

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 110/2021 OF 23RD AUGUST 2021
BETWEEN

GEONET TECHNOLOGIES LIMITED.....APPLICANT
AND
THE ACCOUNTING OFFICER,
MINISTRY OF ICT, INNOVATION AND YOUTH AFFAIRS
STATE DEPARTMENT OF ICT & INNOVATION 1ST RESPONDENT
COM TWENTY ONE LIMITED 2ND RESPONDENT

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

BOARD MEMBERS

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

IN ATTENDANCE

1. Mr. Philip Okumu

-Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

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

Tender Submission Deadline and Opening of Tenders

The Procuring Entity received a total of eleven (11) tenders by the tender submission deadline of 17th March 2021. The tenders were opened by a Tender Opening Committee on the same date of 17th March 2021 and the following tenderers recorded as having submitted their respective tenders: -

1. Adrian Kenya Ltd;
2. Telkom Kenya Ltd;
3. Com Twenty-One
4. Prime Telkoms Ltd
5. Broad Band Comm Ltd
6. Geonet Technologies Ltd
7. Techsource Point Ltd
8. CCS Kenya Ltd and Alternative Comm Ltd

9. Kinde Engineering Works Ltd
10. Topchoice Surveillance
11. Decko Connecting Africa Ltd

Evaluation of Tenders

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

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

Preliminary Mandatory Evaluation

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

2. Technical Mandatory Evaluation

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

(4) tenders found responsive at this stage, thus eligible to proceed to the next stage of evaluation.

3. Technical Evaluation

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

At the end of Technical Evaluation, Adrian Kenya Ltd's and the 2nd Respondent's tenders attained the pass mark of 70% and proceeded to Financial Evaluation. The Applicant's tender was found non-responsive at this stage for failing to attain an overall technical score of 70% having attained an overall score of 65%.

4. Financial Evaluation

Adrian Kenya Ltd's and the 2nd Respondent's tenders were subjected to Financial Evaluation to determine the lowest evaluated responsive tender. Their tender prices were recorded as follows: -

1. 2nd Respondent-Kshs.203,280,000.00
2. Adrian Kenya Ltd -Kshs.203,764,523.30

Recommendation

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

Professional Opinion

In a professional opinion dated 23rd March 2021 (hereinafter referred to as the "1st Professional Opinion"), the Procuring Entity's Head of Procurement reviewed the evaluation process and concurred with the Evaluation Committee's recommendation to award the subject tender to the 2nd Respondent for submitting the lowest evaluated tender at its tender price of Kshs. 203,280,000.00. The Procuring Entity's Head of Procurement thus advised the 1st Respondent to award the subject tender to the 2nd Respondent. The said professional opinion was approved by the 1st Respondent on 23rd March 2021.

Letters of Notification

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

REQUEST FOR REVIEW NO. 47 OF 2021

Aggrieved by the decision of the 1st Respondent as contained in a letter dated 23rd March 2021, the Applicant lodged a Request for Review dated 6th April

2021 and filed on even date through the firm of Caroline Oduor & Associates, seeking the following orders: -

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

evaluation stage and to make an award in compliance with section 86 (1) (a) of the Public Procurement and Asset Disposal Act No. 33 of 2015;

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

In exercise of the powers conferred upon it by section 173 of the Act, the Board on 26th April 2021 in **PPARB Application No. 47 of 2021, Geonet Technologies Limited v. The Accounting Officer, Ministry of ICT, Innovation and Youth Affairs, State Department of ICT & Innovation & Another** (hereinafter referred to as "Review No. 47 of 2021") made the following orders:

- 1. The Accounting Officer of the Procuring Entity's Letters of Notification in Tender No. MOICT/SDICT/248/2020-2021 for Provision of Operation and Maintenance of National Optic Fibre Backbone Infrastructure Phase II (NOFBI II) Active and Passive Equipment for Lot 2: Western Region) addressed to the Applicant and all other unsuccessful bidders, be and are hereby cancelled and set aside.***
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. MOICT/SDICT/248/2020-2021 for Provision of Operation and Maintenance of National Optic Fibre Backbone Infrastructure Phase II (NOFBI II) Active and Passive Equipment for Lot 2: Western Region)***

addressed to the 2nd Respondent herein, be and is hereby cancelled and set aside.

3. The Accounting Officer of the Procuring Entity is hereby ordered to furnish the Applicant with a summary of the proceedings of the opening of tenders, a summary of evaluation and comparison of the tenders including the evaluation criteria used, pursuant to section 67 (4) read together with section 68 (2) (d) (iii) of the Act.

