

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 43/2010 OF 21ST JULY, 2010

BETWEEN

BRITISH-AMERICAN INSURANCE COMPANY (KENYA) LTD...Applicant

AND

MINISTRY OF EDUCATIONProcuring Entity

REVIEW NO. 45/2010 OF 23RD JULY, 2010

BETWEEN

&

INTRA AFRICA ASSURANCE LIMITED.....Applicant

AND

MINISTRY OF EDUCATIONProcuring Entity

Review against the decision of the Tender Committee of the Ministry of Education of 9th August, 2010 in the matter of tender for Provision of Comprehensive Motor Vehicle Insurance Covers to Vehicles in Teachers Training Colleges, Secondary, Primary and Special Schools advertised in the Daily Newspapers of 22nd April, 2010.

BOARD MEMBERS PRESENT:

Mr. P. M. Gachoka - Chairman
Ms. Judith Guserwa - Member
Mrs. Loise Ruhiu - Member
Mr. J. W. Wambua - Member

IN ATTENDANCE

Mr. M. A. Obuya - Secretariat
Ms. K. A. Rota - Secretariat

PRESENT BY INVITATION:

Procuring Entity, The Ministry Of Education

Mr. Mr. P. N. Momanyi - Senior Principal Procurement Officer
Mr. Bernard Oloo - Procurement Officer
Mrs. Judith Okungu - Director, Legal Services

Applicant, British-American Insurance Company (Kenya) Limited

Mrs. Diana Sawe - Lawyer
Mr. Kennedy Aosa - General Manager
Ms. Marrellina Bosire - Procurement Officer

Applicant, Intra Africa Assurance Limited

Mr. Chacha Odera - Advocate
Ms. Daisy Ogembo - Advocate
Mr. Richard Kihara - Business Development Manager

Mr. Stephen Kimani - Procurement Officer

INTERESTED CANDIDATES

Ms. Jan Mohamed - Advocate, Monarch Insurance Company Limited

Ms. Ann Mureithi - Legal Officer, Monarch Insurance Company Ltd

Ms. Rosalind Mwaniki - Marketing Officer, Monarch Insurance Company Limited

Ms. Rosemary Koros - Marketing department, Monarch Insurance Company Limited

Mr. John Wananda - Advocate, First Assurance Company Limited

Mr. Nelson Chege - Marketing Manager, First Assurance Company Limited

Mr. Tom O. Onyambu - Counsel, Africa Merchant Assurance Insurance Company Limited

Mr. Patrick Kerongo - Counsel, Africa Merchant Assurance Insurance Company Limited

Mr. Kennedy Abinliya - General Manager, Africa Merchant Assurance Insurance Company Limited

Ms. Daphime Kemuseso - Legal Manager, Africa Merchant Assurance Insurance Company Limited

Mr. Paul Chege - Counsel, Kenyan Alliance Insurance

- Company Limited
- Mr. Simon Waweru - Underwriting, Kenyan Alliance Insurance Company Limited
- Ms. Fidelina Nzonzi - Marketing department, Kenyan Alliance Insurance Company Limited
- Mr. Joseph Ngige - Marketing Manager, Heritage Insurance Company Limited
- Mr. Moses Gakuru - Marketing department, Heritage Insurance Company Limited
- Ms. Grace Nzirwa - Marketing, Cooperative Insurance Company of Kenya Limited (CIC)
- Mr. Antony Njogu - Counsel, APA Insurance Limited
- Mr. Ken Miviti - Marketing Department, APA Insurance Limited
- Mr. Peter Kabae - Marketing Insurance Company of East Africa Limited (ICEA)
- Mr. Hezron Wambugu - Marketing Department, Gateway Insurance Company Limited

BOARD'S DECISION

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

BACKGROUND OF AWARD

The Procuring Entity advertised the tender for Provision of Comprehensive Motor Vehicle Insurance Covers to Vehicles in Teachers Training Colleges, Secondary, Primary and Special Schools in the Daily Newspaper dated 22nd April, 2010. The bids closed/opened on 21st May, 2010. The bidders who submitted bids as at opening and their prices were as follows:

BIDDER		PRICE (Kshs)
1. Insurance Company of East Africa Limited (ICEA)	-	174,799,130.00
2. British American Insurance Company (Kenya) Limited	-	167,115,070.00
3. The Monarch Insurance Company Limited	-	151,920,830.00
4. The Heritage Insurance Company Limited	-	113,517,707.00
5. UAP Insurance Company Limited	-	183,214,934.00
6. Pacis Insurance Co. Limited	-	166,198,312.00
7. Gateway Insurance Company Limited	-	140,230,672.00
8. Intra Africa Assurance Company Limited	-	176,829,566.59
9. First Assurance Company Limited	-	149,567,549.00
10. Kenindia Assurance Company Limited	-	176,384,502.00
11. Kenya Orient Insurance Limited	-	177,031,070.00
12. Africa Merchant Assurance Insurance Company Limited (AMACO)	-	149,567,509.00
13. The Kenyan Alliance Insurance Company Limited	-	149,788,671.00
14. APA Insurance Limited	-	180,573,655.00
15. Madison Insurance Company Kenya Limited	-	161,882,082.00

16. The Cooperative Insurance Company of
Kenya Limited (CIC)

- 175,379,815.00

EVALUATION

The tender was evaluated in three stages namely, Preliminary, Technical and Financial.

