

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 55/2021 OF 15TH APRIL 2021
BETWEEN

WASHINGTON KAHORO T/A

GARDEN PRIME INSURANCE AGENCY.....APPLICANT

AND

COUNTY SECRETARY,

COUNTY GOVERNMENT OF KITUI.....RESPONDENT

PALADIN INSURANCE BROKERS LIMITED...1ST INTERESTED PARTY

BRITAM INSURANCE

COMPANY (KENYA) LIMITED.....2ND INTERESTED PARTY

Review against the decision of County Government of Kitui in respect of Tender No. CGOKTI/OGVN/131/2020-2021 Negotiation No.840796-2 for Provision of Group Medical Insurance Cover for All County Staff Members.

BOARD MEMBERS

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|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Qs. Hussein Were | -Member |
| 3. Mr. Nicholas Mruttu | -Member |
| 4. Ms. Rahab Chacha | -Member |
| 5. Mr. Jackson Awele | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | -Holding brief for the Acting Board Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

The County Government of Kitui (hereinafter referred to as “the Procuring Entity”) invited sealed bids from tenderers to demonstrate their technical and financial competence in providing services to the Procuring Entity in respect of Tender No. CGOKTI/OGVN/131/2020-2021 Negotiation No. 840796-2 Provision of Group Medical Insurance Cover for All County Staff Members (hereinafter referred to as “the subject tender”). To that end, the Procuring Entity published an advertisement in its Website (www.kitui.go.ke) and the Public Procurement Information Portal (www.tenders.go.ke) on 10th March 2021.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of Three (3) bids by the bid submission deadline of 18th March 2021. The same were opened shortly thereafter by a Tender Opening Committee at the County Secretary’s Boardroom and recorded as follows: -

Bidder’s Name
1. Britam Life Assurance Company (Kenya) Limited
2. The Kenyan Alliance Insurance Company Limited
3. Trident Insurance Company Limited

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was done in the following three stages: -

- i. Preliminary Evaluation/Completeness and Responsiveness;
- ii. Technical Evaluation; and
- iii. Financial Evaluation.

Preliminary Evaluation/Completeness and Responsiveness

At this stage, the Evaluation Committee applied the criterion outlined in Clause 2.16 of Section II Instructions to Tenderers of the Tender Document at page 12 of the Blank Tender Document. This stage involved checking mandatory documents and requirements which the bidders were required to submit. Bidders who didn't meet the requirements were eliminated and didn't proceed to the next stage.

Bidder	<u>1. Britam Life Assurance Company (Kenya) Limited</u>	2.The Kenyan Alliance Insurance Company Limited	3.Trident Insurance Company Limited
Responsiveness	PASS	FAIL	FAIL

M/s Britam Life Assurance Company (Kenya) Limited was found responsive thus proceeded to Technical Evaluation.

Technical Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Section V- Schedule of Requirements at page 34 of the Tender Document. Bidders were required to obtain 80 percent and above to qualify for financial

evaluation. At this stage, M/s Britam Life Assurance Company (Kenya) Limited attained a score of 81 percent qualifying to proceed for financial evaluation stage.

Financial Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Section V- Schedule of Requirements at page 37 of the Tender Document to determine the lowest evaluated tenders. At the end of this stage, Bidder No.1 (M/s Britam Life Assurance Company (Kenya) Limited) was found to have submitted the lowest evaluated bid at Kshs 190,478,617.06

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Britam Life Assurance Company (Kenya) Limited at the Tender Sum of Kshs. 190,478,617.06(One Hundred and Ninety Million, Four Hundred and Seventy Eight Thousand Six Hundred and Seventeen Shillings and Six Cents) only being the lowest evaluated bidder.

Professional Opinion

In a Professional Opinion dated 22nd March 2021, the Procuring Entity's Ag. Head Supply Chain Management Services reviewed the subject procurement process and expressed his satisfaction that the same met the requirements of the Act read together with Article 227 of the Constitution. He urged the Chief Officer- Office of the Governor to consider awarding the subject tender

to M/s Britam Life Assurance Company (Kenya) Limited for being the lowest evaluated tenderer as recommended by the Evaluation Committee. The said professional opinion was approved on 22nd March 2021 by the Chief Officer-Office of the Governor.

