

SCHEDULE 1
FORM 4
REPUBLIC OF KENYA
PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS
BOARD

APPLICATION NO. 39/2006 OF 14TH AUGUST, 2006

BETWEEN

AON MINET INSURANCE BROKERS LTD (APPLICANT)
AND
THE JUDICIARY (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of the Judiciary dated 24th July, 2006 in the matter of Tender No. JUD/2/2006-07 for the appointment of a broker for the Judiciary Medical Insurance Scheme.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. P. M. Gachoka	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. John W. Wamaguru	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. Kenneth N. Mwangi	-	Secretary

In attendance

- Ms. P.K. Ouma - Secretariat
Mr. D.M. Amuyunzu - Secretariat

PRESENT BY INVITATION

Applicant, Aon Minet Insurance Brokers Ltd

- Mr. Anthony Njogu - Advocate, Daly and Figgis Advocates
Mr. Sean Omondi - Legal Assistant, Daly and Figgis Advocates
Mr. Joe Onsando - Managing Director
Mr. Sammy Muthui - Divisional Director
Mr. Joseph Kiuna - Divisional Director

Procuring Entity, The Judiciary

- Mrs. L. Achode - Chief Court Administrator
Mr. A. O. Muchelule - Chief Magistrate
Mr. Tom Luvuga - Deputy Registrar (Court of Appeal)
Mr. D. Opande Ogot - Principal Accounts Controller
Mr. C. K. Kimeli - Economist, Treasury (Member, Judiciary Tender Committee)
Mr. S. K. Kiptorus - Senior Economist
Ms. Jane Macharia - Chief Procurement Officer
Mr. P. J. Kimathi - Senior Procurement Officer

Interested Candidates

- Mr. S. Ncheeri - Managing Director, Alexander Forbes Insurance Brokers
Mr. H. A. Ocholi - Deputy Director, Alexander Forbes Insurance Brokers

- Ms. Yvonne Gitobu - Divisional Director, Alexander Forbes
Insurance Brokers
- Mr. J. Mburu - Assistant Director, Alexander Forbes
Insurance Brokers
- Mr. Paul Kamau - Manager, Alexander Forbes Insurance
Brokers
- Mr. F. Magundu - Broking Manager, Chancery Wright
Insurance Brokers

BOARD'S DECISION

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

The tender for Appointment of a Broker to manage the Judiciary Medical Insurance Scheme was advertised on 19th May, 2006. It closed/opened on 20th June, 2006. Four bid documents were opened in the presence of the bidders' representatives and forwarded to the Evaluation Committee for further analysis.

The Technical Evaluation Committee was chaired by Mr. D. O. Ogot, the Principal Accounts Controller. The bids were evaluated as per the requirements listed in the Schedule of Requirements and the Tender Notice. The requirements provided for bidders to submit the following: -

- (i) Copy of certificate of registration from the Commissioner of Insurance
- (ii) List of five largest medical Insurance schemes being managed currently.

- (iii) Copies of Audited Accounts for the last three years.
- (iv) Proof of having been in the medical insurance cover business for the last five (5) years.
- (v) A company profile
- (vi) A copy of the professional indemnity insurance cover of at least Kshs. 20 million.
- (vii) Evidence of current membership to the Association of Insurance Brokers of Kenya

