

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 8/2015 OF 23RD JANUARY, 2015

BETWEEN

AON KENYA INSURANCE BROKERS LIMITED (APPLICANT)

AND

TEACHERS SERVICE COMMISSION (PROCURING ENTITY)

Review against the decision of the Teachers Service Commission in the matter of Tender No. TSC/T/45/2014-2015 for Provision of Medical Healthcare Cover and Group Life Insurance (Including Last Expense) Cover for All Teachers in the Employment of TSC and Their Dependants.

BOARD MEMBERS PRESENT

1. Paul Gicheru - Chairman
2. Josephine W. Mong'are - Member
3. Paul Ngotho - Member
4. Rosemary Gituma - Member
5. Peter Ondieki - Member

IN ATTENDANCE

1. Philip Okumu - Secretariat
 2. Shelmith Miano - Secretariat
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PRESENT BY INVITATION

Applicant - AON Kenya Insurance Brokers Ltd

1. Muthomi Thiankolu - Advocate
2. Maruti Khamala - Advocate
3. Caroline Muchiri - Advocate
4. Joan J. Korir - Advocate
5. Irene Chesire - Insurance Broker
6. Edwin Kegode - Insurance Broker

Procuring Entity - Teachers Service Commission

1. Allan M. Sitima - Advocate
2. Stella Ruto - Advocate
3. Cavin Anyuor - Advocate
4. Simwa F. Atema - Legal Clerk
5. Calleb O. Ogot - Procurement Officer
6. Kenneth Marangu - PA/CC

Interested Parties

1. Steve Kimathi - Advocate, Smart Applications
2. Rachael Nderu - Lawyer, Smart Applications
3. Esther Macharia - Technical Analyst, Smart Applications

4. Ali Abbas - Staff, Pioneer Insurance
5. Nelly Muthiani - Insurer, Jubilee Insurance

BACKGROUND OF AWARD

On 2nd July, 2014 the Procuring Entity (the Teachers Service Commission) placed an advert in the print media (the Daily Nation) inviting eligible firms to express interest for provision of an innovative and cost effective financial model and solution for healthcare for all teachers in the employment of the Commission and their dependants countrywide.

The closing date for the Expression of Interest (EOI) was on 9th July, 2014. Nine (9) firms submitted bids as follows:

- i) Alexander Forbes;
- ii) Smart Application International;
- iii) CIC Insurance;
- iv) AAR;
- v) AON Kenya Insurance Brokers;
- vi) Jubilee Insurance;
- vii) UAP Life;
- viii) Pioneer Insurance; and
- ix) UAP Insurance.

The Tender Processing Committee treated the bids from UAP Life and UAP Insurance as one company since their statutory documentation were similar.

The Evaluation Committee recommended three firms, viz, UAP, CIC Insurance and AON Kenya Ltd, to participate in the bidding through the Request for Proposal, having met the technical criteria. However, the Tender Committee, in their meeting of 28th July, 2014 considered the Evaluation Report and recommended that eight (8) firms be invited for presentation on their Expressions of Interest. The eight firms made their presentations between 5th and 11th August, 2014, after which a report was compiled and later discussed by the Tender Committee on 26th August, 2014 whereupon it was resolved that all the eight bidders be invited to participate in the tender process and be given the tender documents.

The tender submission closed on 6th October, 2014 with seven firms submitting their bids, as follows: Pioneer Assurance, UAP Insurance, AON Kenya Insurance Brokers, Smart Applications, CIC General Insurance, AAR Insurance Kenya, and Jubilee Insurance. The evaluation of the seven bids was conducted between 8th and 21st October, 2014.

Tender documents received by the tender processing committee from various firms were as follows:-

List of bidding firms

S/NO	FIRM'S NAME	ORIGINAL & A COPY	BID BOND FROM;	AMOUNT KSH.
1.	Pioneer Assurance	2 Copies	Chase Bank	24,941,358.20
2.	UAP Insurance	2 Copies	Bank of Africa	360,585,517.00
3.	AON Kenya Insurance Brokers	2 Copies	CBA	120,000,000.00
4.	Smart Applications	2 Copies	UAP Insurance	16,245,148.13
5.	CIC General Insurance	2 Copies	Co-op Bank	529,742,557.00
6.	AAR Insurance Kenya	2 Copies	Madison Insurance	150,000,000.00
7.	Jubilee Insurance	2 Copies	DTB	383,484,979.00

PRELIMINARY EVALUATION

This stage of evaluation assessed compliance with the Mandatory requirements which included:-