Preliminary Evaluation:

The bids were evaluated for responsiveness on the following parameters:

- i) Tender submitted in the required format
- ii) Tender security submitted
- iii) Required copies provided
- iv) Tender valid for the required period
- v) Sample policy cover submitted

The results were as follows:

S/NO	Bidder	Filled and Signed form of tender	Tender security submitted	Filled price schedule	Acceptance for Detailed Examination
1	Insurance Company of East Africa Limited (ICEA)	✓	✓	✓	Accepted
2	British American Insurance Company (Kenya) Limited	✓	✓	✓	Accepted
3	The Monarch Insurance Company Limited	✓	✓	✓	Accepted
4	The Heritage Insurance Company Limited	✓	X	✓	Not accepted
5	UAP Insurance Company Limited	✓	X	✓	Not accepted

6	Pacis Insurance Co. Limited	✓	X	✓	Not accepted
7	Gateway Insurance Company Limited	X	X	✓	Not accepted
8	Intra Africa Assurance Company Limited	✓	✓	✓	Accepted
9	First Assurance Company Limited	✓	✓	✓	Accepted
10	Kenindia Assurance Company Limited	✓	✓	✓	Accepted
11	Kenya Orient Insurance Limited	✓	✓	✓	Accepted
12	Africa Merchant Assurance Insurance Company Limited (Amaco)	✓	✓	✓	Accepted
13	The Kenyan Alliance Insurance Company Limited	✓	✓	✓	Accepted
14	APA Insurance Limited	✓	✓	✓	Accepted
15	Madison Insurance Company Kenya Limited	✓	✓	✓	Accepted
16	The Cooperative Insurance Company of Kenya Limited	✓	✓	✓	Accepted

Two bidders namely, the Heritage Insurance Company Limited and Pacis Insurance Co. Limited were disqualified for guaranteeing themselves by providing a bid bond from their own Insurance Companies. Two other bidders, M/s UAP Insurance Company Limited and Gateway Insurance Company Limited were disqualified for not providing a bid security of 2% of the quoted premium.

The remaining twelve bidders passed the Preliminary evaluation stage were evaluated for their technical responsiveness.

Technical Evaluation:

The Evaluation criteria were as follows:

	EVALUATION CRITERIA	SCORES
1	Full Business Names	4
2	Provision of Certificate of incorporation / Registration, Pin Number Certificate Valid Tax Compliance Certificate, VAT Certificate	4
3	Membership Certificate from the Association of Kenya Insurers (AKI)	2
4	Current license from the Insurance Regulatory Authority (IRA)	5
5	Current Local Authority license	2
6	Performance records since inception	15
7	Evidence of at least five major insurance transactions with any government departments / institutions	10
8	The Company Profile	10
9	Audited Accounts for the last 3 years	12
10	Sample of Comprehensive Policy cover	25
11	The Directors current Certificate of Good Conduct	3
12	Detailed indication of reinsurance arrangement	5
13	Any other information deemed relevant	3
	TOTAL	100

The scores of the technical evaluation of the technical evaluation for the bidders was as summarized:

	Bidders Name	% Scores
1.	M/s Africa Merchant Assurance Insurance Company Limited (Amaco)	99%
2.	M/s First Assurance Company Limited	94%
3.	M/s Madison Insurance Company Kenya Limited	92%
4.	M/s The Kenyan Alliance Insurance Company Limited	87%
5.	M/s Intra Africa Assurance Company Limited	87%
6.	M/s British American Insurance Company (Kenya) Limited	79%
7.	M/s The Monarch Insurance Company Limited	76%
8.	M/s The Cooperative Insurance Company of Kenya Limited	76%
9.	M/s Kenindia Assurance Company Limited	81%
10.	M/s Kenya Orient Insurance Limited	73%
11.	M/s APA Insurance Limited	75%
12.	M/s Insurance Company of East Africa Limited (ICEA)	68%

M/s Insurance Company of East Africa Limited (ICEA) was disqualified at this stage for not meeting the pass mark of 70%. Three other bidders namely, Kenindia Assurance Company Limited; Kenya Orient Insurance Limited; and APA Insurance Limited were disqualified for scoring less than 15 marks out of 25 marks in criterion No. 10 on Sample of Comprehensive Policy Cover, which was core to the tender.

The following 8 bidders were recommended to move to the next stage of commercial evaluation being technically responsive to the requirements of the tender document.

1. Africa Merchant Assurance Insurance Company Limited (AMACO)
2. First Assurance Company Limited

3. Madison Insurance Company Kenya Limited
4. The Kenyan Alliance Insurance Company Limited
5. Intra Africa Assurance Company Limited
6. British American Insurance Company (Kenya) Limited
7. The Monarch Insurance Company Limited
8. The Cooperative Insurance Company of Kenya Limited

FINANCIAL EVALUATION

Provinces	M/s Africa Merchant Assurance Company Limited (AMACO)	M/s First Assurance Company Limited	M/s Madison Insurance Company Kenya Limited	M/s The Kenyan Alliance Insurance Company Limited	M/s Intra Africa Assurance Company Limited	M/s British American Insurance Company (Kenya) Limited	M/s The Monarch Insurance Company Limited	M/s The Cooperative Insurance Company Kenya Limited
Rift Valley	36,063,487	36,063,492	37,899,080	36,076,816	41,972,864.64	39,746,324	36,133,027	41,728,257
Western	21,582,259	21,582,264	24,280,007	21,617,107	27,009,001.80	25,833,631	23,485,124	25,019,536
Nyanza	17,444,570	17,444,575	18,355,639	17,522,332	19,968,102.40	19,202,088	17,456,449	19,771,441
Nairobi	4,688,184	4,688,189	6,909,827	4,753,005	5,667,602.45	5,217,002	4,742,734	5,931,387
Eastern	37,796,096	37,796,101	39,865,598	37,801,385	43,850,555.27	41,605,605	37,823,283	44,045,558
N/ Eastern	406,069	406,074	485,505	406,074	539,165.37	446,676	406,074	582,041
Coast	4,751,788	4,751,793	5,420,865	4,765,314	5,774,369.00	5,475,581	4,977,806	5,806,956
Central	26,835,056	26,835,061	28,665,563	26,846,638	32,047,905.66	29,588,163	26,898,335	32,494,639
Actual Quoted Premium	149,567,509	149,567,549	161,882,084	149,788,671	176,829,566.59	167,115,070	151,922,832	175,379,815
Difference in premium	-----	-----	479	-----	-----	-----	-----	-----
Quoted premium	149,567,509	149,567,549	161,882,563	149,788,671	176,829,566.59	167,115,070	151,922,832	175,379,815
Ranking	Lowest	2 nd lowest	5 th lowest	3 rd lowest	8 th lowest	6 th lowest	4 th lowest	7 th lowest

RECOMMENDATIONS

The committee recommended that since all the 8 bidders were technically qualified as per the tender document requirements, the 4 lowest technically evaluated bidders be considered for the award.

The bidder with the lowest premium may be awarded the zone with the highest number of vehicles and the highest value of vehicles and vice versa.

