

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 69 OF 2022 OF 1st AUGUST 2022

BETWEEN

COM TWENTY ONE LIMITED.....APPLICANT

AND

THE DIRECTOR GENERAL,

COMMUNICATIONS AUTHORITY OF KENYA.....1ST RESPONDENT

COPY CAT LIMITED1ST INTERESTED PARTY

BROADCAST GURUS LIMITED2ND INTERESTED PARTY

CONAN COMMUNICATIONS3RD INTERESTED PARTY

NEW EDGE SOLUTIONS4TH INTERESTED PARTY

NEXT TECHNOLOGIES.....5TH INTERESTED PARTY

SYBYL.....6TH INTERESTED PARTY

STARTIMES CONSORTIUM.....7TH INTERESTED PARTY

BARAN TELCOM NETWORKS.....8TH INTERESTED PARTY

Request for Review of the decision of the Accounting Officer of the Communications Authority of Kenya, made vide a letter dated 19th July, 2022 declaring the Applicant's bid non-responsive with respect to Tender No.CA/PROC/OT/73/2021-2022, Open National Tender for Supply, Delivery, Installation, Commissioning and Maintenance of Broadcast Loggers.

BOARD MEMBERS

- | | |
|-----------------------|----------------------------------|
| 1. Mrs. Njeri Onyango | - Vice Chairperson (panel Chair) |
| 2. Phyllis Chepkemboi | - Member |
| 3. Ambrose Ogeto | - Member |
| 4. Rahab Chacha | - Member |
| 5. Nicholas Mruttu | - Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | - Holding Brief for Board Secretary |
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BACKGROUND TO THE DECISION

The Communications Authority of Kenya, (hereinafter referred to as, "the Procuring Entity"), advertised an Open National Tender No.CA/PROC/OT/73/2021-2022, for Supply, Delivery, Installation, Commissioning and Maintenance of Broadcast Loggers (hereinafter referred to as the 'subject tender'). The Tender was advertised in MyGov newspaper and published on the Public Procurement Information Portal (PPIP) and the Authority's websites on 12th April 2022.

Addendums and Clarifications

Two addenda in response to the clarifications sought by potential bidders dated 22nd April 2022 and 5th May 2022 respectively were issued and uploaded on the Procuring Entity's website and on the Public Procurement Information Portal (PPIP). The tender was initially scheduled to close on 4th May 2022 at 1030hrs. However, following requests from the prospective bidders for extension of the tender submission dates, the closing date was

extended to the 11th May 2022 through *MyGov* newspaper publication of 26th April 2022.

Tender Submission Deadline and Opening of Bids

By the Tender submission deadline of 11th May 2022, the Procuring Entity had received a total of nine (9) bids. The subject tender was opened by a Tender Opening Committee and the following tenderers were recorded as having submitted their bids per the Tender opening summary:

No	Name of Firm	Bid Security (Kshs.) 10,000,000.00)	Tender Sum (Kshs.)
B1	Broadcast Gurus Limited	Sumac microfinance bank	USD 9,988,768.88
B2	Conann Communications	Sumac microfinance bank	USD 9,718,263.68
B3	New Edge Solutions	Family Bank	2,026,340,380.29
B4	Next Technologies	Sumac microfinance bank	USD 14,110,159
B5	Sybl	Family Bank	USD 14,606,620
B6	Startimes Consortium	Co-operative Bank	USD 12,443,925
B7	Copy Cat Limited	Stanbic Bank	USD 10,241,308
B8	Baran Telecom Networks Kenya Ltd	Middle East Bank	USD 8,439,516
B9	Com 21 Limited	Family Bank	USD 13,537,350

Evaluation of Tender Bids

From the evaluation report dated 18th May 2022, the evaluation Committee noted that the tender was to be evaluated through a five (5)-stage evaluation process as indicated below:

1. Mandatory evaluation - Pass/Fail
2. Technical Compliance evaluation - Pass/Fail
3. Technical Capacity evaluation - Pass mark of 75 marks out 100 marks
4. Financial evaluation - lowest cost evaluated bidder
5. Due Diligence - Pass/Fail

Mandatory Evaluation Stage

At this stage of evaluation, the Evaluation Committee evaluated the bids received by the Procuring Entity against the mandatory requirements as outlined in the Tender Document. Failure to meet any of the requirements meant that the firm was to be disqualified at this stage.

Upon conclusion of the mandatory evaluation, out of the nine (9) bidders who submitted their bids in the portal, four (4) bidders were found responsive while five (5) bidders were found to be non-responsive, amongst them the Applicant herein. Reasons advanced as to why the Applicant's tender was non-responsive is that a properly executed Power of Attorney was not submitted as seen below:

Bidder	Reason
B1	<ul style="list-style-type: none">• The bid document was not perfectly bound as it had some loose pages stapled. The financial proposal document was stapled to the bid document.• The submitted form of tender was not duly completed

Bidder	Reason
	<ul style="list-style-type: none"> and was not stamped The confidential business questionnaire was not duly completed and was not stamped
B2	<ul style="list-style-type: none"> The form of tender was not signed and not stamped A properly executed Power of Attorney was not submitted.
B5	<ul style="list-style-type: none"> The company's profile was not legible Part P of the Form of Tender was not duly completed The notes to the Audited Financial Statements were not legible The Certificate of Independent Tender Determination was not duly completed. The choice in Item 5 was not selected.
B6	<ul style="list-style-type: none"> The bid security validity was 204 days instead of the required 240 days i.e expiring on 30th November 2022 instead of 6th January 2023. The form of tender was not stamped The Certificate of Independent Tender Determination was not duly completed. The choice in Item 5 was not selected.
B9	<ul style="list-style-type: none"> A properly executed Power of Attorney was not submitted.

Bidders **B1, B2, B5, B6 and B9** did not meet all the mandatory requirements and were disqualified at this stage. Bidders **B3, B4, B7&B8** met all the mandatory requirements and proceeded to the technical compliance evaluation stage.

Technical Compliance Evaluation Stage

At this stage, bidders were required to comply to the Authority's technical requirements, where they were required to provide explanation of

compliance with reference to the Manufacturers data sheet/brochures with specific page number. The tenders that fail at the technical compliance evaluation will not be considered for the next evaluation stage

Bidders **B3, B4, and B8** did not meet all the technical compliance requirements and were disqualified at this stage because of the following reasons

Bidder	No.	Specifications	Reasons of Failure
B3	2.1.2 1	Provide for at least 2700 TB Network Attached Storage at CA HQ and at least 2700TB redundancy at Disaster Recovery (DR) site at CA Nyeri for storage of recorded content	Did not propose a solution to demonstrate compliance to the requirement
	2.1.3 5	Provide all the required accessories such as Antenna Mounting poles, Antennas, Antenna Cables, Splitters, amplifiers, attenuators, as appropriate	Did not commit to provide the required accessories.
	2.1.4 1	Six no. (6) ultra thin mounted mullion video walls with screens each of minimum display size of 60" with associated mounting and cabling works at CA Centre - <i>Minimum size of each screen revised to 55" as per addendum 2 dated 5th May 2022.</i>	Proposed to supply a TV screen instead of the required ultra thin mounted mullion video walls.
	2.1.4 2	Each screen to display up to 30 HD channels per screen	
	2.1.4 6	Provide associated accessories required	Did not commit to provide associated accessories for the

Bidder	No.	Specifications	Reasons of Failure
			broadcast media monitoring center
	2.1.4 7	Three (3) number 6 kVA SMART UPS with Ethernet port RJ-45 10/100 Base-T to enable remote control over WAN	Did not propose a solution to demonstrate compliance to the requirement
	2.1.4 8	Two (2) Floor Standing 12000 BTU Air Conditioner	Did not propose a solution to demonstrate compliance to the requirement
	2.2.1	Enhanced cabinet logger Maximum Height: 2000mm Maximum Width: 600mm Maximum Depth: 1200mm	Height of proposed cabinet is 2100 mm instead of the required maximum height of 2000 mm
	2.2.1 0	UPS type and rating Input: Single phase, 50Hz, 170 - 270 VAC Output: 240V \pm 10VAC	Range of input voltage of the proposed UPS is 220-240 VAC instead of the required 170-270 VAC
	2.5.2, 2.5.3 & 2.5.4	<i>The Service Level Agreement (SLA) for the duration of the Contract (Warranty and 5 years post warranty period) should include but not limited to the following:</i> The firm will be required to generate digital fingerprint for detection and categorization of structured logged content such as: advertisements, automatic generated public announcements and structured programs (music, TV programs with structured intro's and outro's) Managing, growing and	These requirements were not captured in the draft service level agreement

Bidder	No.	Specifications	Reasons of Failure
		maintaining of the speech to text and the features recognition capability	
		Uploading submitted EPG files to the Logger	
B4	2.1.2 1	Provide for at least 2700 TB Network Attached Storage at CA HQ and at least 2700TB redundancy at Disaster Recovery (DR) site at CA Nyeri for storage of recorded content	Did not propose a solution to demonstrate compliance to the requirement
	2.1.4 1	Six no. (6) ultra thin mounted mullion video walls with screens each of minimum display size of 60" with associated mounting and cabling works at CA Centre - <i>Minimum size of each screen revised to 55" as per addendum 2 dated 5th May 2022.</i>	Proposed to supply a TV screen instead of the required ultra thin mounted mullion video walls.
	2.1.4 2	Each screen to display up to 30 HD channels per screen	
	2.1.4 3	10 Desktop Computers: Latest OS, 64 bit, with a minimum of 16GB RAM, 1TB SSD Hard disk, graphical display hardware, DVD RW, compatible office application including 24" monitor	Did not propose a solution/product to demonstrate compliance to the requirement for 10 desktop computers.
	2.1.4 7	Three (3) number 6 kVA SMART UPS with Ethernet port RJ-45 10/100 Base-T to enable remote control over WAN	Did not propose a solution to demonstrate compliance to the requirement
	2.1.4 8	Two (2) Floor Standing 12000 BTU Air Conditioner	Did not propose a solution to demonstrate compliance to the requirement

