent contends that the Applicant indicated in the compliance statement that it will provide The @PAR Audience Ingestor to carry out TV and Radio fingerprinting but provided no brochures/data sheets for the said software.

The Board notes the Tender Document, at Clause 2.2.1 titled "*Evaluation of Technical Aspects of the Tender*" provides as follows: -

<i>Parameter s</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
<i>Logger</i>	<i>Concerned with Recording & Playback of Tuned T V Signal</i>	

Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
.....		
Digital Finger Printing	<i>The system should have the capability to upload digital fingerprints of media content.</i>	
....
b) FM BROADCAST LOGGER SPECIFICATIONS		
Logger	Concerned with Recording & Playback of Tuned FM Audio Signal	
....
Digital Finger Printing	<i>The system should have the capability to upload</i>	

<i>Parameter s</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
	<i>digital fingerprints of media content.</i>	
.....		

Upon perusal of the Evaluation Report, we observe that the Evaluation Committee at the Technical Mandatory Stage **assigned numbers (clauses/codes)** to the above criteria and went on to evaluate the Applicant's tender as follows:-

<i>No.</i>	<i>Parameter s</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
	<i>Logger</i>	<i>Concerned with Recording & Playback of Tuned TV Signal</i>	

No.	Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures	
4.3 4	Digital Finger Printing	<i>The system should have the capability to upload digital fingerprints of media content.</i>	X	
....	
a)	b) FM BROADCAST LOGGER SPECIFICATIONS			
	Logger	Concerned with Recording & Playback of Tuned FM Audio Signal		
....	
5.2 7	Digital Finger Printing	<i>The system should have the capability to upload digital</i>	X	

No.	Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures	
		<i>fingerprints of media content.</i>		
			

The Evaluation Committee proceeded to make the following observations on the Applicant's evaluated tender:-

Reasons for Failing
<i>The bidder did not demonstrate the capability to upload digital fingerprinting of their logger as per requirement 4.34 and 5.27</i>

Upon perusal of the Applicant's original tender, at page 47 thereof, the Board notes the Applicant submitted the following with respect to the subject criteria: -

Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
Logger	Concerned with Recording & Playback of Tuned T V Signal	
.....		
Digital Finger Printing	<i>The system should have the capability to upload digital fingerprints of media content.</i>	<u>The DML engine is digital fingerprinting plug in ready for media content</u>
....
a) FM BROADCAST LOGGER SPECIFICATIONS		
Logger	Concerned with Recording & Playback of Tuned FM Audio Signal	
....

Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
Digital Finger Printing	<i>The system should have the capability to upload digital fingerprints of media content.</i>	<u>The DML engine is digital fingerprinting plug in ready for media content</u>
.....		

The Board notes the Applicant did not provide a reference page to where the brochures are for the two criteria as required.

You failed to provide for the generation of fingerprints and media analysis of metadata as per requirement 4.36 and 5.29.

The Applicant submits that the cited requirements are not available in the TOR of the tender document for referencing, however, as per TV broadcast logger specifications in the technical mandatory – specification compliance section (2.2.1) of the tender document, the Applicant provided a detailed commitment to digital fingerprinting, digital fingerprinting generation and media analysis under reports (section 4.2) of its technical proposal and provided more details under Television and Radio Digital Finger Printing process flow, section (5.2.a.1). The Applicant avers that it additionally

provided for sample reports for media analysis under section 5.3(b) of its technical proposal.

In response, the Respondent contends that without a brochure of the @PAR audience ingestor, it is was not possible to prove fingerprint generation.