THE TENDER COMMITTEE DECISION

The Ministerial Tender Committee in its meeting held on 17th June, 2010 deliberated on the recommendations of the Evaluation Committee. The Tender Committee deferred the matter and requested the Procurement Unit to write a letter to the Insurance Regulatory Authority (IRA) for professional guidance on rates filled by the Insurance Companies. The IRA replied to the letter on 29th June, 2010 after which the Ministerial Tender Committee held another meeting on 12th July, 2010 where the tender was adjudicated upon and awarded to the first 4 lowest evaluated bidders in order to spread the risks.

THE REVIEW

On 21st July, 2010 British-American Insurance Company (Kenya) Ltd lodged a Request for Review No. 43/2010 and on 23rd July, 2010 Intra Africa Assurance Limited lodged its Request for Review No. 45/2010, both against the decision of the Tender Committee of the Ministry of Education in the matter of tender for Provision of Comprehensive Motor Vehicle Insurance Covers to Vehicles in

Teachers Training Colleges, Secondary, Primary and Special Schools, advertised in the Daily Newspapers of 22nd April 2010.

At the hearing, British-American Insurance Company (Kenya) Limited was represented by Mrs. Diana Sawe, Lawyer, while Intra Africa Assurance Limited was represented by Mr. Chacha Odera, Advocate. The Procuring Entity was represented by Mr. P. N. Momanyi, Senior Principal Procurement Officer.

The Interested candidates present included Monarch Insurance Company Limited represented by Ms. Jan Mohamed, Advocate; First Assurance Company Ltd represented by Mr. John Wananda, Advocate; Africa Merchant Assurance Insurance Company Ltd represented by Mr. Tom O. Onyambu, Advocate; Kenyan Alliance Insurance Company Ltd represented by Mr. Paul Chege, Advocate; APA Insurance Limited represented by Mr. Anthony Njogu, Advocate; Heritage Insurance Company Ltd represented by Mr. Joseph Ngige, Marketing Manager; Co-operative Insurance Company of Kenya Ltd represented by Ms. Grace Nzirwa; Insurance Company of East Africa Limited represented by Mr. Paul Kabae; and Gateway Insurance Company Limited represented by Mr. Hezron Wambugu.

At the commencement of the hearing, it was noted that the two Requests for Review were on the same tender against the same Procuring Entity namely, the Ministry of Education. It was therefore agreed by consent of all the parties that the two Requests for Review be heard concurrently.

REQUEST FOR REVIEW NO. 43/ 2010

Grounds 1 and 3: Breach of Sections 2, 31, 66 of the Act and Regulations 46 and 47(1).

These grounds have been combined as they raise similar issues regarding the evaluation of the tenders.

The Applicant submitted that the Procuring Entity breached Sections 31(1)(a), 31(3) and 66(2) of the Public Procurement and Disposal Act, 2005 (herein after referred to as the "the Act") in that it used an evaluation and award criteria not set out in the tender documents.

The Applicant argued that any bidder who did not meet the Special Conditions of the tender should have been disqualified since these were compulsory requirements. It further submitted that Clause 4.1.2 of the Special Conditions was a compulsory requirement to the effect that an insurance company must have underwritten a gross premium of Kshs. 500,000,000 per annum. The Applicant further referred the Board to Clause 4.1.9 which required a tenderer to provide insurance premium rates that were in line with the Insurance Regulatory Authority guidelines. The Applicant argued that it was wrong for the Procuring Entity to award the tender to tenderers who had not met these two requirements with regard to the gross annual premium and the rates as set by the Insurance Regulatory Authority.

The Applicant further argued that the Procuring Entity breached Regulations 47(1), (2) and 48 (1) by failing to conduct a preliminary evaluation and thus

failing to reject all the tenders which did not meet all the mandatory requirements of the tender documents.

The Applicant averred that some of the Successful Bidders succeeded only because they had undercut on the rates given by the Insurance Regulatory Authority. It referred the Board to the bids by Kenyan Alliance Insurance Company and the First Assurance Company Ltd, claiming that these two successful bidders had contravened the guidelines set by the Insurance Regulator. It stated that for some items, they had quoted below the minimum allowed rate of 5% and that their premium quotes were below the minimum of Kshs 30,000 for some of the vehicles. The Applicant added that this was in breach of section 75(1) of the Insurance Act and other guidelines that had been issued subsequently by the Commissioner of Insurance, and that therefore the said successful candidates should have been disqualified at the preliminary evaluation stage.

The Applicant stated that the Procuring Entity breached Regulation 46 by failing to evaluate the tenders within thirty days after the closing/opening of the tenders.

Two Interested Candidates, APA Insurance Limited and Gateway Insurance Company Ltd concurred with the submissions of the Applicant.

In response, the Procuring Entity submitted that the evaluation criteria were clearly set out in the tender document and that they had been applied

uniformly and fairly to all the bidders. It explained that the Applicant had indeed been found technically qualified under the same criteria and it had only been disqualified due to its high quote of the premium at Kshs 167,115,070 compared to that of the four lowest bidders.

The Procuring Entity stated that the evaluation criteria were distinct from both the General and Special conditions. It argued that it was wrong for the Applicant to aver that the Special Conditions were the basis of the evaluation criteria. It further stated that the bidders were evaluated on a criteria comprising fifteen (15) items. It submitted that only criteria 3 and 10, on possession of current license from the Insurance Regulatory Authority and a bid bond from a reputable financial institution at 2% of the quoted premium respectively, were compulsory.

The Procuring Entity explained that a score had been allocated to each of the technical evaluation criteria and that the total pass mark was 70%. It further explained that as a result of this scoring, eight (8) bidders, including the Applicant, had been found to be technically responsive. The Procuring Entity argued that if the Applicant had not been satisfied with the set evaluation criteria, then it ought to have raised the issue prior to the tender closing date.

With regard to the issue of undercutting by the successful bidders, the Procuring Entity submitted that its fleet of vehicles included saloon cars, Lorries, pickups, trailers, buses and tractors. It further submitted that each of

these categories of vehicles attracted different rates of insurance premiums in line with guidelines from the Insurance Regulatory Authority.

On the issue of the evaluation period, the Procuring Entity stated that the Evaluation Committee had finished its work well within the 30 days and had subsequently presented its report to the Ministerial Tender Committee within the thirty (30) days deadline. It further stated that the award could not have been finalized as some clarifications had to be sought from the Insurance Regulatory Authority.