Bidder	No.	Specifications	Reasons of Failure
	2.1.5 3	The system should be able to extract audio content (English and Swahili languages speech) and convert the content to text (printed form) and extract keywords from recognized text and generate closed captioning. This requirement is applicable to at least 30 channels broadcasting English and Swahili content. The typical usage is three (3) hours per day.	Did not propose a solution to demonstrate compliance to the requirement
	2.1.5 5, 2.1.5 6 & 2.1.5 7	Features recognition for the broadcast logger	Did not propose a solution to demonstrate compliance to the requirement
	2.1.7 1	Provide detailed explanation on how the recorded content will be analyzed fingerprinted, searched and the report generation will be achieved	Did not propose a solution to demonstrate compliance to the requirement
	2.1.7 4	Attach draft training schedules	Did not attach draft training schedules
	2.1.7 7	Ten (10) computers - will be used for accessing/operating the logger at CA HQ and CA Regional Offices Computer: Latest OS, 64 bit, with a minimum of 16GB RAM, 1TB SSD Hard disk, DVD RW, compatible office application software including 24" monitor.	Did not propose a solution to demonstrate compliance to the requirement

Bidder	No.	Specifications	Reasons of Failure
		Five no. (5) wall mounted SMART TV Screens with minimum display size of 60" each with associated mounting and cabling works at CA HQ and CA Regional Offices	
	2.1.7 8	Manufacturer's Authorization letters for broadcast tuners and loggers in the format provided. Where the bidder is an agent of a manufacturer of the system to be supplied then, the manufacturer must fill in and sign the manufacturer's Authorization form(s).	Did not provide the Manufacturer's Authorization letters for TV & FM tuners
	2.1.7 9	Warranty. 12 months or more to begin after installation and acceptance	Did not provide proof of warranty for the tuners
	2.2.1 to 2.2.2 1	Enhanced logger cabinet	Did not propose a solution to demonstrate compliance to the requirement
	2.3.1 to 2.3.1 2	Router	Did not propose a solution to demonstrate compliance to the requirement
	2.4.1 to 2.4.1 3	Network Switch	Did not propose a solution to demonstrate compliance to the requirement
B8	2.1.1 6	Recording formats. Video: H.265 or H.264 Audio: AAC	The proposed solution did not indicate that it supports Audio format: AAC
	2.1.1 7	IP Audio Media Visual formats. Video: MPEG-Transport Stream (TS) over UDP/RTP/HTTP, HLS, RTSP, Web streams Audio: AAC	

Bidder	No.	Specifications	Reasons of Failure
	2.1.2 9	Desktop application-based player allowing for instant access to any part of the recordings by selecting, keying or scrolling to seconds, minutes, hour and days	There was no evidence of a Desktop application-based player.
	2.1.3 3	Export of logged content Minimum of the following Export Formats: Video: H.265, H.264, MPEG-TS, MP4, WMV Audio: AAC, MP3, WAV	The proposed solution did not indicate that it supports Audio format: AAC
	2.1.4 1 &2.1. 42	Six no. (6) ultra thin mounted mullion video walls with screens each of minimum display size of 60" with associated mounting and cabling works at CA Centre - <i>Minimum size of each screen revised to 55" as per addendum 2 dated 5th May 2022.</i>	Proposed to supply a TV screen instead of the required ultra thin mounted mullion video walls.
	2.1.5 3	The system should be able to extract audio content (English and Swahili languages speech) and convert the content to text (printed form) and extract keywords from recognized text and generate closed captioning. This requirement is applicable to at least 30 channels broadcasting English and Swahili content. The typical usage is three (3) hours per day.	Did not propose a solution to demonstrate compliance to the requirement
	2.1.5 5, 2.1.5 6 & 2.1.5 7	Features recognition for the broadcast logger	Did not propose a solution to demonstrate compliance to the requirement
	2.1.6 1	The system should have the capability to measure programme loudness (audio level) of the content recorded in accordance to ITU-R BS 1770-3	Did not provide evidence that proposed system has capability to measure programme loudness of the content recorded in

Bidder	No.	Specifications	Reasons of Failure
			accordance to ITU-R BS 1770-3
	2.1.6 8	Reports. Data reports - graphs, pie charts	Sample reports were not provided to demonstrate compliance to the requirement
	2.2.1	Enhanced cabinet logger Maximum Height: 2000mm Maximum Width: 600mm Maximum Depth: 1200mm	Height of proposed cabinet is 2100 mm instead of the required maximum height of 2000 mm
	2.2.1 5	Enhanced cabinet logger Inbuilt Fire Suppression	Did not propose a solution to demonstrate compliance to the requirement

Bidder **B7** met all the technical compliance requirements and proceeded to the next stage of evaluation i.e technical capacity evaluation.

Technical Capacity Evaluation

Bidders that were successful in the Technical Compliance evaluation stage were to be subjected to a Technical Capacity evaluation. Bidders that attain a pass mark of 75% and above out of 100% were to proceed to the Financial Evaluation stage. **Bidder 7** having passed the Technical Compliance evaluation stage was subjected to the Technical Capacity Evaluation stage. The bidder's scores were 89.2% which is above 75% and as such qualified to financial evaluation.

Financial Evaluation

B7 having qualified at the technical capacity stage was subjected to the

Financial Evaluation criteria set out in the Tender document which stated that the lowest evaluated bidder was to be considered to proceed to the due diligence evaluation stage. The Committee noted that Bidders were required to consider the following requirements at the financial evaluation stage:

- i. The total costs for the projects inclusive all taxes and incidental costs to be taken to the form of tender is (A+B+C+D)*
 - ii. All cost quoted shall be inclusive of all taxes, duties and freight cost and shall be Delivered Duty Paid (DDP).*
 - iii. The cost of the spare parts shall not to be included as part of tender sum taken to the form of tender*
 - iv. The cost of the disposal shall not to be included as part of tender sum taken to the form of tender*
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- v. Bids with arithmetic errors shall be disqualified at the financial evaluation stage.*
 - vi. Bidders MUST ensure that their bids are arithmetic error free*
 - vii. Bidders MUST ensure that all calculations are estimated to two decimal places.*

As per the evaluation Committee report. B7 financial proposal was found to be responsive to the tender requirements and was within the Authority's approved budget of Kshs 1.697 Billion.

Based on the report, the Evaluation Committee recommended that B7 being the lowest evaluated and technically responsive bidder and subject to successful Post qualification (Due Diligence) Report, that the Tender for Supply, Delivery, Installation, Commissioning and Maintenance of Broadcast Loggers to **M/s The Copy Cat Limited of P.O. Box 49872 – 00100 Nairobi** at a total contract sum of US\$ Ten Million, Two Hundred and Forty One Thousand, Three Hundred and Eight (US\$ 10,241,308.00) inclusive of taxes as per the breakdown below:

No.	Item description	Total cost (US\$)
1	Supply, delivery, installation and commissioning of broadcast loggers including Enhanced logger Cabinet rack, Switch and Electrical, Networking inclusive of After Sales Maintenance for a period of 5 years after warranty Period for the broadcast loggers- Phase 1	4,969,999.00
2	Supply, delivery, installation and commissioning of broadcast loggers including Enhanced logger Cabinet rack, Switch and Electrical, Networking inclusive of After Sales Maintenance for a period of 5 years after warranty Period for the broadcast loggers- Phase 2	5,271,309.00
Grand total cost carried to form of tender (US\$)		10,241,308.00
Grand total cost in KShs using the CBK rate as per the tender closing date of 11th May 2022, (1US\$ equivalent 116.0676)		KShs.1,188,684,040.42

List of Replaceable Components (Spare Parts)

Bidders were required to provide the list of spare parts and the unit rates inclusive of taxes to be used as-and-when required for a period of five(5)years. Bidder 7 submission is listedbelow:

List of Spare Parts

No	ITEM	QUANTITY	UNIT PRICE (US\$)
1.	FM Antenna	1	293.00
2.	TV Antenna	1	423.00
3.	FM Tuner	1	4,870.00
4.	TV Tuner	1	1,589.00
5.	Broadcast Logger	1	81,250.00
6.	Smart UPS, 6KVA	1	2,080.00
7.	Router	1	1,640.00
8.	Network Switch	1	5,313.00
9.	Enhanced Cabinet	1	14,100.00

COST OF DISPOSAL

The bidders were to provide the cost of disposing the broadcast loggers at the end of useful life of the equipment.