The Board notes the Tender Document, at Clause 2.2.1 titled "*Evaluation of Technical Aspects of the Tender*" provides as follows:-

<i>Parameter s</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
	<i>Concerned with the generation of fingerprints and simple analysis on meta data of logged content</i>	
.....		
<i>Media analysis</i>	<i>The system should provide analysis and simple reports of logged content. Database of the fingerprinted songs, jingles and advertisements</i>	

Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
	<i>and intro's and outro's of structured programmes.</i>	
....
b) FM BROADCAST LOGGER SPECIFICATIONS		
	<i>Concerned with the generation of fingerprints and simple analysis on meta data of logged content</i>	
....
Digital Finger Printing	<i>The system should have the capability to upload digital fingerprints of media content.</i>	

No.	Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
Concerned with the generation of fingerprints and simple analysis on meta data of logged content			
4.36	Media analysis	<i>The system should provide analysis and simple reports of logged content. Database of the fingerprinted songs, jingles and advertisements and intro's and outro's of structured programmes.</i>	X

a)	b) FM BROADCAST LOGGER SPECIFICATIONS		

		Concerned with the generation of fingerprints and simple analysis on meta data of logged content	

5.29	Digital Finger Printing	<i>The system should have the capability to upload digital fingerprints of media content.</i>	X
		

The Board further notes that upon perusal of the Evaluation Report submitted by the Respondent to the Board, the Evaluation Committee at the Technical Mandatory Stage **assigned numbers (clauses/codes)** to the above criteria and went on to evaluate Applicant's tender as follows:-

The Evaluation Committee proceeded to make the following observations on the Applicant's evaluated tender:-

Reasons for Failing
<i>The bidder failed to provide for the generation of fingerprints and media analysis of metadata as per requirement 4.36 and 5.29</i>

Upon perusal of the Applicant's original tender, at page 47 thereof, the Board notes the Applicant submitted the following with respect to the subject criteria:-

Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
	Concerned with the generation of fingerprints and simple analysis on meta data of logged content	
.....		
Media analysis	The system should provide analysis and simple reports of logged content. Database of the fingerprinted songs, jingles and advertisements and intro's and outro's of structured programmes.	<u>The DML provides analysis and simple reports of logged content, Database of the fingerprinted songs, jingles and advertisements and intro's and outro's of structured programmes.</u>

Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
		<u>(See Television and Radio Digital Finger Printing process flow section</u>
....
a) FM BROADCAST LOGGER SPECIFICATIONS		
	Concerned with the generation of fingerprints and simple analysis on meta data of logged content	
....
Media analysis	<i>The system should provide analysis and simple reports of logged content. Database of the fingerprinted songs, jingles and advertisements</i>	<u>The DML provides analysis and simple reports of logged content, Database of the fingerprinted songs, jingles and advertisements and</u>

<i>Parameter s</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
	<i>and intro's and outro's of structured programs.</i>	<u><i>intro's and outro's of structured programmes. (See Television and Radio Digital Finger Printing process flow section</i></u>
.....		

The Board notes the Applicant has at page 64 of its original tender provided a "Television and Radio Digital Finger Printing Process Flow" diagram. We further note the requirement in the criteria was for a "Compliance Statement & Reference Page to manufacturers datasheet/ brochures," which the Applicant did not comply with.

You failed to demonstrate reporting tool for the generation of reports in their proposed logger as per requirements 4.39, 4.40, 4.41 & 4.45 and 5.31, 5.32, 5.33, 5.34 & 5.38

The Applicant alleges that the cited requirements are not available in the TOR of the tender document for referencing, however, as per TV broadcast

logger specifications in the technical mandatory – specification compliance section (2.2.1) of the tender document, the Applicant provided a written commitment and/or reference to DML output sample reports (section 5.3) of its technical proposal.

In response, the Respondent contends that the Applicant indicated that DML will provide the reports required as per the specifications, but in the DML brochure provided, there was no indication of reporting capabilities of the DML.