On their part, all the four successful bidders namely, Africa Merchant Assurance Insurance Company Limited (AMACO), First Assurance Company Limited, Kenyan Alliance Insurance Company Limited and Monarch Insurance Company Limited, concurred with the submissions of the Procuring Entity.

The four Successful Bidders led the Board through the various guidelines from the Regulator, highlighting the applicable Insurance Premium rates for the various categories of vehicles in a bid to prove that each category attracted different rates.

They submitted that the applicable minimum rate for buses was 5%, for private vehicles 4%, while tractors and trailers attracted a minimum rate of 3%. Africa Merchant Assurance Insurance Company Limited (AMACO) and First Assurance Company Limited each submitted that their gross premiums over the last year had been way above the limit of Kshs. 500,000,000 and that they

had therefore met the Special Condition with regard to the gross premium requirement.

Kenyan Alliance Insurance Company Ltd and Monarch Insurance Company Ltd each conceded that its gross premium was below the Kshs. 500,000,000. However each concurred with the Procuring Entity that the Special Conditions of tender were not set out as mandatory requirements in the Evaluation Criteria. Each of the two bidders pointed out that it had scored a 0% under this category of the evaluation but due to high scores in other categories, it had obtained a total score of over 70% and hence had qualified at the technical evaluation stage and subsequently proceeded to the commercial evaluation. They further claimed that only items three (3) and ten (10) of the evaluation criteria were mandatory and these were the only evaluation criteria under which bidders could be disqualified.

The Board has carefully considered the submissions of the parties and examined the documents presented before it.

The Board notes that the tender for provision of Comprehensive Motor Vehicle Insurance Covers to Vehicles in Teachers Training Colleges, Secondary, Primary and Special Schools was advertised by the Procuring Entity in the Daily Newspapers of 22nd April, 2010.

The Board also notes that the bids closed/opened on 21st May, 2010 when sixteen (16) bids were received. The Board further notes that the tender

evaluation was carried out in three stages namely, Preliminary, Technical and Commercial. Four bidders namely, Heritage Insurance Company Ltd; Pacis Insurance Company Limited; UAP Insurance Company Ltd; and Gateway Insurance Company Limited, were disqualified at the Preliminary Evaluation stage for failing to provide the necessary bid bond. The Board notes that Heritage Insurance Company Ltd and Pacis Insurance Company Ltd were disqualified for providing a bid bond from their own insurance companies respectively but not from a third Party guaranteed bid bonds, while UAP Insurance Company Ltd and Gateway Insurance Company Ltd, had each provided a bid bond that was less than 2% of the quoted premium. The bids submitted by the remaining twelve bidders were subjected to technical evaluation to determine their responsiveness to the tender requirements.

The Board notes that page 34 of the Tender Documents had clearly set out the Evaluation Criteria for tender No. MOE/001/2009 - 2010 which is the subject matter of this Request for Review. The Board further notes that the Evaluation criteria had fifteen (15) requirements out of which criteria Number three (3) and (10) were compulsory as set out below:

1. *“Full Business Names: including actual Physical Location, Postal address, fax and telephone numbers, e-mail address*
2. *Certificate of incorporation/Company Registration Certificate, PIN Number, valid tax compliance certificate and VAT Certificate*
3. ***Current license from the Insurance Regulatory Authority - Failure to produce leads to automatic disqualification.***
4. *Membership certificate from Association of Kenya Insurers*

5. *Current Local Authority trading License - Mandatory*
6. *Performance record since inception including at least five most reputable firms dealt with and the transactions value thereof for the last one year by the underwriter (attach evidence)*
7. *Evidence of at least five major insurance transactions with any Government department/institutions, and the values thereof to the last three years*
8. *The Company Profile including profile of permanent senior employees and total staff establishment of the firm and branch network.*
9. *Audited Accounts for the last three years with an annual gross premium in previous years of Kshs. 500,000, 000. 00 and paid up capital of at least 300,000,000.00*
10. ***Bid bond from reputable financial institution at 2% of the quoted premium. Failure to produce leads to automatic disqualification.***
11. *A sample of your comprehensive policy document, tailor -made as per the specification.*
12. *Premium payment proposal for one year comprehensive coverage*
13. *The Director's Certificate of good conduct*
14. *Must clearly indicate their detailed reinsurance arrangements*
15. *Any other information deemed relevant."*

The Board notes that the Evaluation Committee used criteria No. 10 as part of the Preliminary Evaluation which led to the disqualification of four bidders. Criteria No. 12 was in regard to the Commercial Evaluation. The Evaluation Committee had then developed a marking scheme based on the remaining 13 requirements of the evaluation criteria. The marking scheme gave details of the

buildup of marks for each criterion. More marks were allocated to the requirements which the committee considered as being core to the tender such as requirements for a current license from the Insurance Regulatory Authority which attracted 5 marks. In the other requirements, marks were awarded on basis of degree of compliance; the higher the compliance the higher the marks allocated. A good example of this is in the area of Turnover which was scored as follows:-

“Audited Accounts for the last 3 years (2006/2007/2008/2009). 1 mk for each year (Max 3 mks)

<i>Turnover</i>	<i>Scores</i>
<i>Less than 500 Million</i>	<i>0</i>
<i>500- 750 Million</i>	<i>2</i>
<i>751- 1billion</i>	<i>3</i>
<i>above 1billion</i>	<i>4 (Max 4 mks)</i>

Paid up capital;

300 million and below.....0 mks

300 million and above5 mks (Max 5 mks)”

The Board notes that the technical evaluation was subsequently carried out on the basis of this marking scheme.

Although the gross turnover requirement was a mandatory requirement under the Special Conditions of contract at Clause 4.1.2, it was not a mandatory requirement under the evaluation criteria. In this respect, the Board notes that the mandatory provisions of evaluation override the mandatory provisions in the Special conditions of contract unless otherwise stated.

The Board takes note of a letter from the Insurance Regulatory Authority dated 20th May, 2009 which in part read as follows:

“Premium Turnover

All insurance companies with a current license have met registration requirements under the Insurance Act and have the capacity to determine what level of insurance business they can underwrite, depending on their reinsurance arrangements. Hence the criterion of minimum premium turnover of Kshs. 500 million may have no merit. In any event, the gross premium underwritten by an insurer may have little to do with its stability”

In line with the view from the Insurance Regulatory Authority as detailed above, the Board finds that the treatment that was accorded the requirement on annual gross premium was reasonable.