Cost of Disposal

No.	Cost of disposal of broadcast logger at the following sites	Qty	Unit cost per site (US\$) exclusive of VAT	Total cost per Phase (US\$) inclusive of VAT
1.	Garissa, Eldoret, Kisumu, Kisii, Meru, Webuye, Kitui, Kitale, Narok, Marsabit, Migori, Embu, Lodwar, Kericho,	Lot	500.00	13,920.00

	Kabarnet, Maralal, Malindi, Wundanyi, Kakuma, Siaya, Busia, Rumuruti, CA HQ & CA Nyeri.			
2.	Kakamega, Wajir, Homabay, Chuka, Mt. Elgon, Muranga, Maseno, Mbagathi, Rongo, Nanyuki, Mandera, Hola, Garsen, Kilifi, Kajiado, Kwale, Kerugoya, Kosele, Kuria, Lubao, Mpeketoni, Kibwezi, Baraton, Bunyore, Athi river, Garbatulla, Bomet, Juja, Kapsowar, Isiolo, Kehancha, CA Kahawa, Lamu, Kianjai, CA South B, Kerarapon, Kinoo, Korogocho, Laikipia, Mariashomi, Mathare, Mfangano, CA Mombasa, Nyando, Pumwani, Ruaka, Sio Port, Limuru, Taveta, Utawala, Kasarani, Njoro, Nairobi and Nakuru.	Lot	500.00	31,320.00
Total Cost of Disposal				45,240.00

The project implementation period as proposed by the bidder is as follows:

Phase 1: 20 Weeks

Phase 2: 52 Weeks

Total: 72 Weeks

First Professional Opinion

The Head of Procurement and the Director General vide professional opinion paper No. OP/135/05/2021-2022 dated 19th May 2022 made the several observations, which the Committee also responded to as follows:

No.	Observation made	Evaluation committee response
Head of Procurement		
1	That the reasons provided of " <i>a properly executed power of attorney was not submitted</i> " and " <i>form of tender was not duly completed....</i> " that led to B1, B2 and B9 not qualifying at the mandatory evaluation stage need to be expounded for clarity	B1, B2 and B9 did not attach a duly signed, and stamped power of attorney for the person signing the tender on behalf of the tenderer, duly certified by a Commissioner for Oaths or Notary Public

No.	Observation made	Evaluation committee response
	based on the documentation provided;	
2	<p>The Evaluation committee recommended award of the tender to M/s TheCopy Cat Limited of P.O. Box 49872 – 00100 Nairobi at a total contract sum of US\$ Ten Million, Two Hundred and Forty One Thousand, Three Hundred and Eight (US\$ 10,241,308.00) inclusive of taxes subject to due diligence. Based on the report, the following were not included as part of the recommendation although the same were provided as part of the financial proposal;</p> <p>I. The list of spare parts to be used as and when during the period;</p> <p>II. The cost of disposal (salvage cost);</p>	<p>The list of spares to be used as and when required and the salvage cost has been included in matters arising 1. <i>(Evaluation Committee recommendation)</i></p>
	<p>I. The list of spare parts to be used as and when during the period;</p> <p>II. The cost of disposal (salvage cost);</p>	
3	<p>There is need to provide a detailed breakdown indicating the total cost per phase with (one time and aftersales maintenance costs) being clearly indicated as well as the implementation period for each phase;</p>	<p>The detailed breakdown has been provided for matters arising 1. <i>(Evaluation Committee recommendation)</i></p>
4.	<p>Specific recommendation to undertake due diligence as part of the evaluation process (stage five) of the evaluation criteria</p>	<p>Proposed sites have been provided for under matters arising 1. <i>(Evaluation Committee recommendation)</i></p>

No.	Observation made	Evaluation committee response
	stated in the tender document and also propose the sites to be visited.	
Director General		
5	Evaluation Committee to determine whether due diligence must be a physical exercise or it could be completed virtually. There is need for a more efficient way to conduct due diligence given the time constraints.	The Evaluation Committee noted that some of the aspects that were indicated by the bidder as compliant to the specifications require to be ascertained during the due diligence and requires hands-on interaction/confirmation (demonstration) on an implemented system in a real environment and therefore a virtual exercise may not suffice.
6	Integration with existing platform is important. How does the proposed solution going to integrate with the existing one? Are there guarantees this is going to happen and what conditions are required.	<p>The Committee notes that M/s Copy Cat Limited responded as follows on the system integration aspect.</p> <p>Actus Engineering will need to access the video storage system to understand how video is stored and time stamped. As long as the video and audio files are stored in an open video format, such as .mp4, Actus will be able to read the video files and play them directly through the Actus player.</p> <p>The process for Actus End users should be seamless and invisible. Actus end users will request historic video from the Stirlitz system, the video will be extracted from the Stirlitz video folder and played in the Actus UI.</p> <p>That there are several prerequisites for a successful integration with Stirlitz. First, Stirlitz and/or CA must provide full, direct access to the server(s) and</p>

No.	Observation made	Evaluation committee response
		<p>Stirlitz software for Actus Engineering to analyze the data structure. This includes administrator usernames and passwords to access the server, database, and video file storage. Also, Stirlitz will need to provide an API document with instructions to extract any metadata from the Stirlitz database. The video data must be in an open, standard format where the stored video is playable from any off the shelf video player. Lastly, if metadata also needs to be extracted, Stirlitz must provide database table names for all metadata.</p> <p>There are no guarantees that this would happen as it is dependent on cooperation of supplier and whether the formats are proprietary</p>
7	<p>The evaluation committee must also reach out to the existing supplier to confirm support towards integration.</p>	<p>This was not possible at this stage as the existing supplier is also an interested party in the subject tender and evaluation process is yet to be completed.</p> <p>However, the Evaluation committee is aware that the existing supplier's contract obliges him to ensure integration with a third party.</p>

From the foregoing, B7- M/s Copy Limited of P.O. Box 49872 – 00100 Nairobi was the lowest evaluated and technically responsive bidder for Tender for Supply, Delivery, Installation, Commissioning and Maintenance of Broadcast loggers. The bidder was recommended for the last stage of

evaluation i.e Due Diligence before consideration for award of the tender.
The bidder's proposed solution was Actus digital broadcast logger solution.

The Committee proposed to conduct due diligence in one of the three reference sites given in order of the preference below:

- 1. Encompass Digital Media (EDM) USA**
- 2. EMMC Regulator (India)**
- 3. Multichoice - South Africa**

Due Diligence

Following successful completion of the mandatory, Technical Compliance, Technical Capacity and financial evaluation of the received tenders, the evaluation committee was required to undertake due diligence on the lowest evaluated bidder M/s Copy Cat Limited. The firm is the lead bidder in a joint venture with Actus Digital of the United States of America for the Supply, Delivery, Installation, Commissioning and Maintenance of the Broadcast Loggers Tender.

As stipulated in the Tender Document, Section III – Evaluation Selection criteria - Post qualification and Contract award (ITT 39) (Due Diligence):
"Post qualification due diligence shall be conducted on the lowest evaluated bidder. During the due diligence, the procuring entity was to assess the authenticity of the submitted documentation/information references and the manufacturer's sites".

The Director General, vide a memo dated 8th July 2022 granted approval

for the Evaluation Committee to conduct Due Diligence on the Lowest Evaluated bidder for the Broadcast Loggers. M/s The Copy Cat Limited of P.O. Box 49872 Nairobi – 00100 between Tuesday 12th and Friday 15th July 2022 at the reference sites at Uganda Communications Commission (UCC) in Uganda.

The evaluation committee's key areas of interest were, but not limited to the following:

1. Satisfactory system implementation
2. Satisfactory system performance
3. Satisfactory after-sales maintenance support

Satisfactory Implementation

The Vendor/Actus Digital had successfully implemented the supply, delivery and installation of the broadcast loggers used by UCC. They had supplied Actus software Version 6 for logging FM radio stations in Mwizi, Mbarara and Version 7.1 for logging TV and FM broadcast loggers at the NOC. The Actus logger system was initially integrated with the Volicon logger system but the latter had been phased out at the time of visit.

Satisfactory System performance

The system performance is billed as excellent, helping UCC monitor the recorded content from broadcasters as detailed in the findings above during the Evaluation Committee's visit at NOC and Mbarara broadcast logging station.

Satisfactory After-Sales Maintenance Support

An interview with UCC staff noted that the system development efforts by the supplier were excellent. The team was also informed that the supplier promptly responds to service maintenance requests and provides system updates.

In view of the above positive findings of the Due diligence visit to the referenced Sites, the Evaluation Committee recommended the award of the Tender for Supply, Delivery, Installation, Commissioning and maintenance of the broadcast loggers to **M/s The Copy Cat Limited, P.O. Box: 49872, Nairobi– 00100, Tel: 0709873000**, at a total contract sum of **US\$ Ten Million, Two Hundred and Forty One Thousand, Three Hundred and Eight (US\$ 10,241,308.00)**

The Evaluation committee further recommended that the Performance bond be structured in line with the Tender document Special Conditions of Contract as follows:

Installation Performance Security

For the one time supply & installation costs inclusive of training costs of the Broadcast Loggers and Associated equipment/works, and training, the Bidder shall, before the execution of this contract provide a performance security amounting to 5% of the total one time installation and training costs for phase 1 & phase 2.

The performance security shall remain valid thirty (30) days beyond the duration of the supply, and installation of the broadcast loggers and associated equipment/works warranty period. However, if the period is

extended, the bidder shall provide an extension of the installation performance security.

Maintenance Performance Security

For annual comprehensive maintenance of the Broadcast Loggers and Associated equipment, the bidder shall within thirty (30) days before the expiry of the installation performance security provide a performance security amounting to 5% of the total maintenance costs for each phase after practical completion valid for 5 years and thirty (30) days beyond the contract validity period.

The maintenance and support performance security shall remain valid for thirty (30) days beyond the maintenance period of five (5) years. However, if the period is extended, the bidder shall provide an extension of the installation performance security.

Deployment Period is 72 weeks for both phase 1 and phase 2.

The cost is captured in the revised multiyear procurement plan for the FY 2021-2023 under TV & Radio logger under Budget Code 211601 at a cost of Kshs. 1.6 Billion

Proposed Contract Award

S/N	Item	Description	
1	Lowest evaluated and technically responsive bidder	Name:	M/s The Copy Cat Limited
		Address:	P.O. Box: 49872 – 00100 Nairobi
		Contract Price	(US\$ 10,241,308.00) inclusive of taxes
2	Joint Venture partner	Actus Digital	
3	Estimated	Upon the expiry of the fourteen days of the Notification	

	date of contract signing	of Intention to enter in to contract and upon the parties meeting their respective statutory requirements, the Procuring Entity shall send the successful Tenderer the Contract Agreement and Within fourteen (14) days of receipt of the Contract Agreement, the successful Tenderer shall sign, date, and return it to the Procuring Entity. For avoidance of doubt, the written contract shall be entered into within the period specified in the notification of award and before expiry of the tender validity period
4	Estimated contract completion period/ Date	72 weeks from Commencement Date.
5	Tender Price as per Form of Tender	(US\$ 10,241,308.00)

Evaluation Committee's Recommendation

In view of the positive findings of the Due diligence visit to the referenced Site (Uganda Communications Commission), the Evaluation Committee recommends award of the Tender for Supply, Delivery, Installation, Commissioning and maintenance of the broadcast loggers to M/s The Copy Cat Limited, P.O. Box: 49872, Nairobi – 00100, at a total contract sum of US\$ Ten Million, Two Hundred and Forty One Thousand, Three Hundred and Eight (US\$ 10,241,308.00) inclusive of taxes.