Notification to Tenderers

In letters dated 23rd March 2021, the Procuring Entity notified the successful tenderer and all other unsuccessful tenderers of the outcome of their bids.

THE REQUEST FOR REVIEW

Washington Kahoro T/A Garden Prime Insurance Agency (hereinafter referred to as "the Applicant") lodged a Request for Review dated 13th April 2021 and filed on 15th April 2021 together with a Supporting Affidavit sworn on 13th April 2021 and filed on 15th April 2021, through the firm of Murimi Murango & Associates Advocates, seeking the following orders: -

- 1. An order allowing the Applicant's Request for Review.***
- 2. An order annulling the decision of the Procuring Entity awarding Tender No. CGOKTI/GVN/131/2020-21 for provision of Group Medical Insurance Cover for All County Staff Members to Paladin Insurance Brokers Limited.***
- 3. An order upholding/affirming the Procuring Entity's decision declaring the Applicant's tender as the successful bidder and the sole intermediary as contained in its letters dated 18th March 2021 and 29th March 2021.***

- 4. An order annulling the Procuring Entity's decision declaring the Interested Party as the successful bidder and the broker as contained in its letters dated 30th March 2021.***
- 5. An order be issued restraining Britam Insurance transacting any business, payment of commission and any other dealings with Paladin Insurance Brokers Ltd in respect to Tender No. CGOKTI/GVN/131/2020-2021.***
- 6. An award of costs arising from and incidental to this Application.***

The Respondent responded to the Request for Review vide a letter addressed to the Board dated 19th April 2021 and filed on 23rd April 2021.

The 1st Interested Party has to date not filed a response to the Request of Review. The 2nd Interested party filed a notice of appointment of advocates and a Notice of Preliminary Objection dated 30th March 2021 filed on 3rd May 2021 through the firm of ROM LAW Advocates. The 2nd Interested Party's Preliminary Objection raised the following grounds: -

- 1. The Request for Review having been filed outside the stipulated fourteen (14) days as required by Section 167(1) of the Public Procurement and Asset Disposal Act is fatally defective and should therefore be struck out with costs;***
- 2. That this Honourable Board lacks jurisdiction to entertain the Application herein pursuant to Section 167 (4) (c) of the Public Procurement and Assets Disposal Act on the basis that***

the Respondent has finalized on the procurement process herein and a contract has already been executed;

3. That this Honourable Board lacks jurisdiction to entertain the Application herein on account of the Request for Review having been lodged by a party that is neither a candidate nor a tenderer in the subject tender proceeding.

On 24th March 2020, the Board issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

The Applicant lodged its written submissions dated 3rd March 2021 and filed on 4th May 2021. The Respondent did not file written submissions. The 2nd Interested Party lodged its written submissions dated 4th May 2021 and filed on 5th May 2021.

BOARD'S DECISION

The Board has considered parties' pleadings including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as the Act) and finds that the following issues call for determination: -

1. Whether the Applicant is a candidate or a tenderer within the meaning of section 2 of the Act to invoke the jurisdiction of the Board under section 167 (1) of the Act

Depending on the outcome of the first issue: -

2. Whether the Request for Review is fatally defective for failure by the Applicant to join the successful bidder as a party, thus divesting the Board of jurisdiction.

Depending on the outcome of the second issue: -

3. Whether the contract dated 7th April 2021 between the Procuring Entity and the 2nd Interested Party was entered into in accordance with section 135 of the Act, thus ousting the jurisdiction of the Board by dint of section 167 (4) (c)

Depending on the outcome of the third issue: -

4. Whether the Board has powers to reinstate the alleged cancellation of the Applicant from acting as an intermediary of Britam Life Assurance Company (Kenya) Limited in the Subject procurement process

The Board now proceed to address the above issues as follows: -

On the first issue framed for determination, the Board would like to point out that once a jurisdictional issue is raised before a court or a decision making body, it must be addressed at the earliest opportune moment. It

therefore behooves upon this Board to determine whether it has the jurisdiction to entertain the Request for Review filed by the Applicant.