The Board finds that although Monarch Insurance Company Ltd and Kenya Alliance Insurance Company Ltd were each given 0% for failing to meet the turnover of Kshs. 500,000,000 with regard to the previous year they nevertheless went ahead and scored high marks in the other requirements, thus being able to score above the minimum total score of 70% required for a bidder to be technically responsive.

The Board finds that the Evaluation Criteria was clearly set out in the tender document and that the Evaluation Committee rightly applied it in arriving at the technically responsive bidders in line with Section 66 (2) of the Act. The Board also finds no fault with the marking scheme applied by the Evaluation Committee.

The Board notes that eight bidders including the Applicant were found to be technically responsive and were recommended by the Evaluation Committee to move on to the commercial evaluation stage, as set out in the evaluation report as follows:

"The committee recommended that since all the 8 bidders were technically qualified as per the tender document requirements, the 4 lowest technically evaluated bidders be considered for award.

The bidder with the lowest premium may be awarded the zone with the highest number of vehicles and the highest value of vehicles and vice versa"

The Board also notes the Tender Committee's decision was as follows:

"The Evaluation committee carried out the evaluation and submitted a report and the procurement unit tabled an agenda on the same to the Ministerial Tender Committee meeting held on 17th June, 2010. After deliberations, the Tender Committee deferred the matter and requested

the procurement unit to write a letter to the Insurance Regulatory Authority (IRA) for professional guidance on rates filled by the insurance companies with the Commissioner of Insurance. The IRA replied to the letter on 29th June, 2010 after which the Ministerial Tender Committee held another meeting on 12th July, 2010 where the tender was adjudicated upon and awarded. They advised the Procuring Entity that all the 8 technically qualified bidders have quoted premiums which are within the appropriate range for institutional vehicles as per the recommended guidelines.

The Ministerial Tender Committee considered only the 8 technically qualified bidders when awarding the tender. These bidders included;

Bidder No	Bidders Name	% Scores	Score Ranking	Premium Quoted	Commercial Ranking
12	M/s Africa Merchant Assurance Insurance Company Limited (Amaco)	99%	1 st	149,567,509.00	1 st lowest
9	M/s First Assurance Company Limited	94%	2 nd	149,567,549.00	2 nd lowest
15	M/s Madison Insurance Company Kenya Limited	92%	3 rd	161,882,082.00	5 th lowest
13	M/s The Kenyan Alliance Insurance Company Limited	87%	4 th	149,788,671.00	3 rd lowest
8	M/s Intra Africa Assurance Company Limited	87%	4 th	176,829,566.59	8 th lowest
2	M/s British American Insurance Company (Kenya) Limited	79%	6 th	167,115,070.00	6 th lowest
3	M/s The Monarch Insurance Company Limited	76%	7 th	151,922,830.00	4 th lowest
16	M/s The Cooperative Insurance Company of Kenya Limited	76%	7 th	175,379,815.00	7 th lowest

From the above, the Procuring Entity awarded the tender to the first 4 lowest evaluated bidders in order to spread the risks. "

As can be noted from the evaluation report, the Applicant had qualified at the technical evaluation stage but its total premium quotation was high and it was ranked 6th overall at the commercial evaluation stage. The Board notes that this is the reason that the Applicant was not awarded the tender.

Accordingly this limb of the ground fails.

With regard to the issue of undercutting, the Board takes note of the various guidelines from the Insurance Regulator that was presented to it at the hearing. The Board notes that different premium rates were specified for the various categories of vehicles. The Board notes that the Procuring Entity had on 17th June, 2010 sought clarification from the Insurance Regulatory Authority with regard to the rates that the eight (8) bidders had used in their financial proposals. The Insurance Regulatory Authority replied on 28th June, 2010 as follows:

"We have analysed the premiums quoted by the 9 bidders using the motor underwriting guidelines which provide for institutional fleet at a rate of 6.5% and also factored in the NCD discount. We therefore advise that the insurers have quoted within the appropriate range for institutional vehicle as per the recommended guidelines."

The Board finds that the Procuring Entity considered the rates by the four lowest bidders after evaluation and obtaining the expert advice from the relevant regulatory body the Board notes that the insurance was for various categories of vehicles and this could not attract a uniform rate as argued by the Applicant. In this regard, the Board finds that the Evaluation was properly carried out and that this limb of the ground has no merit.

Accordingly, it fails.

The other issue that was raised by the Applicant that the Procuring Entity did not carry out Preliminary Evaluation in line with Regulation 47 (1). With regard to this issue, as the Board has already found, a Preliminary Evaluation was carried out at which stage four bidders were disqualified for failing to provide valid bid bonds.

Accordingly, this limb of this ground has no merit and therefore it fails.

On the issue of the evaluation period, the Board notes that the tenders were opened on 21st May 2010 and that the evaluation report was tabled to the Ministerial Tender Committee held on 17th June, 2010. The Board finds that this was within the thirty days provided for in the Act and the tender documents. The Board therefore finds that this limb of the ground has no merit and it also fails.

Ground 2: Breach of Section 67 of the Act.

The Applicant submitted that the Procuring Entity breached section 67(2) of the Act by failing to notify it of the outcome of the tender simultaneously with the successful bidders.

In response, the Procuring Entity submitted that both successful and unsuccessful bidders were notified simultaneously.

The Board has carefully considered the arguments of the parties and the documents presented before it.

The Board notes that the letters of notification to the successful bidders were all dated 16th July, 2010 while the letters to all the unsuccessful bidders were dated 12th July, 2010.

The Board finds that the unsuccessful bidders were notified earlier than the successful bidders. The purpose of simultaneous notification is to accord the unsuccessful bidders fourteen days appeal window to lodge a Request for Review, if need be. Having been notified earlier than the successful bidders, the unsuccessful bidders were given a higher advantage than the minimum time required under the Act. In any event, the Board notes that the Applicant did not suffer any prejudice since it was able to lodge this Request for Review well within the fourteen days appeal window.

Accordingly, this ground of appeal also fails.

