

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO.50/2022 OF 17th JUNE, 2022

BETWEEN

ECOSOFT INSURANCE AGENCY LIMITED.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF UASIN GISHU.....RESPONDENT

(Review Against the Decision of the Accounting Officer of the County Government of Uasin Gishu in Tender No. CGU/PSM/T/003/2022-2023 for the Provision of brokerage of medical insurance services for County Staff.)

BOARD MEMBERS

- | | |
|--------------------------|-------------------|
| 1. Mr.Jackson Awele | - Member in Chair |
| 2. Eng. Mbiu Kimani, OGW | - Member |
| 3. Mr. Ambrose Ogeto | - Member |
| 4. Mr. Nicholas Mruttu | - Member |

IN ATTENDANCE

Mr. Stanley Miheso - Holding brief for Acting Board Secretary

Introduction

The County Government of Uasin Gishu invited tenders from reputable and eligible firms for **Provision of** Brokerage Services for Staff Medical Insurance

Services for Staff of the County. The Tender was open to all Qualified and Interested Brokers.

Invitation to Bid

In order to undertake the above services, the County Government of Uasin-Gishu, used Open National Tender method. Bidders were invited through an advertisement in The Nation Media Group Newspaper dated 16th May 2021.

The Tenders were invited on 16th May, 2022 and closed on 30th May, 2022.

The Chief Officer Public Service Management vide letters **REF: CGU/PSM/2022/519,520,521 and 522** dated 30th May, 2022 appointed Tender Opening Committee and an Ad-Hoc Tender Evaluation Committee in fulfilment of Sections 46 and 78 of the Public Procurement and Asset Disposal Act 2015.

Tender Opening process.

The Tenders closed via Ifmis portal on **Monday 30th May, 2022 at 10.30am** and opened on Monday 30th May, 2022. Thereafter, the tender opening exercise was conducted electronically as per the opening register at County Multipurpose Hall. The following tenderers were noted to have submitted their tenders.

Bidder No.	Bidders Name	Quotes No
1	Amana Insurance Brokers Limited P O.Box 40906 - 00100 Nairobi	1279520
2	Clarkson Insurance Brokers Ltd P O.Box 30279 -00100 Nairobi	1279079
3	Minet Insurance Brokers Limited P O.Box 48729 -00100	1268819

	Nairobi	
4	Paladin Insurance Brokers Limited P O.Box 5546 - 00100 Nairobi	1279618
5	Scoreline Insurance Brokers Limited P O.Box 60064 - 00100 Nairobi	1277903
6	Trident Insurance Company Limited P O.Box 55651 - 00100 Nairobi	1280519

Tender Evaluation Committee

A Tender Evaluation Committee was appointed by the Chief Officer Public Service Management vide Letter **REF:CGU/PSM/2022/523,524,525,526** dated **30th May, 2022** to carry out a comprehensive evaluation of tenders in accordance with **Section 46(1)** of the Public Procurement and Asset Disposal Act 2015 and prepare a Technical Evaluation Report.

Evaluation Criteria

The evaluation exercise was conducted in the following three (3) stages in accordance with the criteria set out in the Tender Document.

- i. Stage 1: Preliminary Evaluation
- ii. Stage 2: Technical Evaluation
- iii. Stage 3: Financial Evaluation

Stage 1: Preliminary Evaluation

A mandatory requirement as per the Tender Document for Tender Provision of Brokerage Services for Staff Medical Insurance Services for Staff of the

County. **Tender NO.CGU/PSM/T/003/2022/2023** formed the basis of the evaluation at this stage.

As a requirement, bidders who were found to miss any of the mandatory requirements in the Tender Document were considered by the Evaluation Committee as non-responsive and therefore were not subjected to the second stage of the evaluation process.

From preliminary evaluation, five bidders were found to be non-responsive and one bidder was found to be responsive.

Technical Evaluation Criteria

To be eligible for the Financial Evaluation, tenderers were required to score at least (80%) at the Technical Evaluation Stage. After technical evaluation **Bidder no.1** Amana Insurance Brokers Limited of P.O.BOX 40906 -00100 Nairobi was found to be the only responsive evaluated bidder and therefore awarded the Tender at their Total Tender Price for Insurance Service Per Annum of Kshs. **217,822,333.00** for Provision of Brokerage Services for Staff Medical Insurance Services for Staff of the County.