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

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

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

✓ Provide sample preventive, corrective and permanent restoration procedures/activities when responding to service interruption due to

active equipment malfunction/faults. (Gantt chart) with clearly defined timelines

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

5. Further to Order No. 4 above, the Accounting Officer of the Procuring Entity is hereby directed to complete the procurement proceedings in Tender No. MOICT/SDICT/248/2020-2021 for Provision of Operation and Maintenance of National Optic Fibre Backbone Infrastructure Phase II (NOFBI II) Active and Passive Equipment for Lot 2: Western Region) to its logical conclusion, including the making of an award within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this Review.

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

RE-EVALUATION OF TENDERS

Technical Evaluation

According to the Evaluation Committee's Re-Evaluation Report executed on 3rd May 2021 (hereinafter referred to as the 2nd Evaluation Report) and pursuant to the Orders of the Board of 26th April 2021, the Evaluation

Committee re-instated the tenders submitted by M/s Adrian Kenya Ltd, M/s Broad Band Comm Ltd, the Applicant and the 2nd Respondent at the Technical Evaluation Stage. The Evaluation Committee conducted a re-evaluation of the said tenders at the Technical Evaluation Stage.

At the end of re-evaluation at the Technical Evaluation, the 2nd Respondent's tender is the only tender that attained the pass mark of 70% and proceeded to Financial Evaluation. The Applicant's tender was found non-responsive at this stage for failing to attain an overall technical score of 70% having attained an overall score of 53%.

Financial Evaluation

At this stage, the Evaluation Committee recorded the tender price of the 2nd Respondent's tender as follows Kshs. 203,280,000.00 and found the 2nd Respondent to be the lowest responsive evaluated tender.

Recommendation

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

Professional Opinion

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

Letters of Notification

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

REQUEST FOR REVIEW NO. 69 OF 2021

Dissatisfied with the decision of the 1st Respondent as contained in a letter dated 5th May 2021, the Applicant lodged Request for Review dated 11th April 2021 and filed on even date through the firm of Caroline Oduor & Associates, seeking the following orders: -

- i. An order cancelling and setting aside the 1st Respondent's decision contained in its letter dated 5th May 2021 and related notifications to other tenderers;***
- ii. An order annulling the subject procurement proceedings undertaken by the 1st Respondent in relation to re-evaluation***

at the Technical Evaluation stage in respect of "contractors' qualifications and past performance on similar projects" on grounds inter alia that the Applicant's Tender was unfairly and unlawfully re-evaluated;

iii. An order directing the 1st Respondent to admit the Applicant herein to the subject tender's Financial Evaluation Stage and conclude the tender award in accordance with the law upon fairly re-evaluating the Applicant's Tender at the Technical Evaluation stage in accordance with the tender requirements, the law and as directed by the Public Procurement Administrative Review Board in exercise of its mandate and powers under section 28 and 173 of PPADA;

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

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

In exercise of the powers conferred upon it by section 173 of the Act, the Board on 31st May 2021 in **PPARB Application No. 69 of 2021, Geonet Technologies Limited v. The Accounting Officer, Ministry of ICT, Innovation and Youth Affairs, State Department of ICT & Innovation & Another** (hereinafter referred to as "Review No. 69 of 2021") made the following orders: -

1. The Accounting Officer of the Procuring Entity's Letters of Notification of Tender No. MOICT/SDICT/248/2020-2021 for

Provision of Operation and Maintenance of National Optic Fibre Backbone Infrastructure Phase II (NOFBI II) Active and Passive Equipment for Lot 2: Western Region) dated 5th May 2021 and addressed to the Applicant and all other unsuccessful bidders, be and are hereby cancelled and set aside.

2. The Accounting Officer of the Procuring Entity's Letter of Award of Tender No. MOICT/SDICT/248/2020-2021 for Provision of Operation and Maintenance of National Optic Fibre Backbone Infrastructure Phase II (NOFBI II) Active and Passive Equipment for Lot 2: Western Region) dated 5th May 2021 and addressed to the 2nd Respondent, be and is hereby cancelled and set aside.

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

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

4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to complete the procurement proceedings in Tender No. MOICT/SDICT/248/2020-2021 for Provision of Operation and Maintenance of National Optic Fibre Backbone Infrastructure Phase II (NOFBI II) Active and Passive Equipment for Lot 2: Western Region) to its logical conclusion, including the making of an award within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this Review.

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

SECOND RE-EVALUATION OF TENDERS

Technical Evaluation

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

At the end of re-evaluation at the Technical Evaluation, Adrian Kenya Ltd's and the 2nd Respondent's tenders were the only tenders that attained the pass mark of 70% and proceeded to Financial Evaluation. The Applicant's tender was found non-responsive at this stage for failing to attain an overall technical score of 70% having attained an overall score of 67%.

Financial Evaluation

Adrian Kenya Ltd's and the 2nd Respondent's tenders were subjected to Financial Evaluation to determine the lowest evaluated responsive tender. Their tender prices were recorded as follows: -

1. 2nd Respondent-Kshs.203,280,000.00;
2. Adrian Kenya Ltd-Kshs.203,764,532.30.