Second Professional Opinion and Recommendation to Director General

The professional opinion paper No. OP/02/07/2022-2023 dated 19th July 2022 concurred with the Recommendations of the Evaluation Committee, citing that the process and criteria was set in accordance with Section 80(3) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and that the award was within the prevailing matrix. The Director General pursuant to the recommendation approved award of the subject tender.

Notification of Intention to Award

Vide letters dated 29th July 2022, the Director General of the Procuring Entity notified the tenderers of the outcome of their respective bids. The Applicant was informed that its' bid was unsuccessful because it did not attach a duly signed, and stamped power of attorney for the person signing the tender on behalf of the tenderer, which must be certified by a Commissioner of Oaths or Notary Public.

The Applicant was further notified that the Procuring Entity intended to award the Subject Tender to M/s The Copy Cat Limited, P.O. Box: 49872, Nairobi – 00100, at a total contract sum of US\$ Ten Million, Two Hundred and Forty One Thousand, Three Hundred and Eight (US\$ 10,241,308.00) inclusive of taxes.

REQUEST FOR REVIEW NO. 65OF 2022

The Request for Review was lodged by M/s Com Twenty One Limited, on 1st August, 2022 in the matter of Tender No.CA/PROC/OT/73/2021-2022

for Open National Tender for Supply, Delivery, Installation, Commissioning and Maintenance of Broadcast Loggers together with a Supporting Affidavit sworn by Evans Mwaura Githua seeking the following orders **THAT**:

- a) An order declaring that the Accounting Officer of the Procuring Entity's decision of awarding Tender No.CA/PROC/OT/73/2021-2022, Open National Tender for Supply, Delivery, Installation, Commissioning and Maintenance of Broadcast Loggers to M/s Copy Cat Limited, the Interested Party herein is null and void.***
- b) An order cancelling and setting aside the letter dated 19th July, 2022, notifying the Applicant that its bid was unsuccessful in Tender No.CA/PROC/OT/73/2021-2022, Open National Tender for Supply, Delivery, Installation, Commissioning and Maintenance of Broadcast Loggers.***

- c) An order declaring that the Applicant's bid was responsive at the Preliminary Evaluation stage in accordance with section 79 (1) and 80 (2) of the Act, thus ought to proceed to Technical Evaluation and having submitted an entirely different manufacturer's authorization from that of Copy Cat Limited, the Applicant be evaluated technically and financially so as to be considered for award of Tender No.CA/PROC/OT/73/2021-2022, Open National Tender for Supply, Delivery, Installation, Commissioning and Maintenance of Broadcast Loggers.***

- d) In the alternative to prayer (c) above, an order directing the Accounting Officer of the Procuring Entity to instruct the Evaluation Committee to reinstate all tenders at the Preliminary Evaluation stage so as to undertake a re-evaluation at that stage in accordance with the Tender Document, the Act, Regulations and all other enabling provisions.***
- e) An order directing and compelling the Procuring Entity to bear the costs of this Request for Review.***
- f) The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***

Board Notification to the Respondent of filed Request for Review

In a Notification of Appeal and a letter dated 1st August 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") notified the Respondents of the existence of the Request for Review and suspension of procurement proceedings for the subject tender while forwarding a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit any information and arguments about the subject tender within five days pursuant to the PPARB Circular No. 2/2020 dated 24th March 2020.

In opposition of the Request for Review, the Respondent filed its Memorandum of Response to the Applicant's Request for Review dated 5th August 2022 and filed on 8th August 2022.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all requests for review applications shall be canvassed by way of written submissions. The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Act. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

Vide letters and notifications of appeal dated 8th August 2022, the Acting Board Secretary notified the rest of the Tenderers via email as provided in

the submitted confidential documents, of the existence of the subject Request for Review while forwarding to the interested parties a copy of the Request for Review together with the Board's circular No. 02/2020 dated 24th March 2020. The tenderers were invited to submit to the Board any information and arguments about the subject tender within 3 days from 8th August 2022.

The Applicant filed a further Affidavit on 15th August 2022 sworn by Evans Mwaura in response to the Respondent's Statement of Response.

The 2nd Interested Party filed on 11th August 2022 its Affidavit in support of the Request for Review before the Board

THE APPLICANT'S CASE

It is the Applicant's case that the Procuring Entity breached section 79 (1) and 80 (2) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") read together with Regulation 74 (1) (h) of the Public Procurement and Asset Disposal Regulations, 2022 (hereafter referred to as "the Regulations") by failing to evaluate its tender at the Preliminary Evaluation stage in accordance with the documents and information submitted for evaluation.

That in particular, Mandatory/Preliminary Evaluation Criteria No. 13 of Section III. Evaluation and Qualification Criteria at page 30 of the Tender Document provided:

"A duly signed, and stamped power of attorney for the person signing the tender on behalf of the tenderer, which must be certified by a Commissioner for oaths or Notary public"

That ITT Clause 19.4 of Section I. Instructions to Tenderers on page 14 of the Tender Document provided further guidance in instances where tenderers were bidding as Joint Venture Partners as follows:

"In case the Tenderer is a JV, the Tender shall be signed by an authorized representative of the JV on behalf of the JV, and so as to be legally binding on all the members as evidenced by a power of attorney signed by each members' legally authorized representatives."

Further, ITT Clause 19.1 of the Appendix to Instructions to Tenderers at page 26 of the Tender Document further amended the general provisions in the Instructions to Tenderers and specifically provided that:

"The written confirmation of authorization to sign on behalf of the Tenderer shall consist of: A DULY SIGNED, AND STAMPED POWER OF ATTORNEY FOR THE PERSON SIGNING THE TENDER ON BEHALF OF THE TENDERER, WHICH MUST BE CERTIFIED BY A COMMISSIONER FOR OATHS OR NOTARY PUBLIC"

The Applicant further claims that the Procuring Entity breached Section 80 (2) of the Act by failing to apply the eligibility criteria under Clause 33 (c) and (d) of Section I. Instructions to Tenderers of the Tender Document

when evaluating the successful bidder thereby awarding the tender to a bidder who did not satisfy the eligibility and mandatory requirements of the Tender Document.

It was therefore clear to the Applicant, that since it wanted to bid in Joint Venture (JV) with another company, **M/s Durants Media Limited**, then:

"...the Applicant's Tender needed to be signed by an authorized representative of the JV on behalf of the JV, and so as to be legally binding on all the members as evidenced by a power of attorney signed by each members' legally authorized representatives..."

Provided further that the power of attorney is:

"A duly signed, and stamped power of attorney for the person signing the Tender on behalf of the tenderer, which must be Certified by a Commissioner for Oaths or Notary Public"

That in response to this criterion, the Applicant attached a Power of Attorney dated 19th April, 2022 at page 0124 of its original bidduly signed by an authorized representative of the JV, MR. EVANS MWAURA GITHUA as the legally authorized signatory of all the parties of the Joint Venture. This Power of Attorney was duly signed and stamped by both JV partners and certified by a Commissioner for Oaths, LYDIA, KINYANJUI CIERA Advocate.

The Applicant avers that its bid qualified for Technical Evaluation but was denied this right by the Respondent's Evaluation Committee which leads it

to the conclusion that their technical and financial competence was not considered having been unfairly excluded from the evaluation process.

The Applicant contends that the Procuring Entity undermined the principle of fairness and competitiveness and failed to ensure that the principles enshrined in Article 227 of the Constitution are applied and protected in the subject procurement process, in particular, by failing to promote fair competition among bidders by opting to award the tender to the successful bidder who did not satisfy all eligibility requirements of the tender, but was given an unfair advantage to the detriment of other bidders.

That upon receipt of a letter addressed to the Public Procurement Regulatory Authority (hereafter "PPRA") by one of the bidders, M/s Broadcast Gurus (the 2nd Interested Party herein) the Applicant was notified from the contents of the said letter that the principal manufacturer of the said bidder, M/s ACTUS DIGITAL INC had provided a manufacturer's authorization to M/s COPY CAT LIMITED, the 1st Interested Party herein. Hence, the 1st Interested Party herein (having the same Principal called ACTUS DIGITAL INC.) was afforded an unfair advantage over other bidders who sought to supply the Broadcast Logger manufactured by M/S ACTUS DIGITAL INC.

The Applicant avers that ITT Clause 16.2 (a) found in the Tender Data Sheet of the Tender Document stated that "Manufacturer's authorization is: REQUIRED". In addition, Mandatory Requirement (MR) 14 at page 30 of the Tender Document stipulated that a tenderer ought to submit:

"A statement confirming that the Tenderer is the manufacturer of the proposed Broadcast Logger OR Where the bidder is an agent of a manufacturer of the proposed Broadcast Logger to be supplied, the manufacturer Must fill in and sign the manufacturer's Authorization form in the format provided in Section IV"

The Applicant's interpretation and understanding of the above criteria was that bidders could elect to submit their own Broadcast Logger if they are manufacturers of the Broadcast Logger OR for manufacturers to appoint an agent who will supply the Broadcast Logger to the Procuring Entity on behalf of the manufacturer, provided a manufacturer's authorization is provided by the Manufacturer himself.

That receiving the manufacturer's authorization meant that a bidder would be supplying Broadcast Logger belonging to another person thus the technical capacity of that bidder is a representation of the Technical Capacity of the Manufacturer.

The Applicant avers that there was unfair treatment in the procurement process since through a reading of the letter submitted to PPRA by Broadcast gurus, it is evident that the Broadcast Logger to be supplied by the 1st Interested Party (from the same manufacturer called ACTUS DIGITAL INC.) does not satisfy the technical requirements of the subject tender.