Ground 4 - Breach of Section 45 of the Act

The Applicant submitted that the Procuring Entity breached Sections 45(1) (e) and 45(3) of the Act by failing to provide it with a summary of the tender evaluation.

The Procuring Entity responded that, the Applicant did not write and request for the evaluation summary report in line with the requirements of the Act.

The Board notes that Section 44(3) allows for the Procuring Entity to disclose to the Applicant seeking Review, a summary of the evaluation and comparison of tenders. The Board also notes that the Procuring Entity has submitted that it did not provide the summary to the Applicant because there was no formal request for the report. The Applicant was not able to prove that it had written to the Procuring Entity requesting for the summary evaluation report.

The Board finds that this ground had no merit and it therefore fails.

Ground 5 - Breach of Section 27 of the Act

The Applicant submitted that the Accounting Officer of the Procuring Entity breached Section 27(1) and (2) of the Act by failing to ensure that the provisions of the Act were followed.

The Procuring Entity responded that it complied with the Act and the Regulations. It argued that the Applicant did not indicate which provisions and obligations the Procuring Entity failed to comply with.

After review of the tender documents, the Board finds that this is a mere statement, as the Applicant did not quote the specific provisions of the law to support its allegation that the Accounting Officer failed to comply with Section 27 (1) and (2) of the Act.

In this regard, the Board need not make any more finding on it.

Ground 6 - Breach of Section 2 of the Act

The Applicant alleged that The Procuring Entity's decision of 12th July, 2010 was unfair, arbitrary, unjust and contrary to the spirit and purpose of Section 2 (a), (b), (c), (d), and (e) of the Public Procurement and Disposal Act.

In response, the Procuring Entity stated that the tender was an open tender and any eligible bidder could win. It concluded that the tender was transparent, fair and competitive.

The Board notes as earlier stated that the tender process was conducted within the broad provisions of Section 2 of the Act. Further, the Board notes that

Section 2 of the Act sets out the purpose of the Act and cannot be breached in isolation.

Ground 7 – Statement of Loss

The Applicant submitted that it had been awarded the subject tender for the years 2008-2009 and 2009-2010 the latter being extended for a further one (1) month upon expiry to facilitate completion of the tender process. It therefore argued that it would incur financial loss and reputational damage if this Request for Review was not allowed as prayed.

In response, the Procuring Entity submitted that the tender was conducted in a fair and competitive manner and it could not be responsible to any perceived loss by any of the bidders.

The Board has, on several occasions, held that costs incurred by tenderers at the time of tendering are commercial risks borne by people in business and therefore each bidder carries its own costs.

Taking into account all the foregoing matters, the Board finds that the evaluation process was carried out in line with the criteria set out in the tender document and in compliance with the Act and the Regulations.

Accordingly this Request for Review fails and is hereby dismissed.

REQUEST FOR REVIEW NO. 45/2010

Ground 1 - Breach of Sections 2, 3, 31, 32, 34, 53, 57, 64, 66 and 67 of the Act and Regulations 49 and 50.

The Applicant submitted that the Procuring Entity awarded the tender to some bidders that had not attained the required annual gross premium of Kshs. 500,000,000 in the previous year. It claimed that Monarch Insurance Company Limited and Kenya Alliance insurance Ltd, two of the successful bidders had attained an annual gross premium of Kshs. 163 million and Kshs. 294 million respectively in the year 2009.

The Applicant wondered why the criterion had been included in the tender document if it was not important as argued by the Procuring Entity. It argued that this must have been put to lock out some of the insurance companies whose gross premiums were below the set threshold. This it added, was clearly in breach of Section 2 of the Act.

The Applicant further submitted that the Procuring Entity awarded the tender to four companies namely Kenya Alliance insurance Company Limited, First Assurance Company Limited, Monarch Insurance Company Limited and AMACO, whose premium rates were below the rates prescribed by the Insurance Regulatory Authority, under Section 75 of the Insurance Act. It argued that this was in breach of both the Insurance Act and the Special Conditions prescribed in the tender documents.

The Applicant averred that the motor vehicle underwriting guidelines and the subsequent guidelines from the Commissioner of Insurance had clearly stated the rates that are applicable. It stated that the minimum prescribed rate by the Regulator was 5% of the insured value subject to a minimum of Kshs 30,000. It therefore argued that the Procuring Entity had breached the provisions of the Act and the tender documents by awarding the tender to the bidders who had not used the prescribed rates.

The Applicant further averred that the Procuring Entity failed to disqualify the bid by Pacis Insurance Company in spite of the fact that the said company did not provide a third party guaranteed bid bond.

It concluded that the Procuring Entity did not comply with the requirement of the tender and also breached Section 2 of the Act.

Two interested candidates, APA Insurance and Gateway Insurance concurred with the submissions of the Applicant.

In response, the Procuring Entity submitted that it had clearly set out the evaluation criteria in the tender document and that it was wrong for the Applicant to imply that the Special Conditions were part of the evaluation criteria.

It further submitted that the evaluation criteria were clearly specified in the tender document in line with section 52(3) (i) of the Act and that the same was applied uniformly and without discrimination to all the bidders.

The Procuring Entity denied that it had awarded the tender to some bidders who had not met the set criteria. It explained that attainment of a gross annual premium of Kshs 500,000,000 was not a mandatory requirement under the set criteria. It further explained that the annual gross premium was part of the criteria which was allocated some scores but was not used as a basis of eliminating a bidder. It argued that all the Insurance Companies with a current license must have met all registration requirements under the Insurance Act and had the capacity to determine what level of insurance business they could underwrite, depending on their re-insurance arrangements.

The Procuring Entity further submitted that the premium rates of the four Successful Bidders were in line with the rates prescribed by the Insurance Regulatory Authority, under Section 75 of the Insurance Act. It further submitted that on 17th June, 2010, it had sought for technical advice from Insurance Regulatory Authority with regard to the applicable rates. It explained that when the eight technically responsive bidders were assessed by the Insurance Regulatory Authority, the Authority advised that they had quoted within the appropriate range for institutional vehicles as per the recommended guidelines. The Procuring Entity urged the Board to note that the tender document had clearly specified the type of vehicles to be insured namely, saloon vehicles, pickups, minibuses, vans, Lorries, busses, and tractors.