The 2nd Respondent's tender was found to be the lowest responsive evaluated tender at the end of evaluation at this stage.

Recommendation

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

Professional Opinion

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

Letters of Notification

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

REQUEST FOR REVIEW NO. 87 OF 2021

Aggrieved by the decision of the 1st Respondent as contained in a letter dated 11th June 2021, the Applicant lodged the subject Request for Review dated 22nd June 2021 on 23rd June 2021, seeking the following orders: -

- i. An order annulling the subject procurement proceedings undertaken by the 1st Respondent in relation to the re-evaluation at the technical evaluation stage on grounds inter alia, that the Applicant's bid was unfairly evaluated.***

- ii. An order cancelling and setting aside the 1st Respondent's decision contained in its letter dated 11th June 2021 and related notifications to other tenderers;***
- iii. An order finding that the Applicant fully complied with the requirements of Clause 2.22.1 (3): Appendix to Tenderers of the Tender document;***
- iv. An order finding and holding that the Applicant's initial score in respect of the criterion on Contractors qualifications, experience and past performance on similar project was 7.5 marks out of 10 marks awarded per project which is equivalent to 75% of the score for each project and thus ought to be proportionately adjusted against the score of 30 marks awardable under the criterion in line with Board's finding in Review No.69 of 2021; thus earning the Applicant 22.5 marks under this criterion;***
- v. An order further to (iv) above and pursuant to section 173(c) of the Act substituting the Board's decision with that of the 1st Respondent with respect to technical evaluation proceedings of the tender herein and further an order directing that the Applicant be admitted to the tender's financial stage evaluation for a decision by the 1st Respondent within 14 days from the date hereof in accordance with the law;***
- vi. An order directing the 1st Respondent to pay costs of the Review; and***
- vii. Any other orders as are necessary for the ends of justice.***

In exercise of the powers conferred upon it by section 173 of the Act, the Board on 14th July 2021 in **PPARB Application No. 87 of 2021, Geonet Technologies Limited v. The Accounting Officer, Ministry of ICT, Innovation and Youth Affairs, State Department of ICT & Innovation & Another** (hereinafter referred to as "Review No. 87 of 2021") made the following orders:

- 1. The 1st Respondent's Letter of Award of Tender No. MOICT/SDICT/248/2020-2021 for Provision of Operation and Maintenance of National Optic Fibre Backbone Infrastructure Phase II (NOFBI II) Active and Passive Equipment for Lot 2: Western Region dated 11th June 2021 and addressed to the 2nd Respondent, be and is hereby cancelled and set aside.**
- 2. The 1st Respondent's Letters of Notification of Tender No. MOICT/SDICT/248/2020-2021 for Provision of Operation and Maintenance of National Optic Fibre Backbone Infrastructure Phase II (NOFBI II) Active and Passive Equipment for Lot 2: Western Region dated 11th June 2021 and addressed to the Applicant and all other unsuccessful tenderers, be and are hereby cancelled and set aside.**
- 3. The 1st Respondent is hereby ordered to direct the Evaluation Committee to reinstate the Applicant's tender together with the tenders that made it to the Financial Evaluation Stage, at the Financial Evaluation Stage and conduct a re-evaluation at the Financial Evaluation Stage in accordance with Article**

227(1), Section 80 (2) of the Act read together with the criteria set out in the Tender Document.

- 4. Further to Order No. 3 above, the 1st Respondent is hereby directed to complete the procurement proceedings in Tender No. MOICT/SDICT/248/2020-2021 for Provision of Operation and Maintenance of National Optic Fibre Backbone Infrastructure Phase II (NOFBI II) Active and Passive Equipment for Lot 2: Western Region to its logical conclusion, including the making of an award within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this Review.**
- 5. Given that the subject procurement proceedings have not been completed, each party shall bear its own costs in the Request for Review.**

THIRD RE-EVALUATION OF TENDERS

Financial Evaluation

According to the Evaluation Committee's Re-Evaluation Report executed on 18th July 2021 (hereinafter referred to as the 4th Evaluation Report) and pursuant to the Orders of the Board of 14th July 2021, the Evaluation Committee re-instated the tenders submitted by the Applicant, the 2nd Respondent and Adrian Kenya Ltd to the Financial Evaluation Stage.

Their tender prices were recorded as follows: -

1. Applicant-Kshs.199,400,000.00

2. 2nd Respondent-Kshs.203,280,000.00;
3. Adrian Kenya Ltd-Kshs.203,764,532.30.

At the end of this stage of evaluation, the Applicant's tender was found to be the lowest responsive tender and the Applicant was recommended for award of the subject tender at Kshs.199,400,000.00 subject to the Applicant being subjected to a due diligence exercise in accordance with section 83 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act').