That the wording of the letter submitted to PPRA by Broadcast Gurus Limited intimates that there is a direct relationship between the

1st Interested Party and M/S ACTUS DIGITAL INC as manufacturer, and possibly, beyond just being the manufacturer providing a manufacturer's authorization. Any other extra relationship between the 1st Interested Party and M/S ACTUS DIGITAL INC beyond just providing a manufacturer's authorization would then create a conflict of interest, thus pointing to the 1st Interested Party's failure to satisfy the eligibility requirements of the subject tender.

In the absence of fair treatment, the Applicant states that the 1st Interested Party herein is ineligible for award of the subject tender and its evaluation at the Technical and Financial Evaluation stages are null and void. By its own Tender Document, the Procuring Entity asserted applicability of the Competition Act, 2010 to the subject procurement process by providing several clauses prohibiting unfair competition.

The Applicant avers that the Procuring Entity's action of electing to give M/s COPY CAT LIMITED, the 1st Interested Party an unfair advantage over other bidders even though the Broadcast Logger of Manufacturer ACTUS DIGITAL INC. does not satisfy the technical requirements of the subject tender and the Procuring Entity undermined the national values and principles of good governance enshrined in Article 10 and 227 of the Constitution, thus failing to demonstrate some level of fairness, competitiveness, transparency and accountability to tenderers and the public at large. Failure by the Respondent to act in accordance with the law should not be applied to its prejudice.

The Applicant further states that it risks suffering loss or damage since it legitimately stood a good chance of becoming the successful bidder if only

evaluation of the bids was undertaken whilst taking into consideration, the import of section 82 of the Act read together with Regulation 77 of the 2020 Regulations.

The Applicant confirms that it is a tenderer as envisioned under Section 167(1) of the Act since by the tender submission deadline of 11th May 2022, it submitted its bid to the Procuring Entity pursuant to the Procuring Entity's Tender Advert.

The Respondents Case

In respect of the allegations raised in the Request for Review, the Respondent states that it met all its obligations under Section 79(1) and 80(2) of the Public Procurement and Asset Disposal Act, 2015 (PPADA) and Regulation 74(1)(h) of the Public Procurement and Asset Disposal Regulations, 2020 (PPADR).

That it subjected the Applicant's bid to mandatory/preliminary evaluation stage hence the finding that the tender was non-responsive on account of Criterion 13 of the Mandatory/Preliminary Evaluation Criteria and therefore could not proceed to the subsequent evaluation stages. Criterion No. 13 of the Mandatory/Preliminary Evaluation Criteria in the Tender Document required bidders to submit ***"A duly signed, and stamped power of attorney for the person signing the tender on behalf of the tenderer, which must be certified by a Commissioner for oaths or Notary public."***

In the Tender Data Sheet ITT 19.3, the tenderers were instructed to submit written confirmation of authorization to sign on behalf of the tenderer

consisting of ***A DULY SIGNED, AND STAMPED POWER OF ATTORNEY FOR THE PERSON SIGNING THE TENDER ON BEHALF OF THE TENDERER, WHICH MUST BE CERTIFIED BY A COMMISSIONER FOR OATHS OR NOTARY PUBLIC***

The Respondent states that the Applicant was disqualified at the mandatory/preliminary evaluation stage because they did not submit a properly executed power of attorney as required in the Mandatory requirements. The Power of Attorney submitted by the bidders was not certified by a Commissioner for oaths as required in Criterion No. 13 of the Tender document. As evidenced by the stamp thereon, the Power of Attorney submitted was certified by an Advocate and not a Commissioner for Oaths as required. Hence, the reason provided by the Procuring Entity was in line with the requirement of the tender document.

Further, the Respondent states that Section I. Instructions to Tenderers of the Tender Document in respect of the Tender subject of this review does not have Clauses 33 (c) or Clause 33 (d) and without prejudice to the aforesaid, if the intention of the Applicant was to rely on Clauses 3.3 (c) or Clause 3.3 (d) on conflict of interest in the Tender document , there is no evidence that the 1st Interested Party has the same representative or ownership as any of the other eight (8) Tenderers in the tender subject of this review.

The Respondent notes that the existence of a relationship in and of its own does not amount to conflict of interest. What amounts to conflict of interest is a relationship that puts a Tenderer in a position to influence the Tender of another Tenderer, or influence the decisions of the Procuring entity

regarding the Tendering process. Had the intention been that any relationship between a Tenderer and other tenderers been that of conflict of interest, then the qualifier provision would not have been included in Clause 3.3 (d). This Clause demands more than just allegations of perceived conflict to the existence of real conflict of interest with real impact that can be supported by admissible evidence.

Further, other than allegations at Paragraphs 27 and 28 of the relationship between M/s Actus Digital Inc and the 1st Interested Party going beyond just being the manufacturer providing a manufacturer's Authorization, there is no evidence that this relationship exists in such a way that it puts the 1st Interested Party in a position to influence the Tender of any another Tenderer, or influence the decisions of the Procuring Entity regarding the Tendering process. The Applicant has not demonstrated the nature and extent of this extra relationship vis-à-vis the relationship between the said M/s Actus Digital Inc and the other bidders to which is issued the Manufacturers Certificate.

The Respondent contends that M/s Actus Digital Inc did not submit a Tender in the subject tender. As such, M/s Actus Digital Inc is not a Tenderer for purposes of Clause 3.3 (d) and (c). In the overall, the record relied on by the Applicant to allege conflict of interest does not provide evidence of the existence of conflict of interest or the perception of conflict of interest as defined in the Tender Document. The allegations remain unsupported and strict proof of the conflict of interest of the 1st Interested Party is invited to enable the Respondent take the necessary action.

As concerns the allegation at Paragraph 25 of the Supporting Affidavit that receiving the Manufacturer's Authorization meant that the technical capacity of a bidder supplying a Broadcast Logger belonging to another person would have its technical capacity being a representation of the Technical Capacity of the Manufacturer, the Procuring Entity notes that the technical capacity that would rely on the Manufacturer's capacity only forms a portion of the requirements/criteria when evaluating technical capacity under the item. Additionally, a majority of the marks that do not necessarily rely on the technical capacity of the manufacturer are human resource capacity, project architecture and project implementation plan, and financial capacity. The Manufacturers capacity was thus not the sole determinant for the Tenderers' technical capacity.

The Respondent affirms that it treated all bidders fairly, evaluated the tender as per the criteria in the tender document and complied with the Constitution of Kenya, 2010, the Public Procurement and Asset Disposal Act, 2015 together and the Regulations made thereunder. Other than merely alleging unfair treatment, the Applicant has not demonstrated how their Tender was treated unfairly.

The Respondent humbly submits that the Board dismisses the Applicant's Request for Review with costs.

2nd Interested Party's Case

In support of the Request for Review, the 2nd Interested party states that the Respondent failed to treat bidders fairly during the Technical evaluation

of and further treated bidders unfairly in considering whether they have satisfied the eligibility criteria of the subject tender.

The 2nd Interested party states that its submitted Manufacturer's Authorization from M/s ACTUS DIGITAL INC. was similar to the Manufacturer's Authorization submitted by the 1st interested party which the Respondent permitted without any restriction.

That through the Manufacturer's Authorization provided by M/s ACTUS DIGITAL INC., the 1st Interested Party intends to supply the same Broadcast Logger with the same technical specifications that the 2nd Interested Party intends to supply to the Procuring Entity yet the 2nd Interested Party bid was found to be technically non-responsive.

Further, the 2nd Interested party avers that its manufacturer, M/s ACTUS DIGITAL INC., has confirmed as to being in a Joint Venture relationship with the 1st Interested Party, an arrangement that was agreed upon for the purposes of participation in the subject tender.

From the foregoing, the 2nd Interested party was prompted to lodge a complaint with the Public Procurement Regulatory Authority on discovering the relationship between M/s ACTUS DIGITAL INC., and the 1st Interested Party as the nature of the relationship indicates that the Respondent failed to promote fair competition in the subject tender contrary to the requirements of Article 227 (1) of the Constitution.

The 2nd Interested party contests that ITT Clause 33 under Eligibility criteria at page 6 of the Tender Document is instructive in avoiding conflict of interest and that even though providing manufacturer's authorization to

one or more firms was not prohibited in the Tender Document, what was prohibited is an additional relationship that would create a conflict of interest, thereby impeding competition.

The 2nd Interested Party states that there is an actual conflict of interest relationship between the 1st Interested Party and M/s ACTUS DIGITAL INC., when they elected to bid as Joint Venture Partners which means the 1st Interested Party failed to satisfy the eligibility criteria provided in the Tender Document and thus ought to have been adjudged non-responsive at the Preliminary Evaluation stage.

That it is evident that the Respondent not only gave the 1st Interested Party an unfair advantage over other bidders when considering the technical capacity of participating bidders, but also turned a blind eye to the eligibility and mandatory requirements when it came to evaluation of the 1st Interested Party's bid.

The 2nd Interested Party prays that the Board grants an order that would ensure there is fair treatment of bidders during evaluation up to the conclusion of the subject procurement procedure.

Applicant's Rejoinder

In its rejoinder, the Applicant affirms that its power of attorney was certified by a Commissioner for Oaths being Lydia Kinyanjui Ciera Advocate, a Commissioner for Oaths duly admitted as such pursuant to Section 2 of the Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya. The Applicant also states that Lydia Kinyanjui Chera

Advocate obtained an appointment as commissioner for Oaths on 9th May 1996 and attached an affidavit sworn by Lydia Wambui Kinyanjui confirming her appointment as a Commissioner for Oaths stating that she was competent enough to witness the execution of the Power of Attorney that was attached to its original bid.

The Applicant re-iterates that the Respondent breached Section 80 of the Act read together with subclause 33 which are part of the main Clause 3 at pages 5,6, and 7 of the Tender Document.

