

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION No. 44 OF 2018 DATED 29TH MARCH, 2018

BETWEEN

BRITAM GENERAL INSURANCE COMPANY (K) LTD....APPLICANT

AND

COUNTY GOVERNMENT OF MANDERA..... PROCURING ENTITY

Review against the decision of County Government of Mandera in the Matter of Tender Number Tender No MCG/OT/067/2018-2019. For the Provision of Medical Insurance Cover to The Executive and Staff Members (Underwriters Only).

BOARD MEMBERS PRESENT

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| 1. Mrs. Josephine Mong'are | - Member (in the Chair) |
| 2. Mr. Hussein Were | - Member |
| 3. Mr. Peter Ondieki | - Member |
| 4. Mrs. Gilda Odera | - Member |
| 5. Mr. Nelson Orgut | - Member |

IN ATTENDANCE

- | | |
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| 1. Philemon Kiprop | - Holding Brief for Secretary |
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PRESENT BY INVITATION

Applicant- Britam Insurance Co. (K) Ltd

Mr. George Kamau- Advocate – NOW Advocates LLD

BOARD'S DECISION

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

BACKGROUND OF AWARD

The Request for Review for the applications were lodged by M/s Britam General Insurance Co. (K) Ltd, on 29th March, 2018 in the matter of the Tender No MCG/OT/067/2018-2019. For the Provision Of Medical Insurance Cover to The Executive And Staff Members (Underwriters Only).

THE REQUEST FOR REVIEW

The Applicant M/S Britam General Insurance company limited (the Applicant), whose address, for purposes of the review, is P. O. Box 30375-00100 Nairobi, filed the Request for Review on 29th March 2018 in the Matter of Tender No MCG/OT/067/2018-2019 for the Provision Of Medical Insurance Cover to The Executive And Staff Members (Underwriters Only).

The Request for Review was supported by a statement sworn on the same date by Ms. Caroline C. Kimetto, the legal manager of the Applicant.

The Applicant sought for the following orders:-

- a) The Board in exercise of its discretion to annul anything done by the Accounting Officer of the Procuring Entity in contravention of the policy document between the parties, the constitution and the Act.*

- b. *The Board exercise discretion under Section 173 of the Act to give directions to the Accounting Officer of the Procuring Entity to recall the advertisement made in the Standard newspaper on 20th March, 2018 inviting Tender No MCG/OT/067/2018-2019. For the Provision Of Medical Insurance Cover to The Executive And Staff Members (Underwriters Only).*
- c. *The Respondent be compelled to pay the costs to the Applicant arising from/and incidental to this application ;and*
- d. *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.*

APPLICANT'S CASE

At the hearing the Request for Review the Applicant was represented by Mr. George Kamau Advocates while the Procuring Entity did not send a representative to the hearing nor file any papers in response. The Applicant stated that the tenders in dispute were advertised on 20th March 2018 and closed on 3rd April 201 and challenged the same on the basis that it had an existing contract with the Procuring Entity issued on 24th January 2017, under Tender Number MCG/T/18/2016-2017 for the provision of the same exact services and that if allowed to proceed with the process then this would create an overlap of two tenders. Counsel for Applicant submitted that by the Procuring Entity advertising the new tender, it was breach of Section 3 and Section 53 of the Public Procurement and Disposal Act, 2015 ('The Act') and Article 227 of the Constitution of Kenya. The Applicant averred that the tender in place was to run for a period of two years, renewable annually and that the earliest the contract can expire after the

stipulated period in the contract. The Applicant expressed apprehension on the motive of the Procuring Entity advertising a tender for existing services almost one year in advance and asserted that the advert was aimed at the Procuring Entity setting a basis to terminate the existing services the Applicant was providing. The Applicant stated that there had been no complaint whatsoever received by the Applicant from the Procuring Entity on the service provision by it nor was there any notice of termination issued by the Procuring Entity prior to advertising for the same services being provided by the Applicant. The Applicant expressed fear and was apprehensive that in the process of awarding the advertised tender its existing contract would be terminated or rendered irrelevant and that the process was unnecessary and a waste of public resources.

The Applicant further submitted that it had after the receipt of the Letter of Award and Form of Contract from the Procuring Entity, executed its part of the contract and proceeded to issue Policy Documents for the said insurance service and had effectively performed its obligation within the contract by rendering the service therein envisioned. Indeed the Applicant further submitted that it had been paid premium for the first year of 2017 and was still providing the said services in 2018. The applicant attached medical claims for services rendered in 2018 for the staff of the Procuring Entity as evidence that indeed it was performing its part of the obligations under the tender. The Applicant further submitted that no communication of intention to terminate had been send to it and hence the Applicant was surprised to see an advert for a tender for the same services it was already providing hence the decision to approach the Board for the orders it was seeking to stay the process to allow it run the full course of their tender and the

subsequent contractual obligations thereto. The Applicant argued that if allowed to proceed with the process the same would partly interfere with the period of their contract which would lapse in December 2018. Counsel for the Applicant however informed the Board that the Applicant had received full payment for services rendered in the first year and that it had issued fresh insurance policies for the year 2018 for Tender Number MCG/T/18/2016-2017.