Due Diligence Report

According to the Evaluation Committee's Due Diligence Report executed on 9th August 2021, the Evaluation Committee subjected the Applicant to due diligence and found the Applicant did not qualify to be awarded the subject tender. The Evaluation Committee proceeded to subject the 2nd Respondent to due diligence similar to what the Applicant was subjected to as the next lowest responsive tender and found the 2nd Respondent qualifies for award of the subject tender.

Recommendation

The Evaluation Committee recommended award of the subject tender to the 2nd Respondent for the fourth time at its tender sum of Kshs. 203,280,000.00.

Professional Opinion

In a Professional Opinion dated 10th August 2021 (hereinafter referred to as the fourth Professional Opinion), the Procuring Entity's Head of Supply Chain

Management reviewed the manner in which the Evaluation Committee undertook re-evaluation of tenders and due diligence exercise 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 the 2nd Respondent for having submitted the lowest evaluated responsive tender after due diligence was conducted on it at its tender sum of Kshs. 203,280,000.00. The Accounting Officer approved the Professional Opinion on 10th August 2021.

Letters of Notification

In letters dated 10th August 2021, tenderers were notified of the outcome of their respective tenders.

REQUEST FOR REVIEW NO. 110 OF 2021

Aggrieved by the decision of the 1st Respondent as contained in a letter dated 10th August 2021, the Applicant lodged a Request for Review dated 23rd August 2021 and filed on even date together with a Statement in Support of the Request for Review and a Verifying Affidavit sworn on 23rd August 2021 by Patrick Kiplagat Changwony and filed on even date and a Reply to the 1st Respondent's Affidavit in Response to the Request for Review dated 2nd September 2021 and filed on 3rd September 2021 through the firm of Caroline Oduor and Associates, seeking the following orders as paraphrased herein below: -

- i. An order annulling the subject procurement proceedings undertaken by the 1st Respondent in relation to the post***

- qualification stage on grounds inter alia that the Applicant was unfairly and unlawfully evaluated by the 1st Respondent;***
- ii. An order cancelling and setting aside the 1st Respondent's decision contained in his letter of notification dated 10th August 2021 and related notifications to other tenderers;***
- iii. An order finding and holding the Applicant as the lowest responsive evaluated tenderer and qualified to perform the contract satisfactorily having presented a financial tender of Kshs.199,400,000.00;***
- iv. Further to order (iii) above, an order substituting the Board's decision with that of the 1st Respondent and direct the Applicant be awarded the subject tender being the tenderer with the lowest responsive cost in accordance with the law;***
- v. An order directing the 1st Respondent to pay costs of the Review; and***
- vi. Any other orders as are necessary for the ends of justice.***

The 1st Respondent on 30th August 2021, filed an Affidavit in Response to the Request for Review sworn on 30th August 2021 by Pius Muchai Kaua through Mr. Christopher Maina, Deputy Chief State Counsel at the Ministry of ICT, Innovation and Youth Affairs.

Vide letters dated 1st September 2021, the Acting Board Secretary notified tenderers in the subject tender of the existence of the Request for Review while inviting them to supply the Board with any information and arguments

touching on the subject tender. 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.

The 2nd Respondent did not file a Response in support or in opposition to the Request for Review despite being notified through a letter dated 1st September 2021 sent by email on the same day.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests 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.

The Applicant filed its Written Submissions together with a List and Bundle of Authorities dated 2nd September 2021 on 3rd September 2021.

BOARD'S DECISION

The Board has considered each of the parties' pleadings, written submissions, list and bundle of authorities and confidential documents submitted by the 1st Respondent and the Procuring Entity pursuant to section 67 (3) (e) of the Act and finds the following issues call for determination: -

- 1. Whether the Procuring Entity conducted due diligence exercise in accordance with sub-clause a) Post qualification of Clause 2.27 Award Criteria of Section II Instructions To Tenderers at page 13 and 14 of the Tender Document read together with sub-clause a) Post qualification Due Diligence of ITT Clause 2.27 Award Criteria of the Appendix To Instructions To Tenderers at page 17 of the Tender Document and Section 83 of the Act.**

- 2. Whether the Procuring Entity's letter dated 10th August 2021 notifying the Applicant of its unsuccessful tender, was issued in accordance with Section 87(3) of the Act read together with Regulation 82 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020').**

The Applicant avers that through a letter dated 10th August 2021 (hereinafter referred to as the 'Applicant's notification letter'), the 1st Respondent notified it that its tender was not successful because the Applicant had not been affirmed by an Original Equipment Manufacturer in accordance with section 2.27 criteria set out in the Tender Document and Section 83 of the Act, that the Applicant was not the lowest responsive evaluated tenderer following a due diligence report and that the 2nd Respondent had been awarded the subject tender at Kshs.203,280,000.00 being the lowest responsive tenderer following due diligence report.