Recommendation

The Evaluation committee recommended award to **M/s. AMANA INSURANCE BROKERS LIMITED P O.BOX 40906 -00100 NAIROBI**, having satisfied the conditions of responsiveness, at their Total Tender Price for Insurance Service Per Annum of Kshs. **217,822,333.00 (Two Hundred**

and Seventeen Million Eight Hundred and Twenty-Two Thousand Three Hundred and Thirty-Three Shillings Only) to the Head of Supply Chain Management and subsequently to the Chief Officer Public Service Management. This brings to the Total Sum for the Two Years at tender sum of **Kshs.435,644,666.00 (Four Hundred and Thirty-Five Million Six Hundred and Forty-Four Thousand Six Hundred and Sixty-Six Shillings Only.**

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s Ecosoft Insurance Agency Limited, on 17th June, 2022 and seeks the following orders:

- A. Pending the hearing and determination of the review; the Board issues interim orders preventing the Respondent/procuring entity from proceeding with the award of the tender Number CGU/PSM/T/003/2022-2023 for provision of Brokerage of medical insurance services for county staff.***
- B. The advertisement and/or invitation to tender dated the 16th May, 2022 -Tender Number CGU/PSM/T/003/2022-2023 for provision of Brokerage of medical insurance services for county staff be nullified.***
- C. The procurement entity be ordered to correct and re advertise the tender number COU/PSM/T/003/2022-2023 for provision of Brokerage of medical insurance services for county staff;***

D. That in the event the tender is going to be reviewed, a different and distinct review board be appointed for the purposes of the review of that tender.

E. The costs of the review be awarded to the Applicant;

F. Any other relief that this Board may deem fit and just to grant.

PRELIMINARY POINTS OF LAW

The Board having considered the totality of the Parties' Pleadings notes that the Respondent raised a preliminary point of law that essentially amounts to an objection to this Board's jurisdiction to entertain the Request for review. The Respondent contends that the Applicant has no locus standi to bring this Request for a Review as it is neither a candidate nor a bidder within the definition of Section 3 as read together with Section 167 of the Public Procurement and Asset Disposal Act (hereinafter referred to as the Act). The Board further notes from a cursory review of the pleadings that the Request for review has been filed as against the Procuring Entity only and that the Accounting officer is not a party to the same.

It is trite law that courts and decision-making bodies can only act in cases where they have jurisdiction to do so. It accordingly behooves the Board to determine whether it has jurisdiction to entertain the Request for Review before considering any other issue arising in the Application.

In the leading authority on this point, Nyarangi JA in the *locus classicus* case of *The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) eKLR* opined as follows

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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." [Emphasis added]

Similarly, in the case of *Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others [2013] eKLR* the Court of Appeal emphasized the point as follows:

"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."

Such is the centrality of jurisdiction that the Court of Appeal has held in *Isaak Aliaza v Samuel Kisiavuki [2021] eKLR*, that whether it is raised either by parties themselves or the Court *suo moto*, it has to be addressed first before delving into the interrogation of the

merits of issues that may be in controversy in a matter." (emphasis ours)

Two jurisdictional issues arise from the foregoing are;

- i) That the Applicant is NOT a candidate or a tenderer.*
- ii) That the Request for review is fatally defective for failure to enjoin the procuring Entity's Accounting officer*

i) That the Applicant is NOT a candidate or a tenderer.

Section 167(1) of the Act provides for the filing of a request for review as follows;

"(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."

In **Smartmatic International Holding B.V vs Independent Electoral And Boundaries Commission And Public Procurement Administrative Review Board And 1 Other HCJRMISC/E134/ 2021 (Smartmaric case)**, the High Court provided the following exposition on Section 167(1) of the Act;

"In my humble view, assuming there was any breach of the provisions of either the Constitution or the Public Procurement and Asset Disposal Act in the tender document, it occurred as early as 14 April 2021 when the procuring entity placed an advertisement in the print or electronic media inviting sealed bids for the tender. But for purposes of instituting review proceedings against the tender before the respondent under section 167(1) of the Act, time started running as soon as the applicant in the review in the request for review downloaded a copy of the tender documents. It is at this stage that the applicant, or any other candidate or tender for that matter is deemed to have been aware of the breaches complained of in the tender document..." [Emphasis by the Board]

In this case, the Applicant did not submit a bid and is accordingly not a tenderer. According to the tender opening register of 30th May, 2022 and tender opening minutes, the following bidders participated:-

Bidder No.	Bidders Name	Quotes No
1	Amana Insurance Brokers Limited	1279520
2	Clarkson Insurance Brokers Ltd	1279079
3	Minet Insurance Brokers Limited	1268819
4	Paladin Insurance Brokers Limited	1279618
5	Scoreline Insurance Brokers Limited	1277903
6	Trident Insurance Company Limited	1280519

Was the Applicant a candidate though?

Under Section 2 of the Act, a candidate is defined as ***a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity.*** The High Court in **Smartmatic case (Supra)** further held that a party must have obtained the tender documents within the tender advertisement period to qualify as a candidate.

From the uncontested facts of this case, the tender was advertised on 16th May 2022 and closed on 30th May 2022. By the fact that the Applicant has exhibited the tender document and challenges its provisions, a reasonable presumption may be made that it indeed obtained the Tender Document as directed in the Respondent's advertisement. However, none of the parties make any averment as to when the Applicant obtained the tender documents.