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the celebrated case of **The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, Justice Nyarangi (as he then was), stated as follows:-

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

In the case of **Kakuta Maimai Hamisi v. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:-

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. "

Similarly, in the case of **Samuel Macharia and Another v. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** the Supreme Court held that:-

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus a Court of law can only exercise

jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the First and Second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

This Board is a creature of statute owing to the provision of Section 27 (1) of the Act which provides that:-

"27. Establishment of the Public Procurement Administrative Review Board

(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

Further, Section 28 of the Act provides as follows:-

"28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

(a) Reviewing, hearing and determining tendering and asset disposal disputes; and

(b) To perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”

The above provisions demonstrate that the Board is a specialized, centralized, independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and assets disposal disputes.

The Board notes that at paragraph one of its Request for Review, the Applicant avers that it submitted its bid on 18th March 2021. The Applicant further states that its proprietor, one Washing Kahoro, was present at tender opening and signed the attendance sheet of all the attendees. Further, the Applicant alleges that the Respondent fraudulently and illegally awarded the tender to the 1st Interested Party through a letter dated 30th March 2021 without the 1st Interested Party tendering for the subject Tender. The Applicant further alleges that the Respondent violated procurement rules by awarding the tender to the 1st Interested Party, who is not an intermediary but a broker of the 2nd Interested Party. On the other hand, the Applicant averred that it was an intermediary of the 2nd Interested Party and not a broker as the 1st Interested Party.

The Procuring entity vide a letter dated 19 march 2021 addressed to the Board Secretary, and received on 23rd April 2021, indicated that no insurance brokers and /or Intermediaries submitted bids for the Subject tender.

Further, the procuring entity indicated that the 2nd Interested Party had 3 representatives in attendance during tender opening meeting.

The 2nd Interested Party, through a preliminary Objection dated 3rd March 2021 and filed on 4th May 2021 objected to the hearing of the instant Request for Review on grounds that the Board lacks jurisdiction to entertain the same on account that the Request for Review was lodged by a party that is neither a candidate nor a tenderer in the subject procurement.

Having considered parties' rival arguments the Board notes that section 167 (1) of the Act provides for who has the *locus standi* to file a request for review. Section 167

“(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.”

From the above provision, it is clear that filing of a Request for Review before the Board is not open to all and sundry but limited to candidates and tenderers only. At this juncture, it is important to understand who a

candidate or tender is. Section 2 of the Act interprets the meaning of a candidate and tenderer as follows:-

"Candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity.

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

Accordingly, a candidate is a person who has obtained the tender documents from a public entity pursuant to an invitation notice. In the instant case the Procuring Entity's invitation notice dated 10th March 2021 provided the manner in which the blank tender document in the subject tender could be obtained by bidders as follows;

"...the tender documents containing detailed information on the tenders can freely be downloaded from the county government of Kitui Website (www.kitui.go.ke) or PPIP portal: www.tenders.go.ke with effect from 10th March 2021."

Any person was at liberty to obtain the Blank tender document in the subject tender by downloading the same from two sources namely, (a) County Government of Kitui website (www.kitui.go.ke) (b) PPIP portal: www.tenders.go.ke.

The Board has perused the Applicant's Request for Review together with its appurtenant supporting Affidavit and has not found any blank tender

document the subject tender attached. The Board also notes that the Applicant has also not proven that it obtained the blank tender document on its own behalf or for its own use.

Accordingly, the Board finds that the Applicant was and still is not a candidate in the subject procurement.

On the other hand, a tenderer is a person who has submitted a tender/bid pursuant to an invitation by a Public Entity.

In the instant case, the Applicant has not demonstrated that it submitted a tender/bid to the Procuring Entity pursuant to the Procuring Entity's invitation notice dated 10th March 2021. All the Applicant has indicated is that it was an intermediary of the 2nd Interested Party with respect to the subject tender and not a broker as the 1st Interested Party. It buttressed this information by attaching annexure Wk 3 (a) to its Supporting Affidavit being a letter dated 18th March 2021 by the County Government of Kitui and addressed to the Chief Executive Officer Britam General stating as follows

"RE: MR WASHINGTON KAHORO

This is to confirm that the above has been to see me and generally to our county headquarters, inquiring about our staff medical cover as advertised CGOKTI/GNV/131/2020-21 for the purposes of this issue. I confirm he is our intermediary."