In the Applicant's view, the Applicant's notification letter failed to disclose the reason(s) that informed the 1st Respondent to conclude the Applicant was not positively affirmed by the Original Equipment Manufacturer yet the Applicant had submitted its original tender containing duly completed manufacturer's authorization forms and manufacturers service commitment letters from various manufacturers and dealers with respect to passive and active equipment relating to the subject tender and that it had never been rated poorly and/or negatively affirmed by any of the said manufacturer's and/or dealers and/or entities for which it had performed similar work/contracts for.

The Applicant further avers that despite writing to the 1st Respondent vide a letter dated 12th August 2021 requesting to be supplied with *inter alia* the reasons that informed the 1st Respondent to conclude the Applicant was not positively affirmed by an Original Equipment Manufacturer the 1st Respondent has failed to give such reasons and/or to provide the due diligence report or its relevant part thereof contrary to Article 10, 35(1)(b), 47 and 227(1) of the Constitution and that the 1st Respondent has failed to disclose the financial and/or technical capabilities of the Applicant that were taken into account in reaching the adverse finding against the Applicant. Further, that the Procuring Entity did not disclose the specific documentary evidence used during due diligence and that the Applicant was not given an opportunity to be heard with respect to the alleged negative affirmation contrary to the rules of natural justice, the Fair Administrative Action Act, 2015 and Articles 10, 47 and 227(1) of the Constitution, Section 80(2) and 87(3) of the Act. The Applicant avers that because of the 1st Respondent's unlawful decision it risks suffering loss of business.

The Applicant submits that due diligence ought to have been carried out in accordance with public procurement principles espoused in Article 227(1) of the Constitution and Section 83 of the Act, it further submits that this being the fourth review with respect to the subject tender, the 1st Respondent has exhibited open bias and it is unlikely to be re-evaluated fairly should the Procuring Entity be ordered to re-evaluate it. Consequently, the Applicant urges the Board to exercise its statutory powers and allow the Request for Review as prayed.

In response, the 1st Respondent contends that pursuant to the Board's orders in Request for Review No. 87 of 2021, its Evaluation Committee re-evaluated tenders as ordered by the Board and the Applicant emerged as the lowest evaluated tenderer. However, following results of a due diligence exercise conducted in accordance with clause 2.27 of the Instructions to Tenderers of the Tender Document and section 83 of the Act, the 1st Respondent was left with no option but to find the Applicant's tender non-responsive and that the documentary evidence relied upon to disqualify the Applicant have been submitted to the Board pursuant to section 67 of the Act which guide procuring entities on disclosure of procurement documents. It is the 1st Respondent's contention that the Applicant's opportunity to be heard with respect to due diligence is not contemplated under the Act.

The 1st Respondent further contends that all tenderers were required to demonstrate they have the required competencies to implement the contract and that during due diligence, if any anomalies are considered material to the tender arise, then the lowest evaluated tenderer would be considered to

have failed post-qualification and their tender would be rejected as was the case with the Applicant.

Having considered parties rival cases the Board notes that the Applicant's notification letter dated 10th August 2021 reads as follows: -

"The Ministry regrets to notify you that you were not successful in the tender for the following reasons:

- a) You were not positively affirmed by the Original Tender Manufacturer in accordance with section 2.27 criteria set out in the Tender document and section 83 of the Public Procurement and Asset Disposal Act 2015.***
- b) You were not the lowest responsive evaluated bidder following the due diligence report.***
- c) The tender was awarded to M/s Com Twenty One Limited being the bidder with the lowest responsive cost of Kshs. 203,280,000.00 following the due diligence report.***

The Board has perused the Tender Document for the subject tender and notes that post qualification is provided for under sub-clause a) Post qualification of Clause 2.27 Award Criteria of Section II Instructions To Tenderers at page 13 and 14 of the Tender Document as follows:-

"2.27.1 In the absence of pre-qualification, the Procuring Entity will determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated responsive tender is qualified to perform the contract satisfactorily.

2.27.2 The determination will take into account the tenderer's financial and technical capabilities. It will be based upon an examination of the documentary evidence of the tenderers qualifications submitted by the tenderer, pursuant to paragraph 2.12.3, as well as such other information as the Procuring Entity deems necessary and appropriate.

2.27.3 An affirmative determination will be a prerequisite for award of the contract to the tenderer. A negative determination will result in rejection of the Tenderer's tender, in which event the Procuring Entity will proceed to the next lowest evaluated tender to make a similar determination of that Tenderer's capabilities to perform satisfactorily.

