

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

**PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND
APPEALS BOARD**

APPLICATION NO. 25/2005 OF 20TH JULY, 2005

BETWEEN

LEON INSURANCE BROKERS LTD.....APPLICANT

AND

CITY COUNCIL OF NAIROBI..... PROCURING ENTITY

Appeal against the Award of Tender Committee of City Council of Nairobi (Procuring Entity) dated 30th June, 2005 in the matter of Tender No CT/01/2005 – 2006 for Provision of Insurance Services.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Cyrus Gituai	-	Member
Mr. Adam S. Marjan	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. J. W. Wamaguru	-	Member
Prof. N. D. Nzomo	-	Member
Mr. P. M. Gachoka	-	Member
Eng. D. W. Njora	-	Member
Mr. Kenneth Mwangi	-	Secretary

BOARD'S DECISION

Upon hearing the representations of the parties and upon considering the information in all the documents before it, the Board decides as follows:-

BACKGROUND

This Tender for insurance services was advertised on 20th April, 2005 in the Daily Nation, East African Standard and the People Newspapers. The tender closed/opened on the due date on 17th May, 2005.

Nine (9) bidders bought the tender documents and seven (7) Returned their completed documents.

The details read out at the tender opening were as follows:-

S/NO	NAME OF TENDERER	AMOUNT TENDERED	BID BOND
1.	Arkchoice Insurance Brokers	42,044,396.00	5,000,000 Barclays Bank
2.	Co-operative Insurance company	37,943,283.00	5,000,000 Co-operative Bank
3.	Leon Insurance Brokers Ltd	34,592,090.00	5,000,000 Consolidated Bank
4.	Maglata Insurance Brokers Ltd	53,023,786.00	5,000,000 -
5.	Getrio Insurance Brokers Ltd	45,148,846.00	5,000,000 Giro Bank
6.	Vinmox Insurance Brokers Ltd	52,292,532.00	-
7.	Essential Insurance Brokers Ltd	82,574,102.00	5,000,000 Barclays Bank

Representatives of all bidders, except those of Essential Insurance Brokers Ltd were present during the opening of tender on Tuesday 17th May, 2005.

The premium quotations required by the Procuring Entity were for the following insurance covers.

- i) Fire (Main Assets)
- ii) All Risks
- iii) Fidelity guarantee – Primary
- iv) Money
- v) Public Liability
- vi) Group Personal Accident (24 hours Cover)
- vii) Group Personal Accident – all staff except those in City Engineer's and City Inspectorate Departments.
- viii) Fidelity Guarantee – Excess
- ix) Employers Liability (Common Law)
- x) Fire-Tenants Purchase Housing
- xi) Computers
- xii) Commercial (Special Vehicles)

- xiii) Motor Private (T.P.O.)
- xiv) Motor Private (Comprehensive)
- xv) Motor Commercial (Comprehensive)
- xvi) Motor Commercial (T.P.O.)
- xvii) Motor Cycles (T.P.O.)

It was a tender requirement at the Instructions to Tenderers Clause 4.2 and special conditions of contract that the candidates submit the following mandatory information:-

- i) Current certificate from the Commissioner of Insurance (where applicable)
- ii) PIN certificate
- iii) Professional Indemnity Certificate (where applicable)
- iv) List of current corporate Clients covered and their addresses with a premium turnover of at least KShs.20,000,000.00 (attach proof).
- v) Proof of membership of the Association of Insurance Brokers of Kenya (where applicable).
- vi) Certificate of Registration/Incorporation.
- vii) Profile of the Executive Management including relevant experience.
- viii) Proof of sound Financial base (including Audited Accounts of the last two financial Years).
- ix) Current Business permit issued by City Council of Nairobi or any other local authority.
- x) Current clearance certificates for Government statutory requirements i.e. N.S.S.F., N.H.I.F., tax etc.

- xi) Current certificate of Good conduct for all the Directors.
- xii) Current Efficiency and Performance confirmation by the Commissioner of Insurance."

The tender Evaluation Committee of the Procuring Entity disqualified six out of seven bidders for various reasons, as set out in Table 1 hereunder. It recommended that the tender to be awarded to Co-operative Insurance Company, being the lowest qualified bidder at KShs. 37,943,283.00.

Table 1 – Reasons for Disqualification of Tenderers

NAME OF TENDERER	REASON FOR DISQUALIFICATION
Leon Insurance Brokers Ltd	<ul style="list-style-type: none"> - Did not meet the minimum standards set by the regulatory body Commissioner of Insurance for class (1) fire main assets. They quoted KShs.16,050,831 way below the set standard set by the Commissioner of Insurance of KShs.25,484,943.50 for the City Council of Nairobi main assets. - Did not have re-insurance certificate as per clause 32.1.
MAGLATA INSURANCE BROKERS LTD	<ul style="list-style-type: none"> - Had not attached the statutory requirement of association of Insurance Brokers of Kenya Certificate. It had attached a certificate that had expired on 31st December, 2004. - Did not have re-insurance certificate as per clause 32.1.
GETRIO INSURANCE BROKERS LTD	<ul style="list-style-type: none"> - Did not submit re-insurance certificate as per clause 32.1. - Offered 2 different bids on the bid form, which was irregular and unacceptable.