Further, annexure 3Wk 2 being a letter dated 30th March 2021 by the Branch Manager Britam addressed to the County secretary county Government of Kitui sated as follows

"Please note that Garden Prime Insurance Agency has been licensed as an Intermediary under our branch. Washington Kinuru Kahoro is the Principal Officer of this agency."

On the same day, 30th March 2021 there was another letter dated 30th March 2021 addressed to the chief executive officer being annexure 3WK 4

"RE: PALADIN INSURANCE BROKERS LIMITED

This is to confirm that the above ref. is our recognized insurance Broker duly authorized to undertake brokerage on our behalf with you. Ignore any other correspondences/ instructions on the same that you have received earlier from my office.

Paladin will represent us in all insurance related matters and disputes."

At this juncture it is important to understand who an intermediary or broker to an insurance company is:-

According to the Insurance Act Chapter 487 Laws of Kenya section 2 of the Act defines:-

*“**intermediary**” as a person who in the course of any business or profession invites other persons to make offers or proposals or to take other steps with a view to entering into contracts of insurance with an insurer, but does not include a person who merely publishes invitations on behalf of, or to the order of, some other person;*

*“**broker**” on the other is an intermediary concerned with the placing of insurance business with an insurer or reinsurer for or in expectation of payment by way of brokerage, commission, for or on behalf of an insurer, policy-holder or proposer for insurance or reinsurance and includes a health management organization; but does not include a person who canvasses and secures reinsurance business from or to an insurer or broker in Kenya so long as that person does not undertake direct insurance business and does not have a place of business, or a resident representative, in Kenya.*

It is worth noting that the eligible bidders for the subject tender were Insurance Underwriting Companies licenced by Insurance Regulatory Authority to transact business in Kenya as stipulated in Clause 2.1 of the Appendix to Instructions to Tenderers of the Tender Document for the subject tender.

This means, insurance brokers and/or intermediaries were not eligible for the subject tender. Despite this, the Applicant by its own admission, confirms

that it was an intermediary or the 2nd Interested Party and was thus not eligible to tender for the subject tender.

Further, the Board has perused the confidential documents furnished to it by the Procuring Entity pursuant to section 67 (3) (e) of the Act and observes the following:- (a) the tender opening minutes of 18th March 2021 indicate the 2nd Interested Party together with the Kenyan Alliance Insurance Company limited and Trident Insurance Company limited as tenderers who responded to the subject tender and (b) the 2nd Interested Party was represented by three individuals, one of them being Washington Kahoro, at the tender opening meeting.

It is clear, from the Applicant's own admission that it was an intermediary of the 2nd Interested Party and not an insurance underwriter eligible to tender thus was not a tenderer in the subject tender. This is further buttressed by the fact that none of the tenders/bids in the subject tender received by the procuring entity bore the Applicant's name. Instead the Applicant's proprietor represented the 2nd Interested Party at the tender opening as opposed to representing the Applicant.

Accordingly, the Board finds that the Applicant was neither a candidate nor a tenderer in the subject tender to warrant it *locus standi* to invoke the jurisdiction of the Board.

In the circumstances, the Board is left with no option but to strike out the Request for Review for having been filed by a person who has no *locus standi* to file the same before the Board.

The effect of this finding is that the Board shall not address the other issues framed for determination.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review: -

- 1. The Request for Review filed by the Applicant on 15th April 2021 with respect to Tender No. CGOKTI/OGVN/131/2020-21 Negotiation No. 840796-2, Provision of Group Medical Insurance Cover for All County Staff Members be and is hereby struck out.**
- 2. Each party shall bear its own costs in the Request for Review**

Dated at Nairobi this 4th day of May 2021



.....
CHAIRPERSON

PPARB



.....
SECRETARY

PPARB