The Applicant urged the Board to allow its Request for Review and award it costs associated with the Request for Review.

THE BOARD'S FINDINGS

Although the Procuring Entity did not file its response to the Request for Review nor provide the documents despite having been served with all the necessary Request for Review documents nevertheless from the pleadings filed and the submissions made before it by counsel for the Applicant, the Board was able to arrive at a decision in respect of the matters before it. The Board identified the following issue for determination in this Request for Review:

- (i) **Whether, in its attempt to float tender no MCG/OT/067/20118-2018 during the period of tender no. MCG/T/18/2016-2017, the Procuring Entity has breached Section 3, Section 53 of the Public Procurement and Disposal Act, 2015 AND Article 227 of the Constitution of Kenya by failing to observe general procurement principles and principles of integrity.**

The Board having had an opportunity to peruse the documents placed before it and having heard the submissions made by the Applicant, notes the evident facts in this Request for Review. The Board observes that the

Procuring Entity issued a letter of award to the Applicant for Tender No MCG/OT/067/2018-2019. For the Provision Of Medical Insurance Cover to The Executive And Staff Members (Underwriters Only) for the sum of Ksh. 118,966,462.43 and that the Applicant confirmed to the Procuring the acceptance vide a letter dated 9th January 2017. The letter of award specifies that the award "is for a period of the two years renewable annually subject to satisfactory performance".

The Board notes that the Procuring Entity settled the premium for the first year and that the Applicant is already providing insurance cover for the current year 2018. The Board finds that although the Procuring Entity has advertised for the same services being provided by the Applicant, the Applicant's services have not been terminated nor has any notice of termination been issued. The Board further finds that the Applicant confirms that it is still providing the services it was awarded to provide under Tender Number MCG/T/18/2016-2017 for Provision of Medical Insurance Cover to the Executive and Staff Members (Underwriters Only).

This therefore cements the claim that indeed the parties are observing their obligations under tender no. MCG/T/18/2016-2017 without any interruptions and is satisfied that there no issues under the said tender to warrant its involvement.

Subsequently and flowing from the above sequence of events the Board notes that the Procuring Entity has advertised a tender for provisions of General Insurance services for the year 2018-2019, which services are currently being offered by the Applicant. The Board notes that the Applicant's services have not been terminated nor has any notice of

termination been issued. The Board further notes that the current tender subject matter of this Request for Review is Tender No. MCG/OT/067/2018-2018 for Medical Cover for to the executive and Staff Members (Underwriters Only) while the tender for which the parties have contracted is tender Number MCG/T/18/2016-2017 for Medical Cover for to the executive and Staff Members (Underwriters Only). The Board therefore finds that the Applicant's Request for Review is premature and based on unfounded apprehension that Tender Number MCG/OT/067/2017-2018 for Medical Cover for to the executive and Staff Members (Underwriters Only) will overlap with their contract under the old tender being Tender Number MCG/OT/067/2016-2017 for Provision of Medical Insurance Cover to the Executive and Staff Members (Underwrites Only).

The Board further notes that under section 3 the Act, the law sets out the guiding principles that Procuring Entities must apply in order to ensure public resources are not wasted and that the process of procurement is free, fair, transparent and accountable and open to all members of the public. Section 3 of the Act states as follows:-

3. Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

Guiding principles.

- a) the national values and principles provided for under Article 10;*
- b) the equality and freedom from discrimination provided for under Article 27;*
- c) affirmative action programmes provided for under Articles 55 and 56;*

- d) *principles of integrity under the Leadership and Integrity Act, 2012; No. 19 of 2012.*
- e) *the principles of public finance under Article 201;*
- f) *the values and principles of public service as provided for under Article 232;*
- g) *principles governing the procurement profession, international norms;*
- h) *maximization of value for money;*
- i) *promotion of local industry, sustainable development and protection of the environment; and*
- j) *promotion of citizen contractors.*

Under section 53 of the Act, sets out the general rules and procedures that a procuring entity must adhere to in carrying out its procurement for goods and also while disposing of obsolete merchandise. It encourages procurement planning for multi-year periods and also preparation for the same before the lapse of services to allow free flow of goods and services. Section 53 states as follows:-

53. (1) All procurement by State organs and public entities are subject to the rules and principles of this Act.

Procurement and asset disposal planning.