A summary of the evaluation results is as illustrated in the table below: -

No.	Name of Firm	Copy of Current Registration by Commissioner of Insurance	Five largest Medical Insurance Accounts	Audited Accounts for the last three Years	Last Five years Medical Insurance Cover	Company Profile	Ksh.20 Million Professional Indemnity cover	Current Membership of (AIB)
1.	Liaison Insurance Brokers Limited	Reg. No. 6061 09 upto 31/12/06 Also registered as a Medical Insurance Provider No. 120602 expiring 31/12/06	- Trans National Bank - Kenya College of Accountancy - Standard Group - Siasi Agriflora - Tracker Group	2002 2003 (Not signed by Auditors and Directors. 2004 2005 (Not provided)	Letters are indicative of all brokerage services but not period specific on past Medical Brokerage.	Reg. C.22216 1981 as a Broker, Medical Insurance unit and facilities in place though not clear when this was started.	Kshs.20 Million by AIG Kenya Insurance Company Limited Upto 31 / 12/06	Reg. No. 01749 Expiry 31 / 1 2/06
2.	Alexander Forbes Insurance Brokers	Reg. No. 606163 for 2006 also Registered as a Medical Insurance provider No.120609 for 2006	- National Bank of Kenya - Nation Media Group - General Motors (EA) Ltd. - Catholic University - Commercial Bank of Africa	2003 2004 2005	Provided 5 years Brokerage certificates and 2006 as Medical Service Provider.	Provided a detailed profile on Medical Brokerage e.g. equipment, software, Human Resource.	Kshs. 1 2 Million by AIG Kenya Insurance Company Limited upto 31/12/06 and £8,750,000 by Lloyd's Underwriters, London.	Reg. No. 01801 Expiry date 31/12/06.
3.	Chancery Wright Insurance Brokers	Reg. No. 606134 for 2006	- International Christian Centre - Norfolk Towers Ltd.	2003 2004 2005	Registered 1999 as Brokers but not clear when Medical Brokerage commenced.	Provided but not detailing relevant medical experience.	Cover 100 million by AIG Kenya Insurance Limited Upto 31/12/06	Reg. No. 01884 Expiry date 31/12/06
4.	AON Minet Insurance Brokers Limited.	Reg. No. 606102 Expiring 31/12/06	- Judiciary - Barclays Bank(K) Ltd. - KACC - NSIS - Dela Rue	2003 2004 2005	No letters from clients provided over the period in question but copies of certificate of Registration as Insurance Broker and Medical Service provider for year 2006 only.	List of Directors and brief CV and portfolio of clients.	No local but \$17.5 Million cover expiring 29/4/07 by American International Specialty Lines Insurance. Company to AON Risk services Inc. of Illinois.	Reg. No.01831 Expiring 31/12/06

The Evaluation Committee subjected the audited accounts submitted by the bidders to a financial analysis based on: turnover, liquidity ratio, return on investment and the net working capital.

The summary of the results is as tabulated below:-

Criteria (Average for year 2003, 2004 and 2005)	Liaison Insurance	Alexander Forbes	Chancery Wright	AON Minet
Turnover (Millions)	25.87	221.60	38.87	493.50
Ranking	4	2	3	1
Liquidity Ratio	0.67	1.09	1.28	1.05
Ranking	4	2	1	3
Return on Investment	54.3%	394.2%	28.9%	41.2%
Ranking	2	1	4	3
Net working capital	989,469	28,145,289	12,783,019	49,677,667
Ranking	4	2	3	1
Total points	14	7	11	8
Total Ranking	4	1	3	2

The Evaluation Committee recommended M/s Alexander Forbes Insurance Brokers Limited as it had met all the requirements as set out in the tender documents and was ranked first in the financial analysis.

The Judiciary Tender Committee in its meeting No. JTC/4/2006-07 held on 24th July, 2006 deliberated on the matter and appointed M/s Alexander Forbes Insurance Brokers Limited to manage the Judiciary Medical Insurance Scheme. It authorized immediate communication.

THE APPEAL

Aon Minet Insurance Brokers Limited lodged the appeal on 14th August, 2006. It was represented by Anthony Njogu, Advocate, and Sean Omondi, Legal Assistant, both of Daly and Figgis Advocates, Joe Onsando, Managing Director, Sammy Muthui, Divisional Director and Joseph Kiuna, Divisional Director.

The Procuring Entity was represented by Mrs. L. Achode, Chief Court Administrator, Mr. A. O. Muchelule, Chief Magistrate, Tom Luvuga, Deputy Registrar (Court of Appeal), D. Opande Ogot, Principal Accounts Controller, C. K. Kimeli, Economist, Treasury, S.K. Kiptorus, Senior Economist, Jane Macharia, Chief Procurement Officer and P. J. Kimathi, Senior Procurement Officer.