It argued that the rates computed by the Applicant could not therefore be realistic, noting that the different vehicle categories could not attract the same rate.

The Procuring Entity stated that it had sought for clarification from the Public Procurement Oversight Authority (PPOA) with regard to the self guaranteed bid bond that had been submitted by PACIS Insurance Company. It added that when PPOA advised that only a third party guarantee was acceptable, it had proceeded to disqualify PACIS Insurance Company at the preliminary evaluation stage for its failure to submit a valid bid bond.

The Procuring Entity argued that it had acted in line with the requirements of Section 2 of the Act and the tender documents in the evaluation and award of the tender. It further argued that the tender process was transparent, fair and competitive, adding that the Applicant had passed the technical evaluation stage and that the only reason it had not been awarded the tender was that it had quoted a higher premium than that quoted by the four lowest evaluated bidders to whom the tender had been awarded.

On their part, all the four successful bidders namely, Africa Merchant Assurance Insurance Company Limited (AMACO), First Assurance Company Limited, Kenyan Alliance Insurance Company Limited and Monarch Insurance Company Limited, concurred with the submissions of the Procuring Entity.

The four Successful Bidders led the Board through the various guidelines from the Regulator, highlighting the applicable Insurance Premium rates for the various categories of vehicles in a bid to prove that each category attracted different rates.

They submitted that the applicable minimum rate for buses was 5%, for private vehicles 4%, while tractors and trailers attracted a minimum rate of 3%. Africa Merchant Assurance Insurance Company Limited (AMACO) and First Assurance Company Limited each submitted that their gross premiums over the last year had been way above the limit of Kshs. 500,000,000 and that they had therefore met the Special Condition with regard to the gross premium requirement.

Kenyan Alliance Insurance Company Ltd and Monarch Insurance Company Ltd each conceded that its gross premium was below the Kshs. 500,000,000. However each concurred with the Procuring Entity that the Special Conditions of tender were not set out as mandatory requirements in the Evaluation Criteria. Each of the two bidders pointed out that it had scored a 0% under this category of the evaluation but due to high scores in other categories, it had obtained a total score of over 70% and hence had qualified at the technical evaluation stage and subsequently proceeded to the commercial evaluation. They further claimed that only items three (3) and ten (10) of the evaluation criteria were mandatory and these were the only evaluation criteria under which bidders could be disqualified.

The Board has carefully considered the submissions of the parties and examined the documents presented before it.

The Board notes that the tender for provision of Comprehensive Motor Vehicle Insurance Covers to Vehicles in Teachers Training Colleges, Secondary, Primary and Special Schools was advertised by the Procuring Entity in the Daily Newspapers of 22nd April, 2010.

The Board also notes that the bids closed/opened on 21st May, 2010 when sixteen (16) bids were received. The Board further notes that the tender evaluation was carried out in three stages namely, Preliminary, Technical and Commercial. Four bidders namely, Heritage Insurance Company Ltd; Pacis Insurance Company Limited; UAP Insurance Company Ltd; and Gateway Insurance Company Limited, were disqualified at the Preliminary Evaluation stage for failing to provide the necessary bid bond. The Board notes that Heritage Insurance Company Ltd and Pacis Insurance Company Ltd were disqualified for providing a bid bond from their own insurance companies respectively but not from a third Party guaranteed bid bonds, while UAP Insurance Company Ltd and Gateway Insurance Company Ltd, had each provided a bid bond that was less than 2% of the quoted premium. The bids submitted by the remaining twelve bidders were subjected to technical evaluation to determine their responsiveness to the tender requirements.

The Board notes that page 34 of the Tender Documents had clearly set out the Evaluation Criteria for tender No. MOE/001/2009 - 2010 which is the subject

matter of this Request for Review. The Board further notes that the Evaluation criteria had fifteen (15) requirements out of which criteria Number three (3) and (10) were compulsory as set out below:

1. *“Full Business Names: including actual Physical Location, Postal address, fax and telephone numbers, e-mail address*
2. *Certificate of incorporation/Company Registration Certificate, PIN Number, valid tax compliance certificate and VAT Certificate*
3. ***Current license from the Insurance Regulatory Authority - Failure to produce leads to automatic disqualification.***
4. *Membership certificate from Association of Kenya Insurers*
5. *Current Local Authority trading License - Mandatory*
6. *Performance record since inception including at least five most reputable firms dealt with and the transactions value thereof for the last one year by the underwriter (attach evidence)*
7. *Evidence of at least five major insurance transactions with any Government department/institutions, and the values thereof to the last three years*
8. *The Company Profile including profile of permanent senior employees and total staff establishment of the firm and branch network.*
9. *Audited Accounts for the last three years with an annual gross premium in previous years of Kshs. 500,000, 000. 00 and paid up capital of at least 300,000,000.00*
10. ***Bid bond from reputable financial institution at 2% of the quoted premium. Failure to produce leads to automatic disqualification.***
11. *A sample of your comprehensive policy document, tailor -made as per the specification.*
12. *Premium payment proposal for one year comprehensive coverage*

13. *The Director's Certificate of good conduct*
14. *Must clearly indicate their detailed reinsurance arrangements*
15. *Any other information deemed relevant."*

The Board notes that the Evaluation Committee used criteria No. 10 as part of the Preliminary Evaluation which led to the disqualification of four bidders. Criteria No. 12 was in regard to the Commercial Evaluation. The Evaluation Committee had then developed a marking scheme based on the remaining 13 requirements of the evaluation criteria. The marking scheme gave details of the buildup of marks for each criterion. More marks were allocated to the requirements which the committee considered as being core to the tender such as requirements for a current license from the Insurance Regulatory Authority which attracted 5 marks. In the other requirements, marks were awarded on basis of degree of compliance; the higher the compliance the higher the marks allocated. A good example of this is in the area of Turnover which was scored as follows:-

"Audited Accounts for the last 3 years (2006/2007/2008/2009). 1 mk for each year (Max 3 mks)

<u>Turnover</u>	<u>Scores</u>
<i>Less than 500 Million</i>	0
<i>500- 750 Million</i>	2
<i>751- 1billion</i>	3
<i>above 1billion</i>	4 (Max 4 mks)

Paid up capital;

300 million and below.....0 mks

300 million and above5 mks (Max 5 mks)"

The Board notes that the technical evaluation was subsequently carried out on the basis of this marking scheme.