On the other hand, Clause 2.12.3 of Section II Instructions To Tenderers at page 6 of the Tender Document provides as follows:

"The documentary evidence of the tenderers qualifications to perform the contract if its tender is accepted shall be established to the Procuring entity's satisfaction;

a) that, in the case of a tenderer offering to supply goods under the contract which the tenderer did not manufacture or otherwise produce, the tenderer has been duly authorized by the goods' Manufacturer or producer to supply the goods.

b) that the tenderer has financial, technical, and production capability necessary to perform the contract;

c) that, in the case of a tenderer not doing business within Kenya, the tenderer is or will be (if awarded the contract) represented by an Agent in Kenya, equipped, and able to carry out the Tenderer's maintenance, repair and spare parts-stocking obligations prescribed in. the Conditions of Contract and/or Technical Specifications."

However, sub-clause a) Post qualification Due Diligence of ITT Clause 2.27 Award Criteria of the Appendix To Instruction To The Tenderers at page 17 of the Tender Document provides as follows:-

"The procuring entity shall conduct post qualification due diligence to determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated responsive tender is qualified to perform the contract satisfactorily"

It is worth noting that the passage at the beginning of the Appendix To Instructions To The Tenderers at page 16 of the Tender Document reads as follows:-

"The following information for procurement of services shall complement or amend the provisions of the instructions to tenderers. Wherever there is a conflict between the provisions of the instructions to tenderers and the provisions of the appendix, the provisions of the appendix herein shall prevail over those of the instructions to Tenderers."

A reading of the aforementioned provisions of the Tender Document, the Board notes that the Procuring Entity had the discretion to conduct post qualification evaluation or what is also known as a due diligence exercise. Such post qualification evaluation was required to take into account the tenderer's financial and technical capabilities based on examination of documentary evidence of the tenderers qualification submitted by a tenderer such like a manufacturer's/producer's authorization to supply goods for the subject tender. However, post qualification evaluation was not only confined to what was stipulated in the Tender Document but was open to such other information as the Procuring Entity deemed necessary and appropriate as provided in sub-clause 2.27.2 of sub-clause a) of Clause 2.27 Award Criteria of Section II Instructions To Tenderers at page 14 of the Tender Document. What this means is that the Procuring Entity had a wide latitude of conducting post qualification evaluation on a tenderer based on the tenderer's documentary evidence and information provided in a tenderer's original tender.

We also note that a negative determination arising from a post qualification evaluation process would result in rejection of the lowest evaluated tenderer's tender and a post qualification evaluation would subsequently be conducted on the next lowest evaluated tenderer.

Section 83 of the Act provides as follows with respect to post qualification:-

“(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the

tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation”

A reading of section 83 of the Act elucidates on what is and how an evaluation committee should conduct post-qualification evaluation. Post-qualification or due diligence is an exercise conducted by an evaluation committee on a tenderer who has been found to have submitted the lowest evaluated responsive tender, before an award of tender is made to such tenderer, to confirm and verify the qualifications of such tenderer. This exercise entail but is not limited to obtaining confidential references from persons with whom such tenderer has had prior engagement. Further, each member of the evaluation committee must initial each page of the due diligence report and append his/her signature as well as their full name and designation for a due diligence report to be acknowledge to be a true reflection of the proceedings held with respect to due diligence exercise. In a nutshell, a due diligence report is different from an evaluation report and can only be prepared after an evaluation report has been concluded and an evaluation committee has recommended an award to a tenderer who has

been found to have submitted the lowest evaluated responsive tender but prior to award of the tender to such tenderer.

Interpreting both the provisions of the Tender Document cited herein before and Section 3 of the Act, due diligence is conducted on the lowest evaluated responsive tenderer to verify and confirm the qualification of the lowest evaluated tenderer after preliminary, technical and financial evaluation with respect to what such tenderer provided in its tender, in response to the minimum eligibility and mandatory requirements in the Tender Document and which documents ought to have been considered during evaluation.

After concluding the exercise, a due diligence report must be prepared outlining how due diligence was conducted together with the findings of the process. The said report is separate from an Evaluation Report and is only signed by members of the Evaluation Committee who took part in the due diligence exercise, and who must also include their designation. In addition, the report must be initialed on each page.

If the qualifications of the lowest evaluated tenderer are satisfactory, the report is submitted to the Head of Procurement function for his/her professional opinion and onward transmission to the Accounting Officer who will consider the professional opinion in deciding to award the tender. Assuming the lowest evaluated tenderer is disqualified after the first due diligence, this fact must be noted in the Due Diligence Report with reasons.

In view of the findings of this report that the lowest evaluated tenderer be disqualified after due diligence, the Evaluation Committee will then

recommend award to the next lowest evaluated tenderer. Thereafter, a similar due diligence process is conducted on such a tenderer. This process is repeated until a responsive tenderer is identified.