The Interested Candidates present included Alexander Forbes Insurance Brokers represented by S. Ncheeri, Managing Director, H. A. Ochoi, Deputy Director, Yvonne Gitobu, Divisional Director, J. Mburu, Assistant Director and Paul Kamau, Manager, and Chancery Wright Insurance Brokers was represented by F. Magondu, the Broking Manager.

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

Grounds 1 and 5

At the hearing the Applicant consolidated these two grounds as they are both complaints concerning breach of Regulation 24.

The Applicant stated that the Procuring Entity breached Regulation 24(2) as Clause 26 of the tender document was expressed in ambiguous, non-objective

and non-quantifiable terms leading to a non-transparent award. It argued that Clause 26 was subject to clause 10, 23 and 28 of the tender document, which dealt with the evaluation of goods, and that this tender was for provision of services and therefore clause 10, 23 and 28 were not relevant. It therefore submitted that there was no basis for an objective evaluation of the tender.

It further argued that the Procuring Entity erred in using the standard tender document for Procurement of Goods that was not suited for tendering for Insurance Brokerage Services. The use of the standard tender for Goods was improper and contrary to the provisions of Regulation 24(1). The tender documents failed to give the evaluation criteria and method of evaluation to be used. Further, though the Procuring Entity in its response to the memorandum of appeal had indicated that the financial analysis was to be based on the bidders' audited accounts, the Applicant submitted that the audited accounts would not be a true reflection of its financial capability and its ability to service the contract.

In response, the Procuring Entity denied that it had contravened Regulation 24 (1) and (2) as it used the standard tender documents published by the Ministry of Finance as set out in the Third Schedule to the Regulations. In addition, Clause 26 of its tender document was a standard clause reproduced from the standard tender document. It argued that the Applicant had not demonstrated how the clause was ambiguous, non-objective and non-quantifiable. It asserted that on the basis of Clause 26 (1) it awarded the tenderer who was determined to be substantially responsive and qualified to perform the contract satisfactorily. It added that the tender documents,

particularly the specifications, contained sufficient details of the services required.

Further, it argued that it was not asserting that the Applicant was not capable of managing its medical scheme, but that during the evaluation another tenderer was found to be more responsive to its needs as per the tender requirements. It stated that it was a requirement in the tender document that a bidder had to provide proof that it had been offering medical insurance cover for a minimum period of five years. The Applicant failed to provide such proof. In addition, the Evaluation Committee could not consider the fact that the Applicant is the one who had been managing the scheme for the last 3 years, as this was an open tender and the evaluation had to be carried out on the basis of the information supplied by the bidders themselves. Use of its own knowledge, as submitted by the Applicant, would have been tantamount to single-sourcing which, in turn, would have been a breach of the Regulations.

Finally, it stated that the tender notice clearly indicated seven requirements that were used as the evaluation criteria. In addition, Clause 5 of the tender document gave bidders the opportunity to seek for clarification in case of any difficulty in understanding the tender documents. Since the Applicant did not seek clarification, its argument that the tender document was ambiguous was an afterthought.

The Board has carefully considered the representations of the parties and examined the documents submitted before it. We note that the Procuring Entity customized some parts of the Standard Tender Document for Procurement of Goods, and adapted it for its tender for provision of

Insurance Brokerage Services. Clause 26 of the tender document used, was reproduced from the Standard Tender document issued by the Directorate of Public Procurement. The Procuring Entity stated that it used the Clause to award the contract to the tenderer whose tender had been determined to be substantially responsive.

The Board finds that it is a legal requirement for procuring entities to use the standard tender documents stipulated in the Third Schedule to the Regulations, pursuant to Regulation 24 (1). We, however, note that among the twenty documents listed in the Third Schedule, there is no standard tender document for procurement of insurance brokerage services. Thus the Procuring Entity had to customize the document for their use for procurement of insurance brokerage services.

We further note that although the Procuring Entity had customized the Standard Tender Document for Goods, it retained clause 23 on evaluation and comparison of tenders. Clause 23 relates to procurement of goods and was not relevant to this tender which involved provision of brokerage services. However, though that clause ought not to have been included in the tender document, our analysis of the Procuring Entity's evaluation report that was produced, shows that the evaluation itself was based on the criteria set out in the tender document. Clause 23 was not used in evaluation and no bidder was prejudiced.