Although the gross turnover requirement was a mandatory requirement under the Special Conditions of contract at Clause 4.1.2, it was not a mandatory requirement under the evaluation criteria. In this respect, the Board notes that the mandatory provisions of evaluation override the mandatory provisions in the Special conditions of contract unless otherwise stated.

The Board takes note of a letter from the Insurance Regulatory Authority dated 20th May, 2009 which in part read as follows:

“Premium Turnover

All insurance companies with a current license have met registration requirements under the Insurance Act and have the capacity to determine what level of insurance business they can underwrite, depending on their reinsurance arrangements. Hence the criterion of minimum premium turnover of Kshs. 500 million may have no merit. In any event, the gross premium underwritten by an insurer may have little to do with its stability”

In line with the view from the Insurance Regulatory Authority as detailed above, the Board finds that the treatment that was accorded the requirement on annual gross premium was reasonable.

The Board finds that although Monarch Insurance Company Ltd and Kenya Alliance Insurance Company Ltd were each given 0% for failing to meet the turnover of Kshs. 500,000,000 with regard to the previous year they nevertheless went ahead and scored high marks in the other requirements, thus being able to score above the minimum total score of 70% required for a bidder to be technically responsive.

The Board finds that the Evaluation Criteria was clearly set out in the tender document and that the Evaluation Committee rightly applied it in arriving at the technically responsive bidders in line with Section 66 (2) of the Act. The Board also finds no fault with the marking scheme applied by the Evaluation Committee.

The Board notes that eight bidders including the Applicant were found to be technically responsive and were recommended by the Evaluation Committee to move on to the commercial evaluation stage, as set out in the evaluation report as follows:

"The committee recommended that since all the 8 bidders were technically qualified as per the tender document requirements, the 4 lowest technically evaluated bidders be considered for award.

The bidder with the lowest premium may be awarded the zone with the highest number of vehicles and the highest value of vehicles and vice versa"

The Board also notes the Tender Committee's decision was as follows:

"The Evaluation committee carried out the evaluation and submitted a report and the procurement unit tabled an agenda on the same to the Ministerial Tender Committee meeting held on 17th June, 2010. After deliberations, the Tender Committee deferred the matter and requested the procurement unit to write a letter to the Insurance Regulatory Authority (IRA) for professional guidance on rates filled by the insurance companies with the Commissioner of Insurance. The IRA replied to the letter on 29th June, 2010 after which the Ministerial Tender Committee held another meeting on 12th July, 2010 where the tender was adjudicated upon and awarded. They advised the Procuring Entity that all the 8 technically qualified bidders have quoted premiums which are within the appropriate range for institutional vehicles as per the recommended guidelines.

The Ministerial Tender Committee considered only the 8 technically qualified bidders when awarding the tender. These bidders included;

Bidder No	Bidders Name	% Scores	Score Ranking	Premium Quoted	Commercial Ranking
12	M/s Africa Merchant Assurance Insurance Company Limited (Amaco)	99%	1 st	149,567,509.00	1 st lowest
9	M/s First Assurance Company Limited	94%	2 nd	149,567,549.00	2 nd lowest

15	M/s Madison Insurance Company Kenya Limited	92%	3 rd	161,882,082.00	5 th lowest
13	M/s The Kenyan Alliance Insurance Company Limited	87%	4 th	149,788,671.00	3 rd lowest
8	M/s Intra Africa Assurance Company Limited	87%	4 th	176,829,566.59	8 th lowest
2	M/s British American Insurance Company (Kenya) Limited	79%	6 th	167,115,070.00	6 th lowest
3	M/s The Monarch Insurance Company Limited	76%	7 th	151,922,830.00	4 th lowest
16	M/s The Cooperative Insurance Company of Kenya Limited	76%	7 th	175,379,815.00	7 th lowest

From the above, the Procuring Entity awarded the tender to the first 4 lowest evaluated bidders in order to spread the risks. "

As can be noted from the evaluation report, the Applicant had qualified at the technical evaluation stage but its total premium quotation was high and it was ranked 6th overall at the commercial evaluation stage. The Board notes that this is the reason that the Applicant was not awarded the tender.

Accordingly this limb of the ground fails.

With regard to the issue of undercutting, the Board takes note of the various guidelines from the Insurance Regulator that was presented to it at the hearing. The Board notes that different premium rates were specified for the various categories of vehicles. The Board notes that the Procuring Entity had on 17th June, 2010 sought clarification from the Insurance Regulatory Authority with regard to the rates that the eight (8) bidders had used in their financial

proposals. The Insurance Regulatory Authority replied on 28th June, 2010 as follows:

“We have analysed the premiums quoted by the 9 bidders using the motor underwriting guidelines which provide for institutional fleet at a rate of 6.5% and also factored in the NCD discount. We therefore advise that the insurers have quoted within the appropriate range for institutional vehicle as per the recommended guidelines.”

The Board finds that the Procuring Entity considered the rates by the four lowest bidders after evaluation and obtaining the expert advice from the relevant regulatory body the Board notes that the insurance was for various categories of vehicles and this could not attract a uniform rate as argued by the Applicant. In this regard, the Board finds that the Evaluation was properly carried out and that this limb of the ground has no merit.

Accordingly, it fails.

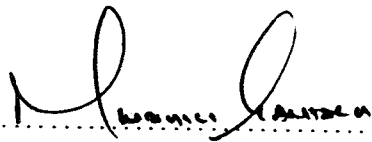
With regard to the allegation that Pacis Insurance Company was not disqualified, the Board finds no merit in the Applicant's claim. As the Board has already noted, M/s Pacis Insurance was disqualified at the Preliminary Evaluation stage for providing a self guaranteed bid bond.

Taking into account all the foregoing matters, the Board finds that the evaluation process was carried out in line with the criteria set out in the tender and in compliance with the Act and the Regulations.

Accordingly, the Request for Review fails and is hereby dismissed.

In view of the foregoing, the Board finds that the two Request for Review have failed. Accordingly, pursuant to Section 98 of the Act, the Board hereby orders the procurement process to proceed.

Dated at Nairobi on this 18th day of August, 2010



Chairman, PPARB



Secretary, PPARB