The Applicant states that it has since learnt from the 2nd Interested Party's letter submitted to the Public Procurement Regulatory Authority and as has been substantiated by the 2nd Interested Party's Affidavit in support of the Request for Review that the manufacturer of M/s Broadcast Gurus Limited is the same manufacturer that provided manufacturer's authorization to the 1st Interested Party. That the said manufacturer is in a Joint Venture relationship with the 1st Interested Party; an arrangement that was agreed upon for purposes of participation in the subject tender.

The Applicant further avers that this admission is sufficient evidence in support of its Request for Review demonstrating the existence of a conflict of interest in breach of ITT Clause 33 (c) and (d) found on Page 6 of the Tender Document because evidently, M/S ACTUS DIGITAL INC has a relationship with two different tenderers in the nature described hereunder:

- a) M/s Actus Digital Inc. is in a Joint Venture relationship with M/s Copy Cat Limited, 1st the Interested Party herein and at the same

time, M/s Actus Digital Inc provided manufacturer's authorization to the 2nd Interested Party.

b) M/s Actus Digital Inc., by virtue of its Joint Venture relationship with the 1st Interested Party, is a tenderer whose technical capacity was relied upon by the 1st Interested Party and considered during evaluation.

c) Consequently, and flowing from the two explanations above, a conflict of interest arose by virtue of M/s Actus Digital INC playing the roles of manufacturer, Joint Venture partner and tenderer but the Procuring Entity opting to give preference to the 1st Interested Party during evaluation of its technical capacity whilst not giving the same treatment to bidders who used manufacturer authorization from the same manufacturer ACTUS DIGITAL INC and have a manufacturer-supplier relationship with the latter.

The Applicant refutes any suggestion that evaluation of the human resource capacity, project architecture, project implementation plan and financial capacity alone, without looking at the Technical Capacity of the Broadcast Logger proposed by the 1st Interested Party was sufficient for the 1st Interested Party to meet the high threshold of 75 out of 100 marks so as to be technically responsive.

The Applicant states that it is a well-established principle owing to the cases handled by this Board that a company that bids in Joint Venture with another company after entering into a Joint Venture Agreement, makes the Joint Venture Partnership (M/s Copy Cat Limited and M/s ACTUS DIGITAL

INC.), the tenderer in the procurement process. The Procuring Entity cannot therefore isolate M/s Copy Cat Limited from M/s ACTUS DIGITAL who are in a Joint Venture arrangement thus making them collectively, one tenderer.

The Applicant further urges this Board to note that the technical capacity of M/S ACTUS DIGITAL INC relied on by the Interested Party was in our view, subjected to Technical Evaluation the way tenderers are subjected to an evaluation. The action that the Respondent ought to have taken is to first establish if the 1st Interested Party satisfied the eligibility requirements on page 6 of the Tender Document, which we reiterate, were not satisfied.

As a result, the 1st Interested Party and M/s ACTUS DIGITAL INC ought to have been evaluated jointly and not treating them separately yet they bided as one tenderer (Joint Venture Members) for purposes of determining whether they satisfied the technical requirements of the subject tender, only after meeting the eligibility requirements provided on page 6 of the Tender Document. Consequently, the treatment provided in disqualifying the technical expertise of M/S ACTUS DIGITAL INC. in relation to the 2nd Interested Party ought to have been the same treatment given in evaluating and disqualifying the 1st Interested Party.

The Applicant reiterates and maintains its position that the Respondent acted in breach of Section 80 (2) of the Act which required the Procuring Entity to apply the criteria and procedures for evaluation as detailed in the Eligibility Requirements found on page 6 of the Tender Document. The Applicant invites this Board to peruse its bid document submitted to the Procuring Entity where it provided manufacturer's authorization from M/s

Durants Media Limited and satisfied the eligibility and technical specifications of the subject tender and thus has a legitimate expectation to qualify for award of the subject tender.

The Applicant filed its submissions on 16th August 2022.

BOARD'S DECISION

The Board has considered each of the Parties case, pleadings, documents, written submissions, authorities, and confidential documents submitted by the Respondents pursuant to Section 67 (3)(e) of the Act and finds the following issues call for determination:

- 1. Whether the Applicant's tender was Responsive as stipulated under Section 79 of the Act and if the evaluation committee adhered to the preliminary evaluation criteria set out in the tender document and as stipulated under Section 80 of the Act.**
- 2. Whether the Evaluation Committee in making its recommendation complied with the principle of fairness and promoted competition in the procurement process of the subject tender as stipulated in Article 227 of the Constitution read together with the provisions of the Public Procurement**

and Asset Disposal Act 2015 and the Public Procurement and Asset Disposal Regulations 2020.

3. What orders should the Board grant in the circumstances.

DETERMINATION OF ISSUES

The Board now proceeds to address the above issues conclusively as follows:

Whether the Applicant's tender was Responsive as stipulated under Section 79 of the Act and if the evaluation committee adhered to the preliminary evaluation criteria set out in the tender document and as stipulated under Section 80 of the Act.

Vide a letter of notification dated 29th July 2022, the Applicant was notified that its bid was non-responsiveness for reason that it did not attach a duly signed, and stamped power of attorney for the person signing the tender on behalf of the tenderer, which must be certified by a Commissioner of Oaths or Notary Public.

The letter states:

"The Authority wishes to inform you that the tender evaluation process had been completed and your bid was unsuccessful because you did not attach a duly signed, and stamped power of attorney for the person signing the tender

on behalf of the tenderer, which must be certified by a Commissioner of oaths or Notary Public”

The Respondent's contention is that the Applicant did not submit a properly executed power of attorney as required in the Mandatory requirements. The Power of Attorney submitted by the bidders was not certified by a Commissioner for oaths as required in Criterion No. 13 of the Tender document. As evidenced by the stamp thereon, the Power of Attorney submitted was certified by an Advocate and not a Commissioner for Oaths or Notary Public.

The Applicant submits that it availed a power of attorney that was duly certified by Lydia Kinyanjui Ciera Advocate, who is a qualified Advocate of the High Court, a fact which in their view has not been disputed by the Respondents. In its further affidavit, the Applicant states that Lydia Kinyanjui Ciera Advocate is a commissioner for Oaths duly admitted pursuant to Section 2 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya and that she obtained an appointment as commissioner for Oaths on 9th May 1996. The Applicant also attached an affidavit sworn by Lydia Wambui Kinyanjui confirming her appointment as a Commissioner for Oaths stating that she was competent enough to witness the execution of the Power of Attorney that was attached to its original bid.

Further, the Applicant has detailed in its submissions that the duty to certify documents does not in law belong to a commissioner for oaths or notary public where the document is not foreign; that the duty of a commissioner for oaths is to administer oaths and statutory declarations

under oath; and that this Board should reject the often made argument that once a criteria is contained in the tender document, then it should be complied with no matter the legal absurdity of the requirement. The Applicant argues that where a criteria in a tender document flies on the face of the law, then the criteria should rightly be disregarded and more so where an Applicant demonstrates that it has complied with the law such as in this instant where the Applicant's Power of Attorney was duly certified by a competent Advocate.

From the foregoing, the Board observes that the Applicant is questioning the mandatory requirements in the subject tender. There is no indication or evidence before this Board that during the tendering process and before the close of the tender submission the Applicant ever raised issue or sought clarification on the mandatory criteria requiring certification of the power of attorney to be made by a commissioner of oaths. This Board has previously held that where a party has issues with any requirements in the Tender Document then the same ought to be raised with the Procuring Entity as soon as they are noted and before tender submission date. A party cannot participate in a tender process only to raise concerns regarding compliance requirements in the Tender Document after the Evaluation and more so after it has learnt of its disqualification.

The Board notes that the provisions of the law are very clear on what amounts to a responsive tender. Section 79 of the Act provides for responsiveness of tenders as follows:

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

(2) A responsive tender shall not be affected by—

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall—

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders.

From the above provision, a bid only qualifies as a responsive bid if it meets all requirements set out in the bid documents.

In the case of **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex ParteTuv Austria Turk [2020] eKLR** the Court stated:

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with

tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions..... In essence, a conforming / compliant / responsive tender is defined as a tender that complies with all the "material" or "substantial" aspects of the tender invitation. Procuring entities are allowed to consider tenders even if they contain minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents, or if they contain errors or oversights that can be corrected without touching on the substance of the tender. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be

considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document."

Responsiveness serves as an important first hurdle for bidders to overcome. Where there appears to be ambiguity or irregularity in the tender document, tenderers ought to seek clarifications on the same before tender submission deadline. Indeed, clarification of tendering document has been provided for under clause 6 at page 8 of the Tender document.

Clause 6.1 states:

"A tenderer requiring clarification of the Tender document shall contact the procuring entity in writing at the Procuring Entity's address specified in the TDS..."

Further, Section II-Tender Data Sheet ITT 6.3 at page 25 states that:

"questions to reach the procuring entity not later than 7 days before the Tender closing date."

An evaluation committee appointed by the accounting officer of the Procuring Entity is tasked with evaluating bids using the procedures and criteria set out in the tender documents pursuant to Section 80(2) of the Act which provides:

"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."

The Board observes that the tender document at page 29 Section III Evaluation and Qualification Criteria Clause 2.2 provides for mandatory/preliminary evaluation of tenders and states that:

"The Procuring Entity will examine all bids submitted to ensure that the bids are complete in all aspects in meeting the requirements provided for in the mandatory/preliminary evaluation criteria outlined below. Tenders that do not meet the Mandatory/Preliminary Evaluation Criteria will be considered non-responsive and will not be considered further."