It is however deducible from the aforesaid tender opening and closing dates that assuming the said documents were obtained on the tender closing date –, the request for review ought to have been filed by or before the 13th of June 2022 being the 14th day from the date a candidate is deemed to have discovered the breach complained of. It is not in dispute that the request for review was filed on 17th June 2022 about 18 days from the close of the tender.

In the Smartmatic case (Supra), the High Court held thus;

Now, it is not clear when the applicant in the request for review downloaded the tender document. According to the respondent's decision, it became aware of the breaches on 3 August 2021. It would be reasonable to assume that this is the same date that the

applicant in the request for review downloaded the tender document, in the (sic) absence any evidence to the contrary or, if at all the document was downloaded much earlier, in the absence of any explanation of why the applicant could not decipher the breaches as soon as the document was downloaded.

Proceeding on the presumption that the applicant for request for review downloaded the tender document on 3 August 2021 and as this date, the tender had long been closed, then there is no doubt that the applicant obtained the document after the deadline for submission of tenders. Could the applicant in the request for review be properly described as a candidate in these circumstances? My answer would be emphatically in the negative. I say so because a 'candidate' according to section 2 of the Act is "a person who has obtained the tender document from a public entity pursuant to an invitation notice by a procuring entity."

The invitation notice is not a vain advertisement or announcement. It serves a specific purpose of inviting interested bidders to participate in the procurement process. This, to me, means that one is only 'a candidate' as defined in the Act if he or she obtains the tender document in response to the invitation notice and, therefore, for purposes of participating in the procurement process. Only then can one say that he or she is a 'candidate' who has suffered or risks suffering loss or damage due to the breach of duty imposed on a procuring entity by the Act or the Regulations made under this Act. A person who obtains the tender document after the tender closing

date cannot, by any stretch of imagination, be said to be a 'candidate' as defined in the Act" (emphasis added)

To hold that the Applicant is a candidate would implicitly mean that it obtained the tender document after the **3rd of June 2022** well after the tender closing period. It follows therefore that the Applicant cannot be said to have been a candidate within the meaning of section 167(1) of the Act.

ii) That the Request for review is fatally defective for failure to enjoin the procuring Entity's Accounting officer

The Board has additionally noted the referenced issue with jurisdictional and competency consequences for the request for review. The Applicant addressed its request for review as follows:-

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Pursuant to section 170 of the Act the following must be parties to a request for review;

The parties to a review shall be—

- (a) the person who requested the review;
- (b) the accounting officer of a procuring entity;
- (c) the tenderer notified as successful by the procuring entity; and
- (d) such other persons as the Review Board may determine.

The Court of Appeal in James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR held that pursuant to section 170 of the Act, the joinder of an accounting officer of a procuring entity to a request for review is mandatory and failure to do so renders a request for review fatally defective and rids the Board of jurisdiction to hear the same. The court stated;

“It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replace it, the PPADA, requires that the accounting officer of the procuring entity, be the party. Like the learned Judge we are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is where the Board’s importation of the law of agency floundered. When the procuring entity was the required party, it would be represented in the proceedings by its officers or agents since, being incorporeal, it would only appear through its agents, though it had to be named as a party. Under the PPADA however, there is no such leeway and the requirement is explicit and the language compulsive that it is the accounting officer who is to be a party to the review proceedings. We think that the arguments advanced in an attempt to wish away a rather elementary omission with jurisdictional and competency consequences, are wholly unpersuasive. When a statute directs in express terms who ought to be parties, it is not open to a person

bringing review proceedings to pick and choose, or to belittle a failure to comply.

We think, with respect, that the learned Judge was fully entitled to, and did address his mind correctly to the law when he followed the binding decision of the Supreme Court in NICHOLAS ARAP KORIR SALAT vs. IEBC[2014] eKLR when it stated, adopting with approval the judgment of Kiage, JA;

"I am not in the least persuaded that Article 159 and Oxygen principles which both commands courts to seek substantial justice in an efficient and proportionate and cost effective manner to eschew defeatist technicalities were ever meant to aid in overthrow of rules of procedure and create anarchical tree for all in administration of justice. This Court, indeed all Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines are to serve the process of judicial adjudication and determine fair, just certain and even handed courts cannot aid in bending or circumventing of rules and a shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules."

We have no difficulty holding, on that score, that the proceedings before the Board were incompetent and a nullity, which the learned Judge properly quashed by way of certiorari."

It follows that the Request for Review is fatally defective for failing to have the Accounting Officer of the Procuring Entity as a party as required under Section 170 (b) of the Act.

The Upshot of the foregoing is that the Request for Review is non-suited and is for striking out. Accordingly, the Board makes the following specific orders:-

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 dated 17th June, 2022:-

- 1. The Request for Review dated 17th June, 2022 is defective and is hereby struck out.**
- 2. The Procuring Entity is hereby directed to proceed with the subject procurement in strict compliance with the Tender Document and the applicable law.**
- 3. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi, this 8th day of July, 2022.



CHAIRPERSON

PPARB



SECRETARY

PPARB