Accordingly, a procuring entity may elect to conduct due diligence exercise to satisfy itself of the qualifications of the tenderer determined by the evaluation committee to be the lowest evaluated responsive tenderer after financial evaluation but before an award is made. When a procuring entity advertises a tender, tenderers submit their tender documents attaching evidence of their qualifications. In arriving at the responsive tenderer therefore, the procuring entity considers documents that support the eligibility and mandatory requirements specified in the procuring entity's tender document.

Turning to the circumstances of this review, the Board has carefully studied the confidential documents submitted to it pursuant to section 67 (3)(e) of the Act and notes that the Applicant was the lowest evaluated tenderer at the end of Financial Evaluation and a due diligence exercise was conducted on it before awarding the subject tender. The Evaluation Committee then drafted a due diligence report detailing the criteria used to conduct due diligence which entailed (i) verifying the validity of the Applicant's tax compliance certificate through the Kenya Revenue Authority (KRA) website <http://itax.kra.go.ke/KRAPortal/cpmplianceMonitoring.htm?actionCode=validateTCC>; and (ii) verifying the Applicant's past performance by writing to sites referenced by the Applicant as evidence of similar works carried out.

With respect to the Applicant's tax compliance certificate, the same was verified and found to be valid upto 23rd April 2021 and a copy of the verification was attached to the Due Diligence Report.

With respect to verification of the Applicant's past performance, the Board notes that written confidential reference by Safaricom PLC and Huawei Technologies (Kenya) Co. Ltd were obtained and attached by the 1st Respondent to the Due Diligence report being entities with whom the Applicant had prior engagement as envisaged under section 83 of the Act.

In its written confidential reference dated 30th July 2021, Safaricom PLC confirmed the Applicant had in the past carried out fibre rollout and maintenance for both fibre-to-sites and fibre-to-the-home works in the Rift Valley Region satisfactorily in accordance with defined service level standards in 2017 to 2018. However, Safaricom PLC pointed out areas for improvement as noted from performance reviews with respect to the Applicant, as accounting and reconciliation for work done. Further, Safaricom PLC confirmed that the Applicant is no longer providing the services mentioned hereinbefore because the Applicant was unsuccessful in the subsequent tender.

On the other hand, the written confidential reference by Huawei Technologies (Kenya) Company Ltd (hereinafter referred to as 'Huawei') dated 29th July 2021 confirmed the Applicant was its subcontractor during Huawei's delivery process of the NOFBI Maintenance Project (hereinafter referred to as the 'Project') responsible for operations and maintenance services for NOFBI network for the period January 2015 to March 2021 and

that though the Applicant finished their part of services, the Applicant got a low score for some Outside Plant Maintenance services. Huawei went to further confirm the Applicant only offered services for the passive network since the active equipment was carried out by Huawei for both IP and transmission network equipment on the Project. Huawei, further indicated the Applicant was no longer supporting the network of the Project and was neither the channel partner of Huawei since the Applicant obtained a performance grade C for some of the historical works fulfilled by the Applicant which did not get the requested performance score stated in the subcontract agreements whilst enumerating the performance grading of the Applicant between years 2015 and 2018. Huawei concluded by distancing itself from the Applicant by stating as follows, "***Huawei wishes not to associate with Geonet (means Geonet Technologies Limited) as stated in the afore bullet on any current or future projects. Currently, we are now cooperating with other more effective and qualified partners***".

Notably, from the Due Diligence report, the Evaluation Committee rejected the Applicant's tender, *inter alia*, on the basis that the subject tender involves support and maintenance of Huawei's equipment, Huawei being the Original Equipment Manufacturer (OEM) is not willing to support the Applicant which position is likely to have a negative significance performance in the project.

Consequently, the Evaluation Committee recommended the 2nd Respondent for award of the subject tender since it was the next lowest evaluated tenderer and conducted due diligence on it based on the same parameters

of (i) validity of its Tax Compliance Certificate and (ii) verification of past experience. The due diligence report with respect to the 2nd Respondent had a positive outcome in favour of the 2nd Respondent in both parameters.

The Evaluation Committee therefore recommended award of the subject tender to the 2nd Respondent at the tender sum of Kshs.203,280,000.00. The Due Diligence report was signed by all the members of the Evaluation Committee that conducted the exercise on 9th August 2021 who initialed on all pages of the Due Diligence report as well as indicated their full names and designation.

In Miscellaneous Civil Application 85 of 2018 ***Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party)*** the Court held that;

"To be considered for award, a bid must comply in all material respects prescribed in the invitation for bids. When any tender is passed over or regarded as non-responsive, the reasons for passing over such tender must be defensible in any court of law. Examples in this regard may include negative banking reports, non-submission of tax clearance certificates, not having the necessary capacity and / or capability, being listed on the Register for Tender Defaulters, negative due diligence reports, a history of poor performance in similar works or services, etc.

It was a bid requirement that bidders would submit lists of similar projects they have undertaken and that a post qualification evaluation was to be undertaken. Due diligence was a requirement. The real import of this requirement could not be tucked away.