Vinmox Insurance Brokers (K) Ltd	<ul style="list-style-type: none"> - Did not attach the financial statement for the last two years. - Did not provide a bid bond. - Did not provide a re-insurance certificate. - Did not meet minimum standards set by the Commissioner if Insurance for fire policy. - Did not attach the following statutory requirements – NHIF, NSSF and Tax Compliant.
Essential Insurance Brokers	<ul style="list-style-type: none"> - Did not quote for Class (8) Fidelity guarantee excess policy. - Did not attach re-insurance certificate. - Did not attach statutory requirements i.e. NSSF and NHIF
Arkchoice Insurance Brokers Ltd	<ul style="list-style-type: none"> - Did not provide re-insurance certificate. - Had quoted for 18 policies instead of 17 asked for in the tender document.

The City Council of Nairobi at its Tender Committee Meeting held on 29th June 2005 awarded the Insurance Tender to Co-operative Insurance Company at KShs. 37,943, 283.00 (Thirty seven million, nine hundred and forty three thousand, two hundred and eighty three) only, for one year.

The Board noted that the Procuring Entity notified both the successful and unsuccessful bidders vide letters dated 30th June, 2005 pursuant to Regulation 33(1). According to the letter of award to the successful bidder the non-motor covers were to become effective by 1st July, 2005 and the motor covers were to take effect from 1st January, 2006. As no contract has been signed between the parties, the Board has jurisdiction to adjudicate on the appeal.

THE APPEAL

The Applicant appealed on 20th July, 2005 against the decision of the Tender Committee of the Procuring Entity awarding the insurance tender. At the hearing, the Applicant was represented by Mr. Paul Mwangi Advocate, while the Procuring Entity was represented by Mr. J. M. Kiai of Kahari & Kiai Advocates.

The Applicant requests the Board for an order/orders that the tender award be annulled and granted to it. In the alternative, it prayed that the entire tender award be set aside and the tender process be repeated.

The appeal is based on four grounds which we deal with as follows:-

GROUND 1 AND 3

Ground 1 alleges that the Procuring Entity breached Regulation 13(3) and (4) by adding new conditions that were not in the tender document after the tender had closed in respect of the minimum rates applicable for Mega risks.

It is noted that the Regulation quoted is on pre-qualification of candidates and is not relevant to the complaint. The complaint should be on Regulation 30(7) on evaluation which is dealt with in Ground No. 3.

In Ground No. 3, the Applicant alleges that the Procuring Entity contravened Regulation 30(8) by not declaring it the successful tenderer and used the reason of minimum rates applicable to Mega risks for the financial year 2004/2005 not to pronounce it the successful tenderer on non-Mega risks classes of insurance.

The Applicant argued that it was wrong for the Procuring Entity to reject its tender because the rate was not given in the tender document and their underwriter was ready to cover the assets at their quoted rate. It stated that brokers are given different rates depending on the value/volume of work they bring to the

underwriters. Furthermore, it argued there was no basis of saying that their quoted rate was far below the recommended rate. On the issue of reinsurance certificate, it stated that it was not mandatory and was not a disqualifying factor. In addition, the Procuring Entity did not raise the issue of reinsurance with the Applicant. Finally, the Applicant prayed that if they were not successful on Mega-risks assets then they should have been considered for award of non-mega risk assets.

The Procuring Entity submitted that the tender document in Clause 12.1 on standards had specifically stated that "The services provided under this tender shall conform to the Commissioner of Insurance requirements." One such requirement is to conform to minimum rates on Mega risks issued by the Commissioner of Insurance. In the case of City Council of Nairobi the rate was 2.192% for the year 2004/2005, as shown in the Commissioner's letter to all insurance companies dated 14th May, 2004 ref. CONF/INS/00/03/1009 annexed to the Procuring Entity's Memorandum of Response. The Applicant used a much lower rate of 1.38% which is below the minimum rate recommended by Commissioner of Insurance for Mega risks. The Applicant also failed to submit evidence of reinsurance of risk as per clause 32.1 of the tender document, which is critical for Mega risks.

The Procuring Entity further stated that according to the Insurance Act Chapter 487 of the Laws of Kenya Part II Section 5(1)(a), the duties of the Commissioner of Insurance shall include:-

"(a) the formulation and enforcement of standards in the conduct of the business of insurance with which a member of the insurance industry must comply.

- (b) directing insurers and reinsurers on the standardization of contracts of compulsory insurance.
- (c) directing an insurer or reinsurers where he is satisfied that the insurer or reinsurer is obscure or contains ambiguous terms or terms and conditions which are unfair or oppressive to the policy-holders, to clarify, simplify, amend or delete the

wording, terms or conditions, as the case may be, in respect of future contracts.