We note the Tender Document, at Clause 2.2.1 titled "*Evaluation of Technical Aspects of the Tender*" provides as follows: -

<i>Parameter s</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
<i>Reporting Tool</i>	<i>The reporting tool should have the capability to generate the following reports and features</i>	
<i>.....</i>		
<i>Reports</i>	<i>Compliance monitoring reports based on captured meta data for all TV and</i>	

Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
Tool deports	<i>Radios' broken down per station including genre analysis.</i>	
	<i>Two or more Station content comparison report</i>	
	<i>Custom reports</i>	
	<i>The reports should be able to be exported in PDF, CSV file formats</i>	
****	****	****
a) FM BROADCAST LOGGER SPECIFICATIONS		
Reporting tool	The reporting tool should have the capability to generate the following reports and features.	
****	****	****
Reports	<i>24 hour Station Log report where each log should be automatically labelled if</i>	

Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
	<i>there is provision of an EPG or digital fingerprint.</i>	
	<i>Compliance monitoring reports based on captured meta data for all TV and Radios' broken down per station including genre analysis</i>	
	<i>Two or more Station content comparison report</i>	
	<i>Custom reports</i>	
	
	<i>The reports should be able to be exported in PDF, CSV file formats</i>	
.....		

The Board further notes upon perusal of the Evaluation Report, the Evaluation Committee at the Technical Mandatory Stage **assigned numbers (clauses/codes)** to the above criteria and went on to evaluate the Applicant's tender as follows:-

No.	Parameters	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures	
	Reporting Tool	The reporting tool should have the capability to generate the following reports and features		
4.39	Reports Tool reports	<i>Compliance monitoring reports based on captured meta data for all TV and Radios' broken down per station including genre analysis.</i>	X	
4.40		<i>Two or more Station content comparison report</i>	X	
4.41		<i>Custom reports</i>	X	

No.	Parameters	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures	
4.45		<i>The reports should be able to be exported in PDF, CSV file formats</i>	X	
	<i>....</i>	<i>....</i>	<i>....</i>	
b) FM BROADCAST LOGGER SPECIFICATIONS				
Reporting tool		<i>The reporting tool should have the capability to generate the following reports and features.</i>		
	<i>....</i>	<i>....</i>	<i>....</i>	
5.31	Reports	<i>24 hour Station Log report where each log should be automatically labeled if there is provision of an EPG or digital fingerprint.</i>	X	

No.	Parameters	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures	
5.32		<i>Compliance monitoring reports based on captured meta data for all TV and Radios' broken down per station including genre analysis</i>	X	
5.33		<i>Two or more Station content comparison report</i>	X	
5.34		<i>Custom reports</i>	X	
	
5.38		<i>The reports should be able to be exported in PDF, CSV file formats</i>	X	
			

The Evaluation Committee proceeded to make the following observations on the Applicant's evaluated tender:-

Reasons for Failing
<i>The bidder failed to demonstrate reporting tool for the generation of reports in their proposed logger as per requirements 4.39, 4.40, 4.41 & 4.45 and 5.31, 5.32, 5.33, 5.34 & 5.38</i>

Upon careful perusal of the Applicant's original tender, at page 48 and 49 thereof, the Board notes the Applicant submitted as follows on the subject criteria: -

<i>Parameter s</i>	<i>Specifications</i>	<i>Compliance Statement & Reference Page to manufacturers datasheet/ brochures</i>
<i>Reporting Tool</i>	<i>The reporting tool should have the capability to generate the following reports and features</i>	
<i>.....</i>		

Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
Reports Tool deports	<i>Compliance monitoring reports based on captured meta data for all TV and Radios' broken down per station including genre analysis.</i>	<i>The DML provides for compliance monitoring reports based on captured meta data for all TVs and Radios broken down per station including genre analysis</i>
	<i>Two or more Station content comparison report</i>	<i>The DML provides for two or more station content comparison report (see DML output sample reports section)</i>
	<i>Custom reports</i>	<i>The DML provides for custom reports (see DML output sample reports section)</i>
	<i>The reports should be able to be exported in PDF, CSV file formats</i>	<i>The DML reports can be exported in PDF, CSV file formats</i>
****	****	****

a) FM BROADCAST LOGGER SPECIFICATIONS

Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
Reporting tool	The reporting tool should have the capability to generate the following reports and features.	
****	****	****
Reports	<i>24 hour Station Log report where each log should be automatically labelled if there is provision of an EPG or digital fingerprint.</i>	<i>The DML audio has a 24 hour Station log report where each log should be automatically labeled if there is provision of an EPG or digital finger print</i>
	<i>Compliance monitoring reports based on captured meta data for all TV and Radios' broken down per station including genre analysis</i>	<i>The DML Audio provides for compliance monitoring reports based on captured meta data for al radios broken down per station including genre analysis.</i>