The Board notes that Criterion No. 13 of the Mandatory/Preliminary Evaluation Criteria at page 30 of the Tender Document required bidders to submit ***A duly signed, and stamped power of attorney for the person signing the tender on behalf of the tenderer, which must be certified by a Commissioner for oaths or Notary public.***

Further at page 26 Section II Tender Data Sheet (TDS) ITT 19.3 clearly stated that:

"The written confirmation of authorization to sign on behalf of the Tenderer shall consist of: A DULY SIGNED, AND STAMPED POWER OF ATTORNEY FOR THE PERSON SIGNING THE TENDER ON BEHALF OF THE TENDERER, WHICH MUST BE CERTIFIED BY A COMMISSIONER FOR OATHS OR NOTARY PUBLIC"

We have studied the power of attorney presented by the Applicant and note that the stamp certifying the same indicates:

***"I certify this to be a true copy of the Original
Signed
Lydia Kinyanjui Ciera-Advocate
P.O.Box 79692-00200,Nairobi"***

The Board notes that although the Applicant has submitted an affidavit by Lydia Kinyanjui Ciera confirming that she is a licensed Commissioner of Oaths, the Applicant did not submit the same with their tender documents to enable the Procuring Entity to be aware that the certifier was a licensed Commissioner of Oaths in the absence of using a Commissioner of Oaths stamp.

The Board draws a distinction between an Advocate, Commissioner for Oaths and Notary Public as follows:

The Advocates Act Cap 16 Laws of Kenya defines an Advocate at Section 2 to be:

advocate means any person whose name is duly entered upon the Roll of Advocates or upon the Roll of Advocates having the rank of Senior Counsel and, for the purposes of Part IX, includes any person mentioned in section 10.

The Oaths and Statutory Declarations Rules (*subsidiary legislation to the Oaths and Statutory Declaration Act Cap 15*) further provides under Rule 2 that:

An advocate who has practiced in Kenya for not less than three years may apply to the Chief Justice to be appointed a commissioner for oaths.

Additionally, the Notaries Public Act Cap 17 at Section 3 states that:

No advocate shall be appointed under this Act unless he has practised as an advocate in Kenya for not less than five years immediately preceding his application to be appointed as a notary public.

Having drawn a distinction between an Advocate and Commissioner for Oaths, it behooved the Applicant to ensure that its Power of Attorney was properly certified by the required person under the mandatory provisions. It would be unfair if the Applicant herein was allowed to circumvent outlined tender conditions.

In **Judicial Review Miscellaneous Civil Application No. 214 Of 2019 Republic v Public Procurement Administrative Review Board; Principles Styles Limited & another (Interested Parties) Ex Parte Accounting Officer, Kenya Water Towers Agency & another [2020] eKLR** Justice Mativo held that:

"Evaluation criteria are the standards and measures used to determine how satisfactorily a proposal has addressed the requirements identified in the Request for Proposals. Suppliers either meet or do not meet mandatory criteria. Mandatory criteria establish the basic requirement of the invitation. Any bidder who is unable to satisfy any of these requirements is deemed to be

incapable of performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established."*[Emphasis]*

This Board in **PPARB Review Application No. 1 of 2017 Nomads Construction Company Limited v Kenya National Highways Authority and Northern Frontier Enterprises** while making a determination on a similar issue as this held:

"It is the Board's opinion that it was upon the Applicant to ensure that they strictly adhered to the mandatory requirements and although the Applicant argued that there was no such requirement for bidders to submit an affidavit, the Board finds that the Applicant failed to meet the mandatory requirements by submitting documents stamped "Advocate" and not "Commissioner of Oaths" as was required."

This decision was upheld by Justice Odinga in **Judicial Review Miscellaneous Civil Application No. 41 of 2017 Republic V Public Procurement Administrative Review Board & 3 others** where he stated at paragraph 59 that:

"As the applicant clearly did not comply with the conditions stipulated in the Tender document, it would be futile to allow the application."

Accordingly, the Board finds that the Procuring Entity did not err in disqualifying the Applicant's tender at the mandatory/preliminary evaluation on finding that the Applicant did not submit a properly executed

power of attorney as required in the Mandatory requirements at the Mandatory/Preliminary Evaluation Stage . The Board has established without a doubt that the power of attorney submitted by the Applicant was not certified by a Commissioner of Oaths or a Notary Public as required under criterion no. 13 as evidenced by the stamp thereon which was certified by an Advocate. On the face value, the document before the Evaluation Committee was certified by an Advocate. The fact of other qualification the attesting person Lydia Ciera that have now been brought before the Board in these proceedings were not available to the Evaluation Committee at the point the Applicant's tender was disqualified as non-responsive. As such, the Board holds that the Applicant's tender was non-responsive contrary to provisions of Sections 79(1) and 80(2) of the Act.

Whether the Evaluation Committee in making its recommendation complied with the principle of fairness and promoted competition in the procurement process of the subject tender as stipulated in Article 227 of the Constitution read together with the provisions of the Public Procurement and Asset Disposal Act 2015 and the Public Procurement and Asset Disposal Regulations 2020.

The averments made by the Applicant on unfairness of the Respondent in the procurement process of the subject Tender emanate from a complaint letter that was forwarded by the 2nd Interested party to the Public Procurement Regulatory Authority and the Applicant confirms from its Affidavit in support of the Request for Review that the said letter led them

to conclude that their technical capacity was never considered since the Respondent opted to provide an unfair advantage to the 1st Interested party.

The Applicant's Request for Review has been supported by the 2nd Interested Party specifically on the ground that the Respondent failed to treat bidders fairly during Technical Evaluation and was unfair in its evaluation on whether they had satisfied the eligibility criteria set out in the tender document.

Upon receipt of its letter of notification dated 19th July 2022 of unsuccessful bid from the Procuring Entity, the Board observes that the 2nd Interested party submitted a compliant with the Public Procurement Regulatory Authority in regard to the subject tender on learning that its designated manufacturer, M/S ACTUS DIGITAL INC, whom they had relied on and obtained a Manufacturer's authorization, had entered into a joint venture with the 1st interested party whom it had provided a manufacturer's authorization to supply the same goods and services they also intended to supply to the procuring entity under the subject tender.

Additionally, that on further enquiry and due diligence communication with other tenderers the 2nd Interested Party attests to have learnt that the manufacturer had provided a manufacturer's authorization to the 3rd interested party, 4th interested party, 1st interested party, and 8th interested party in regard to the subject tender.

The letter in part reads:

"Please refer to the above tender Ref: CA/PROC/OT/73/2021-2021 advertised by the Communications Authority of Kenya, the Procuring Entity and for which we participated as one of the bidders.

We received a letter of notification of unsuccessful bid from the Procuring Entity, dated 19th July, 2022 notifying us of several reasons why our bid was apparently unsuccessful. We had submitted our proposal with guidance from the technical expertise of the Manufacturer ACTUS whom we relied on and had obtained aManufacturer's authorization, authorizing us to supply, deliver, install, commission, and maintain a Broadcast Logger in relation to the above tender.

The reasons cited notwithstanding; the Procuring Entity notified our firm that the tender was awarded to M/S COPY CAT LIMITED. During a conversation with our designated manufacturer, notifying them of the outcome of our bid, our manufacturer disclosed to us that they had entered into a Joint Venture and also provided manufacturer's authorization to M/S COPY CAT LIMITED to supply the same goods and services that we intended to supply to the Procuring Entity. On further enquiry and due diligence communication with other tenderers who participated in the subject tender, we have since learnt that the Manufacturer also provided Manufacturer's Authorization to Conann

Communications, New Edge Solutions, Copy Cat Limited and Baran Telecom Networks in this tender series.

We have attached a copy of our Manufacturer Authorization at the end of this letter.

It is by this reason that we discovered that the Procuring Entity applied double standards in the manner in which it consider the technical competence of tenderers in the subject tender without evaluating our technical compliance and thereafter, electing to award the tender to M/S COPY CAT LIMITED by assuming that they satisfied the technical requirements of the subject tender relying on the Broadcast Logger of Manufacturer ACTUS, but that our firm relying on the same Broadcast Logger manufactured by the same manufacturer was not evaluated on the technical requirements and our technical compliance status shared with us.

We hereby submit a complaint to your good office that the Procuring Entity undermined statutory and constitutional obligations placed on State organs and public entities undertaking procurement of goods and services in Kenya, specifically that all procurements ought to promote fair competition among bidders. Pursuant to section 9 (a) and (h) of the Public Procurement and Asset Disposal Act, 2015, the law gives your office the obligation to:

a) Monitor, assess and review the public procurement and asset disposal system to ensure that they respect the national values and other provisions of the Constitution, including Article 227 and make recommendations for improvements

(h) to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review

....."

A copy of this letter was also sent out to all other bidders in the subject tender as indicated in the tender opening minutes.

The 2nd Interested party states that the Respondent failed to promote fair competition in the subject tender contrary to the requirement of Article 227 (1) of the Constitution given the nature of the relationship between the 1st interested party and M/s ACTUS DIGITAL INC. which created a conflict of interest and thus impeded competition.

The 2nd Respondent has claimed that the Respondent gave the 1st Interested Party an unfair advantage over other bidders when considering the technical capacity of participating bidders, and turned a blind eye to the eligibility and mandatory requirements when evaluating the 1st Interested Party's bid.

The Respondent in objection states that there is no evidence that the 1st Interested Party had the same representative or ownership as any of the other eight (8) Tenderers in the tender subject of this review.

The Respondent has further argued that other than allegations that the relationship between M/s Actus Digital Inc and the 1st Interested Party goes beyond just being the manufacturer providing a manufacturer's Authorization, there is no evidence that this relationship exists in such a way that it puts the 1st Interested Party in a position to influence the Tender of any another Tenderer, or influence the decisions of the Procuring Entity regarding the Tendering process. The Applicant has not demonstrated the nature and extent of this extra relationship vis-à-vis the relationship between the said M/s Actus Digital Inc the other bidders to which is issued the Manufacturers Certificate.

The Board observes that the 2nd interested party also argued that the appointment of M/s ACTUS DIGITAL INC. as a Joint Venture Partner essentially made the manufacturer a tenderer thus putting the said manufacturer within the ambit of ITT Clause 33 (d) of the Tender Document because M/s ACTUS DIGITAL INC., also had a relationship of "manufacturer-supplier", with its firm which submitted a bid in the subject procurement process. The 2nd interested party states that in bidding as Joint Venture Partners, the 1st Interested Party and M/s ACTUS DIGITAL INC., failed to satisfy the eligibility criteria provided in the Tender Document and ought to have been adjudged non-responsive at the Preliminary Evaluation stage.