(d) the approval of tariffs and rates of insurance in respect of any class or classes of insurance.” (emphasis ours)

The Applicant is a licensed member of the insurance industry and should be aware that the Commissioner of Insurance is the custodian and regulator of the rates applied in the industry. Its claim that the Procuring Entity introduced new conditions with respect to rates applicable is therefore not correct. It is feigning ignorance of the rates it is required to operate under.

The representative of the Commissioner of Insurance, Ms Hellen Olima, a Senior Insurance Officer, submitted that Mega risks covers fire and engineering for assets worth more than KShs.300 million, which are supposed to be spread and shared among several underwriters. Further, the Commissioner has established a committee for setting of the rates. The rates are established by considering the factors affecting the various kinds of risks before they are circulated to the underwriters. The underwriters are supposed to adhere to those rates, in order to minimise insurance liability exposure.

The Board observed that the Procuring Entity properly relied upon the recommendations of the Commissioner of Insurance on minimum premium rates for Mega risks.

On non-mega classes of insurance, the Board observed that it is not possible to award their tender separately on the basis of a many item tender as this was not allowed for in either the tender notice or tender document. The Board further observed that the price quoted by the successful bidder on non-mega classes of insurance was KShs. 12,458,339 which was competitive, relative to the quotation by the Applicant at KShs.18,541,259.

In view of the foregoing, these two grounds of Appeal fail.

GROUND 2

Alleges that the Procuring Entity contravened regulation 30(8) by not declaring the Applicant as the successful tenderer.

The Applicant argued that it submitted the lowest bid yet they were denied an award.

The Procuring Entity in response submitted that the Applicant's tender was the lowest priced at the tender opening, but was not the lowest evaluated tender.

The Board observed that the Applicant was not responsive, having not submitted a reinsurance certificate as required by Clause 32.1(1) of the tender document and not complying with the Commissioner of Insurance requirements in respect of minimum recommended premium rates for Mega risks. The Commissioner's recommended rate was 2.192% for City Council of Nairobi main assets but the Applicant's rate was 1.38% thus substantially deviating from the minimum recommended.

The Applicant had the lowest price at tender opening but was not the lowest evaluated bidder since it underquoted on Mega risks at a rate far below that approved by the Commissioner of Insurance and quoted high premiums in non-mega classes of insurance which are not regulated.

In evidence the successful tenderer represented by Mr. Nelson C. Kuria, Chief Executive Officer of Co-operative Insurance Company Ltd stated that as a matter of best practice in the insurance industry, underwriters should not discriminate among brokers as alleged by the Applicant and should subscribe to high standards especially where price is concerned. On rates, he stated that they are periodically obtained from the Commissioner of Insurance and the current rate of 2.192% for City Council main assets has not changed since they were issued in May 2004.

We note that Clause 34.1 on award criteria in the tender document states that "subject to paragraph 10, 23 and 28, the Procuring Entity will award the contract to the successful tenderer(s) whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender provided further that the tender is determined to be qualified to perform the contract satisfactorily".

The Board further observed that the Applicant was among the tenderers disqualified on various grounds as shown in Table 1 herein and that the outcome of the tender evaluation led to the recommendation for award to only the tenderer that met all the requirements.

Accordingly this ground of Appeal also fails.

GROUND 4

This is an allegation that the Procuring Entity failed to issue the acceptable rates that the tenderers were to observe contrary to Regulation 13.

The Procuring Entity argued that it did not give set rates in the tender document but advised all bidders that they must work within the rules set by the Commissioner of Insurance, according to Clause 12.1 of Instructions to bidders. The Commissioner is the one mandated to set the minimum rates under section 5(1) of the Insurance Act. It was not the Procuring Entity to set out the rates since it is not the custodian and regulator of applicable rates in the Insurance Industry.

Getrio Insurance Brokers, an interested candidate, in its written submissions argued that the Applicant was given the correct rate by the underwriter but in a bid to be more competitive than other competitors applied the incorrect rate. It cannot therefore be declared successful when it has already been disqualified on a technicality.


The Board observed that the regulation of minimum rates for Mega risks is done by the Commissioner under statute and not by Procuring Entities.


Accordingly, this ground of appeal also fails.

The Board noted that the Applicant had underquoted for the Mega risks by KShs.9,434,113/=. If this amount is added to their quotation of KShs.34,592,090/= then their comparative price would be 44,026,203 which is higher than that of the successful bidder of KShs.37,943,282/=.

Taking into account all the foregoing issues we find no reason to interfere with the Procuring Entity's award and hereby dismiss this appeal and uphold the decision of the Procuring Entity.

Delivered at Nairobi on this 19th day of August, 2005.


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CHAIRMAN
PPCRAB


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SECRETARY
PPCRAB