Parameter s	Specifications	Compliance Statement & Reference Page to manufacturers datasheet/ brochures
	<i>Two or more Station content comparison report</i>	<i>The DML provides for two or more station content comparison report (see DML output sample reports section)</i>
	<i>Custom reports</i>	<i>The DML provides for custom reports (see DML output sample reports section)</i>
	
	<i>The reports should be able to be exported in PDF, CSV file formats</i>	<i>The DML Audio reports can be exported in PDF, CSV file formats</i>
.....		

The Board notes that the DML brochure provided did not indicate reporting capabilities of the DML as required in the subject criteria.

You did not provide a proposal for FM tuner as required; hence it was not possible to evaluate compliance of TV Tuner to requirements 5.1, 5.2, 5.3, 5.4, 5.5 and 5.6.

The Board notes that the Applicant did not challenge this reason for finding its tender non-responsive. Accordingly, the Board shall not address the same.

The Board has observed and found that the Applicant's tender did not comply with some of the mandatory requirements set out in the Technical Mandatory Evaluation stage and as communicated to the Applicant by the Respondent vide a letter dated 9th July 2021. Having already noted these requirements that the Applicant did not comply with were mandatory requirements, the Board is alive to the provisions of section 79(1) of the Act on what a responsive tender is. Section 79(1) of the Act provides as follows:-

Section 79(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

It is clear that a responsive tender is one that conforms to *inter alia* mandatory requirements in the Tender Document.

In ***Republic v. Public Procurement Administrative Review Board & another Ex Parte Meru University of Science and Technology [2016] eKLR*** this Court expressed itself as hereunder:

"A Procuring Entity is bound by its Bid Documents. Mandatory conditions cannot be waived. No argument was advanced before me to the effect that such deviations do not prejudice the other bidders or confer a benefit to the Interested Party."

In ***Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR*** the High Court pronounced itself on mandatory requirements as follows;

"It is evident that compliance with the requirements for a valid tender process including terms and conditions set out in the bid documents, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that a bidder or the Respondent may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Mandatory requirements in bid document must be complied with. Deviations from mandatory bid requirements should not be permissible."

In ***Republic V Public Procurement Administrative Review Board & 2 others Ex-Parte BABS Security Services Limited [2018] eKLR*** the Court held that: -

"A bid only qualifies as a responsive bid if it meets all mandatory requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements."

In ***Republic v Public Procurement Administrative Review Board & 3 Others Ex Parte Saracen Media Limited [2018] eKLR*** the court held as follows: -

"it is a universally accepted principle of Public Procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be registered as non-responsive and rejected without further consideration."

From a reading of the above cases the courts have held in numerous instances that deviations from mandatory tender requirements are not permissible and cannot be waived because waiver of mandatory

requirements will negate the principle of fairness under Article 227 (1) of the Constitution.

It is the Board's considered opinion that mandatory requirements cannot be treated as minor deviations, thus cannot be waived. The Applicant needed to comply with the mandatory requirements at the Technical Mandatory Evaluation stage and the failure to comply with the mandatory requirements left the Evaluation Committee with no option but to find the Applicant's tender non-responsive.

Accordingly, the Board finds Applicant's tender was evaluated in accordance with Section 80(2) of the Act, Regulation 76 of Regulations 2020 read together with the Technical Mandatory – Specification Compliance of Clause 2.2.1 Evaluation of Technical Aspects of the Tender of Section III – Evaluation and Qualification Criteria of the Tender Document.

In totality, the Board finds Request for Review dated 23rd July 2021 lacks merit and makes the following 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 dated 23rd July 2021:

- 1. The Request for Review dated 23rd July 2021 be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 13th day of August 2021.

CHAIRPERSON

SECRETARY

PPARB

PPARB