- (2) An accounting officer shall prepare an annual procurement plan which is realistic in a format set out in the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process.*
- (3) Any public officer who knowingly recommends to the accounting officer excessive procurement of items beyond a reasonable consumption of the procuring entity commits an offence under this Act.*

- (4) *All asset disposals shall be planned by the accounting officer concerned through annual asset disposal plan in a format set out in the Regulations.*
- (5) *A procurement and asset disposal planning shall be based on indicative or approved budgets which shall be integrated with applicable budget processes and in the case of a State Department or County Department, such plans shall be approved by the Cabinet Secretary or the County Executive Committee member responsible for that entity.*
- (6) *All procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.*
- (7) *Multi-year procurement plans may be prepared in a format set out in the Regulations and shall be consistent with the medium term budgetary expenditure framework for projects or contracts that go beyond one year.*
- (8) *Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.*
- (9) *An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under this Act.*
- (10) *For greater certainty, the procurement and disposal plans approved under subsection (5) shall include choice of procurement and disposal methods and certain percentages referred to under subsection (6).*
- (11) *Any state or public officer who fails to prepare procurement and disposal plans shall be subject to internal disciplinary action*

Article 227 of the Constitution of Kenya entreats Public entities to put in place procurement processes that are fair, equitable and accountable which are

same principles echoed by the Act under section 3. Article 227 provides as follows;-

227. (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.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

- a) categories of preference in the allocation of contracts;*
- b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;*
- c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation;*
- d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.*

Having looked at the evidence placed before it and the law and having heard the submissions of counsel of the Applicant the Board notes that there were two tenders being tenders Nos. MCG/T17/2016-2017 AND MCG/OT/066/2018-2019 which are distinct and separate. The Board further notes that the first tender MCG/T/17/2016-2017 has already been expended and the Procuring Entity has already consumed the services of the Applicant and paid partly for them. This tender is outside the purview and the legal

confines of the Board and no aspect of it is in issue or at all. The Board also notes that the second tender being the tender subject matter of the Request for Review Tender No. MCG/OT/066/2018-2019 has just been issued and is yet to be completed. It relates to a different period in time and has no relationship with the contractual arrangements between the Applicant and the Procuring Entity. No aspect of the new tender has been challenged and no material has been placed before the Board to demonstrate how the Applicant will be prejudiced if the same is processed. Indeed, being a distinct tender and separate from the contract, the Applicant should and is at liberty to participate in it as no evidence has been placed before the Board to demonstrate any interference with the Applicants participation or right to participate in the said tender. That being the case the Board is satisfied that the two tenders are distinct and separate and that there is no demonstrated overlap of the second tender over the existing contractual arrangements. The Board only considers the Procuring Entity actions as an initiative to commence its procurement processes with sufficient time to allow a smooth process from one contractual period to another and to ensure that there are no lapses for such a crucial service. On the basis of the two tenders being for the same services the Board notes that these are separate tenders for different tendering period and as such finds that the Request for Review as filed lacks merit and will proceed to dismiss it.

The Board however notes that pursuant to the Request for Review filed herein, the Board issued an order of stay of any further procurement process relating to the new tender under the provisions of Sections 168 of the Act resulting in a standstill period of 21 days and for the purposes of fairness and creating an equal playing field, the Board will extend the period of

submission of the tenders to cover the period of time when the order of stay was in force.

Costs

The Request for Review has failed for lack of merit, the Procuring Entity under normal circumstances would have been considered for costs. However having absented itself from the process the Board and having not provided any documentation to the Board, the Board will not award any costs to it.

FINAL ORDERS

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015 the Board makes the following orders on this Request for Review.

1. The Request for Review dated 29th March, 2018 and filed with the Board on the same date by the Applicant, M/S Britam General Insurance Co. (K) L Ltd, in the Matter of Tender Number MCG/OT/67/2017-2018 for the Provision for Medical Cover for to the executive and Staff Members (Underwriters Only) is hereby dismissed.
2. The Procuring Entity's may proceed with the procurement plans under tender No. MCG/OT/067/2018-2019 but is directed to extend the tender submission date by a further period of twenty one (21) days from the date of service of this decision on it as directed below

to enable the Applicant and any other interested bidder participate in the said process.

3. The Procuring Entity is further directed to immediately publish the extension of twenty one (21) days stated in order number 2 above in two Daily Newspapers having a national circulation upon being notified of this decision.
4. The Board further directs that the Procuring Entity be immediately served with a copy of this decision by the secretary of the Board both by way of email and by registered post to enable it comply with the Board's orders set out above.
5. The Board makes no orders as to costs on the Request for Review

Dated at Nairobi on this 19th day of April, 2018.

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CHAIRMAN
PPARB

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SECRETARY
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