In respect to the allegation of conflict of interest on account of Clause 3.3 (d), the Respondent argues that the existence of a relationship in and of its own does not amount to conflict of interest. That what amounts to conflict of interest is a relationship that puts a Tenderer in a position to influence the Tender of another Tenderer, or influence the decisions of the Procuring entity regarding the Tendering process. Had the intention been that any relationship between a Tenderer and other tenderers been that of conflict of interest, then the qualifier provision would not have been included in Clause 3.3 (d). This Clause demands more than just allegations of perceived conflict to the existence of real conflict of interest with real impact that can be supported by admissible evidence. The Respondent has also stated that as evidenced by the record of the tender opening proceedings subject to this review on 11th May 2022, M/s ACTUS DIGITAL INC did not submit a Tender in the subject tender. As such, M/s Actus Digital Inc is not a Tenderer for purposes of Clause 3.3 (d) and (c).

That in the overall, the record relied on by the Applicant to allege conflict of interest do not provide evidence of the existence of conflict of interest or the perception of conflict of interest as defined in the Tender Document. The allegations remain unsupported and strict proof of the conflict of interest of the 1st Interested Party is invited to enable the Authority take the necessary action in line with

It is important for us to understand what evaluation of tenders is before determining whether the evaluation of the subject tender was carried out in a fair manner while allowing for competition amongst bidders and in adherence to the criteria set out in the tender document and in compliance

with principles set out in Article 227 of the Constitution as read together with the Act and Regulations 2020.

The Board notes that the Black's Law Dictionary, 6th Edition defines "Bid Evaluation" as:

After the submission deadline, the process of examining, and evaluating bids to determine the bidders' responsiveness, and other factors associated with selection of a bid for recommendation for contract award.

Section 80 of the Act is instructive on how evaluation of tenders should be conducted. Subsection 1 states that:

"The evaluation committee appointed by the accounting officer pursuant to section 46 of the Act shall evaluate and compare the responsive tenders other than tenders rejected."

In its evaluation, the committee is expected to adhere to the procedures and criteria set out in the tender document as provided for in Section 80(2) of the Act which provides that:

"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."

It is our considered view that evaluation is conducted with a view of recommending a tenderer for award of a tender. Section 85 of the Act further provides that:

Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of the contract to the successful tenderers.

Section 80(4) of the Act reveals the document that marks the end of evaluation. It states:

The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.

The Board is cognizant of Article 227(1) of the Constitution which stipulates principles of procurement which the Respondent is required to adhere to when contracting for goods or services. It states:

Article 227. Procurement of Public goods and services

- (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.**

In **PPARB Application 5 & 8 of 2022 Korea Expressway Corp (KEC)/Korea Consultants International Co. Ltd (KCI) & Apec Consortium Limited and Another V Director General Kenya National Highways Authority and Another** this Board stated that the import of Section 80 of the Act as read with Article 227(1) of the Constitution requires an evaluation committee to evaluate tenders in a system that is fair using the criteria and procedure laid out in a tender document. A system that is fair is one that considers equal treatment of all bids against a criteria of evaluation known by all tenderers because such criteria was provided for in a tender document issued to tenderers by a procuring entity.

We have studied the blank Tender document submitted to us and noted the criteria for evaluation of the subject tender as contained therein. There is no contest that the subject tender was to be evaluated through a five (5)-stage evaluation process being Mandatory evaluation; Technical Compliance evaluation; Technical Capacity evaluation; Financial evaluation; and Due Diligence.

We have noted from the evaluation report that the Applicant's tender together with the 2nd Interested Party's tender were both evaluated and found non-responsive at the Mandatory Evaluation Stage. Hence, the Respondent had no duty or obligation to consider the said tenders at the Technical Compliance Evaluation Stage.

It is under the Technical Compliance Evaluation Stage that bidders were required to comply with the Procuring Entity's technical requirements, and were required to provide explanation of compliance with reference to the Manufacturer's data sheet/brochures with specific page number. The tenderers that failed at the technical compliance evaluation would not be considered for the next evaluation stage.

The Board notes that the 1st, 4th and 8th parties who are alleged to have submitted a manufacturer authorization issued by M/S ACTUS DIGITAL INC did proceed for technical compliance evaluation stage together with the 5th Interested Party who has not been associated with the said manufacturer.

We further note that under the Technical Compliance Evaluation it was a requirement for bidders to avail Manufacturer's Authorization letters for broadcast tuners and loggers in the format provided. Where the bidder is an agent of a manufacturer of the system to be supplied then, the manufacturer was required to fill in and sign the manufacturer's Authorization form(s). This was a Mandatory Requirement (MR) 14 at page 30 of the Tender document.

From the evaluation report, this Board notes that the 5th Interested party was disqualified at this stage of evaluation and one of the reasons cited is that it did not provide the Manufacturer's Authorization letters for TV and FM tuners. We also note that the 4th and 8th Interested parties were also disqualified at this juncture but for other reasons not connected to the Manufacturers Authorization letters. Only the 1st Interested party was

found responsive. There is no averment or evidence that the 1st Interested Party being a Joint Venture with the Applicant obtained any undue advantage in evaluation as against the bids of the other parties that proceeded to the stage of Evaluation and who had relied on the manufacturer's authorization letters issued by M/S ACTUS DIGITAL INC

As such, the Board does not decipher an occurrence of conflict of interest as alleged by the Applicant and the 2nd Interested parties who were not evaluated under the Technical Compliance Evaluation stage. Neither could there have been any influence on tenders that had already been determined to be non-responsive.

The Board appreciates provisions of ITT Clause 33 at page 6 of the tender document that details instances where a tenderer may be considered to have conflict of interest for purposes of the tendering process. The same states that:

"A Tenderer shall not have a conflict of interest. Any Tenderer found to have a conflict of interest shall be disqualified. A Tenderer may be considered to have a conflict of interest for the purpose of this Tendering process, if the Tenderer:

- a) directly or indirectly controls, is controlled by or is under common control with another Tenderer; or**
- b) receives or has received any direct or indirect subsidy from another Tenderer; or**
- c) has the same - representative or ownership as another Tenderer; or**

d) has a relationship with another Tenderer, directly or through common third parties, that puts it in a position to influence the Tender of another Tenderer, or influence the decisions of the Procuring Entity regarding this Tendering process; or.....

....."

The Board takes cognizance of the fact that the bone of contention on the issue of conflict of interest is that the manufacturer, M/S ACTUS DIGITAL INC. being a Joint Venture Partner to the 1st Interested Party was a Tenderer in the subject tender and also had a Manufacturer-Supplier relationship with several of the other bidders and thus resulting to what the Applicant perceives to be a conflict of interest within the ambit of ITT Clause 33 (d).

By being a Joint Venture Partner to the 1st Interested party, this Board does consider M/S ACTUS DIGITAL INC. a candidate or tenderer within the meaning ascribed under Section 2 of the Act. Section 2 interprets a Candidate to mean:

"a person who has obtained the tender document from a public entity pursuant to an invitation notice by a procuring entity"

Further under the same section, a tenderer means:

"a person who submitted a tender pursuant to an invitation by a public entity".

This Board notes that ITT 3.1 at page 24 of the Tender document allows for joint evaluation of partners and states:

"ITT 3.1 Maximum number of members in the Joint Venture (JV) shall be: TWO MUST avail a Joint Venture Agreement. The Prime/Lead partner will be evaluated at the mandatory and Financial stage while at the technical evaluation stage the partners will be evaluated jointly"

What we decipher from the above clause is that joint venture partners were to be evaluated jointly at the technical evaluation stage. From the Board's analysis of the outcome of the evaluation by the Evaluation Committee of all the responsive tenders at the Technical Compliance Evaluation stage, and having considered all the reasons advanced for disqualification of the tenderers under that stage, we have not encountered any action by either of the joint venture partners under evaluation or by the Evaluation Committee that may have had an unfair influence on the outcome of the evaluation therein especially with regard to the aspect of the requirement of a Manufacturer's authorization pursuant to the laid out mandatory evaluation requirements.

This Board takes note of the holding in **Miscellaneous Civil Application No. 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) [2019] eKLR**, where the court held:

"Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words,

comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."

In the circumstances, the Board finds and hold that the Respondent adhered to the principle of fairness and promoted competition in the procurement process of the subject tender as stipulated in Article 227 of the Constitution read together with the provisions of the Public Procurement and Asset Disposal Act 2015 and the Public Procurement and Asset Disposal Regulations 2020.

What orders should the Board grant in the circumstances.

The Board has considered the issue of responsiveness of the Applicant's tender at the mandatory/preliminary evaluation stage and found that the Applicant failed to meet the mandatory terms set out in the tender document by availing a Power of Attorney that was certified by an Advocate instead of a Commissioner of Oaths as required.

The Board has also established that the evaluation committee in making its award of the subject tender adhered to the principles of fairness and competition in line with Article 227 of the Constitution as read with the provisions of the Act and Regulations 2020.

The upshot of the Board's findings is that the Request for Review 69 of 2022 fails and the Board 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 1st August 2022:

- 1. The Request for review filed on 1st August 2022 by the Applicant herein with respect to Tender No.CA/PROC/OT/73/2021-2022, Open National Tender for Supply, Delivery, Installation, Commissioning and Maintenance of Broadcast Loggers be and is hereby dismissed.**
- 2. Given the outcome herein, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi, this 22nd day of August 2022

A handwritten signature in blue ink, appearing to read 'G. N. N.', written over a dotted line.

VICE CHAIRPERSON(Panel Chair)

PPARB

A handwritten signature in blue ink, appearing to read 'J. N. N.', written over a dotted line.

SECRETARY

PPARB