.....
In its broadest sense, the term 'due diligence' simply refers to taking reasonable steps or exercising reasonable care in relation to a particular course of action.

All bidders must demonstrate that they have the required competencies in their core teams; the proposal must include all required documentation as requested in the Request For Proposal; and all bidders are required to meet the minimum specifications of compliance, technical expertise, and experience. Where the post qualification evaluation suggests otherwise, the bid will be rejected if the discovery is material to the contract. It is my conclusion that it was unreasonable for the Respondent to ignore such a pertinent requirement which was material to the tender process and a legal requirement. In my view, a reasonable body applying the law to the facts of this case would have arrived at a different conclusion. On this ground, this application succeeds."

From the above case law, courts have emphasized on the importance of due diligence and gone further to hold that a negative due diligence report can be a reason for rejecting a tenderer's tender and it would be unreasonable for the same to be ignored.

In the circumstances of this review, the Board notes that the Evaluation Committee had no option but to reject the Applicant's tender the moment it received a negative due diligence report with respect to the Applicant and to subsequently proceed to conduct due diligence on the next lowest evaluated tenderer.

Accordingly, the Board finds that the Procuring Entity conducted due diligence exercise in accordance with sub-clause a) Post qualification of Clause 2.27 Award Criteria of Section II Instructions To Tenderers at page 13 and 14 of the Tender Document read together with sub-clause a) Post qualification Due Diligence of ITT Clause 2.27 Award Criteria of the Appendix To Instructions To Tenderers at page 17 of the Tender Document and Section 83 of the Act.

On the second issue for determination, the Board is guided by section 87(3) of the Act which provides as follows:-

"When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof."

On the other hand Regulation 82 of Regulations 2020 provide as follows-

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

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

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

Interpretation of the aforementioned provisions of law requires (i) simultaneous notification in writing of the outcome of the evaluation of tenders to both the successful and unsuccessful tenderers, (ii) disclosure to the unsuccessful tenderer of why its tender was not successful, (iii) disclosure to the unsuccessful tenderer who the successful tenderer is, (iv) disclosure to the unsuccessful tenderer the successful tenderer's tender price and (v) disclosure to the unsuccessful tenderer why the successful tenderer's tender was successful e.g. it was the tender with the lowest evaluated price etc in accordance with section 86 (1) of the Act.

The Board has had occasion to pronounce itself on the need for disclosure of reasons to an unsuccessful tenderer why its tender was not successful. In **PPARB Application No. 72 of 2021 Lavington Security Limited V Center For Mathematics, Science And Technology Education In Africa (CAMASTEa)** the Board held that:

"A notification must contain both the reason why the bidder's bid was found non-responsive as well as a disclosure of the winning bidder and the price at which award was made including the reason why a successful bidder was found to be successful in accordance with Section 86(1) of the Act. This is the ideal position in promotion of the principle of transparency envisaged under Article 227 (1) of the Constitution."

In the instant review, the Applicant's notification letter discloses the successful tenderer as the 2nd Respondent and the successful tenderer's tender price of Kshs.203,280,000.00. However, the reason advanced for finding the Applicant's tender not successful is too general. The Applicant has a right to know what led to the 1st Respondent holding that the Applicant was not positively affirmed by an Original Equipment Manufacturer and what this means. This would go a long way in upholding the principle of fairness and transparency under Article 227(1) of the Constitution and upholding the Applicant's right to administrative action that is reasonable and procedurally fair under Article 47 of the Constitution.

Accordingly, the Board finds the Procuring Entity's letter dated 10th August 2021 notifying the Applicant of its unsuccessful tender, was not issued in accordance with Section 87(3) of the Act read together with Regulation 82 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020').

In the circumstances and noting that letters of notification to the successful and unsuccessful tenderers must be issued at the same time, the Board has

no option but to nullify all letters of notification and to direct the 1st Respondent to re-issue letters of notification to the successful tenderer and unsuccessful tenderers in accordance with Section 87 of the Act read together with Regulation 82 of Regulations 2020.

In totality of the foregoing, the Board proceeds to make the following determination.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board proceeds to make the following orders: -

- 1. The Procuring Entity's Letters of Notification dated 10th August 2021 issued to the Applicant and all other unsuccessful tenderers with respect 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, be and are hereby cancelled and set aside.**

- 2. The Procuring Entity's Letter of Notification dated 10th August 2021 issued to the 2nd Respondent with respect 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, be and is hereby cancelled and set aside.**

- 3. The 1st Respondent is hereby directed to re-issue Letters of Notification of the outcome of evaluation of tenders with respect 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 in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020 within seven (7) days from the date of this decision.**

- 4. Given that the procurement proceedings of the subject tender are not complete; each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 13th day of September 2021

CHAIRPERSON

PPARB

SECRETARY

PPARB