The Board also notes that the document produced respectively by the parties at the hearing as being the standard tender document for procurement of services, has not yet been included in the Third Schedule to the Regulations. This is an anomaly that needs to be rectified by the Directorate of Public

Procurement, and the Procuring Entity should not be penalized for this anomaly. As earlier noted, in the current tender, the evaluation was based on the responsiveness of the tenderers based on the parameters and criteria which were clearly stipulated. The parameters that were evaluated were contained both in the tender notice advertised, and also in the tender documents. The Applicant was not responsive in the parameter requiring submission of proof that it had been in the business of medical insurance cover for the past five years. A perusal of the Applicant's original tender document shows that the Applicant failed to provide this information. Having failed to provide the requested information and documents, we find that the evaluation was fairly done in accordance with the criteria set forth in the tender document. We find that the Applicant was not prejudiced in any way as all the parameters for evaluation were applied equally across the board.

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

Ground 2

In this ground the Applicant stated that the Procuring Entity's Tender Committee made decisions based on erroneous considerations, namely, that it had not provided proof of having been in the medical insurance cover for the past five years yet its tender document contained evidence of this fact. It pointed out that it had been in operation since 1949 as evidenced by the company's Certificate of Incorporation. In addition, its company profile illustrated that it had been in business for over fifty years, and had indicated that part of its services included provision of medical insurance. The same information was also within the knowledge of the Tender Committee, since the Applicant had been successfully managing the scheme for the last three

years. It further submitted that the Procuring Entity did not provide the format or form that was to be used to prove its being in the medical insurance business for the past five years. The decision of the Tender Committee was therefore unfair, unjust and discriminatory against the Applicant contrary to Regulation 4 of the Regulations.

In response, the Procuring Entity stated that it was a requirement for tenderers to show proof of having been in the medical insurance business for the last five years. This requirement was stated clearly in the tender notice and also the tender documents. It asserted that it would have been unfair to other bidders for it to use information within its knowledge, relating to the Applicant, while the Applicant had not submitted such information in the tender document. The Applicant had provided its list of clientele and certificates of registration as a Broker and as a medical service provider. The latter ^{covered} ~~was~~ only for the current year, 2006. Finally, the Procuring Entity argued that proof of being in the medical insurance business could have been in the form of correspondence the tenderers had exchanged with clients for the past five years, or its registration certificates for the past five years.

The Board notes that the tender documents required tenderers to have been in the medical insurance business for the last five years. Other tenderers submitted copies of their certificates of registration as Brokers and Medical Service Providers for the past five years. The Board has observed that the Applicant's company profile indicated that it had been in business for over fifty years, but that the period it had serviced medical insurance cover was not stated.

The Applicant's Memorandum of Appeal at page 37 shows a listing of the documents it submitted to the Procuring Entity. The listing did not indicate that it submitted evidence of being in the medical insurance business for the required length of time. We therefore, agree with the Procuring Entity that it could not use its own knowledge of tenderers capacities other than the documentary evidence submitted, unless permitted by the tender requirements.

Accordingly this ground of appeal also fails.

Ground 3 and 4

Ground 3 was an argument based on the general norms applicable in the insurance industry and the laws governing it. This argument is not related to this tender as the Procuring Entity was sourcing for the services of a broker. Ground 4, on the other hand, contained information of the Applicant's self-assessment of its financial capability. This is not provided for in the Regulations and is therefore irrelevant in this tender.

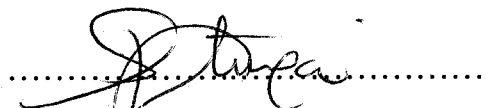
These two grounds of appeal do not disclose the Regulations breached contrary to Regulation 42 (2).

Taking into account all the foregoing matters, the appeal fails and the procurement process may proceed.

Dated at Nairobi on this 14th day of September, 2006



CHAIRMAN
PPCRAB



SECRETARY
PPCRAB