- i) Registration status of the firm
- ii) Valid Tax Compliance
- iii) License by the Regulator (IRA)
- iv) Bid Security
- v) Valid Business permit/Trade License

The table below shows a summary of the Preliminary Evaluation results for the seven (7) bidders:-

Table: Preliminary Evaluation Results

CRITERIA	SUB-CRITERIA	BIDDERS						
		1	2	3	4	5	6	7
STATUTORY REQUIREMENTS (MANDATORY)	a) Copy of registration/ incorporation Certificate (2009 or earlier)	√	√	√	√	√	√	√
	b) Current tax compliance certificate.	√	√	√	√	√	x	√
	c) Evidence of Physical Address/Administration Office	√	√	√	√	√	√	√
	d) Copy of IRA registration certificate.	√	√	√	x	√	√	√
	e) Correct bid security and validity period (150 days)	√	√	√	√	√	√	√
	f) Valid Business Permit/ Current Trading License)	√	√	√	√	√	√	√
RESPONSIVENESS		√	√	√	x	√	x	√

Key

√ - Responsive

X - Non Responsive

TECHNICAL EVALUATION

Technical evaluation of the qualified bidders considered various aspects on the suitability of the firms. These included:-

- Firms' Experience
- Management structure
- Qualification of the key personnel
- Adequacy of ICT infrastructure and support systems.
- Geographical distribution and support systems.

The committee also considered the methodology and work plan presented by each firm which entailed:-

- Scope of Benefits
- Claims administration
- Responsiveness on customer requirements among other aspects.

The four (4) bidders were categorized into 2 namely;-

- i) Insurance Brokers/MIPs and
- ii) Insurance Underwriters/Life Assurance Companies.

This was as per the evaluation criteria outlined in the tender documents

TECHNICAL EVALUATION ON OPTION 1- HYBRID MODEL

The table below is a summary of the Technical Evaluation results for Insurance Brokers and Medical Insurance Providers under the Hybrid model - Option 1

Table: Technical Evaluation Results for Broker under Option 1- (Administrator)

S/ N O	CRITERIA	SUB-CRITERIA	Max Score	Bidde r 03
A	Firms Financial Capability	i. Audited Accounts (2011, 2012,2013) 3mks	10	3
		ii. Gross Profits Margin (positive Trends) 2mks		2
		iii. Current Ratio (2:1) 3mks		2
		iv. Premium Turnover of Ksh.1Billion (2012&2013) 2mks		2
B	Firms Experience/ References	i. Evidence of ability and experience to handle medical claims of Ksh.1Billion 1mk	12	1
		ii. List of at least five (5) reputable clients for both medical and group life insurance policies for the last three (3) years. 5mks		5

S/ N O	CRITERIA	SUB-CRITERIA	Max Score	Bidde r 03
		iii. Reference letters from at least ten (10) large medical service providers showing willingness to offer outpatient services under the capitation model. 5mk		5
		iv. Evidence of at least 100,000 lives managed under medical scheme. 1mk		1
C	Firm's/ Management Profile	i. Firms profile 1mk	2	1
		ii. Organizational Structure 1mk		1
D	Qualifications of Professional personnel	Copies of academic Certificates submitted		
		i. Executive Managers 1mk	3	1
		ii. Business Development Managers 1mk		1
		iii. Underwriters/Actuaries 1mk		1
E	Adequacy of ICT Infrastructure & Support Systems	i. Letter/installation certificate from Biometric Solution provider 2mks	6	2
		ii. Narrative on capability and functionality of the Biometric solution 2mks		2
		iii. Evidence of other ICT integrated Medical information and support systems (software) 2mks		2
F	Geographical Distribution of Firms Services	Network and spread of service providers		
		i. Health care providers/ facilities country wide. 6mks	10	5
		ii. Regional Presence (East Africa) 2mks		2
		iii. Established panels for overseas referrals 2mks		2
G	Methodology and Work Plan	1. Implementation Plan and Timelines. 2mks	25	2
		2. Benefits structure for option one (1)		
		i. Scope of healthcare benefits per family. 8mks		7
		ii. Exclusions 2mks		1
		3. Group Life Cover 2mks		2
		4. Last expense cover 2mks		2

S/ N O	CRITERIA	SUB-CRITERIA	Max Score	Bidde r 03
		5. Any additional benefits offered 2mks		2
		6. Linkages with stakeholders		-
		i. Scheme Governance structure 1mk		1
		ii. Claims administration 1mk		1
		iii. M&E and reporting 1mk		1
		iv. Key Performance indicators 1mk		1
		7. Responsiveness on customer Service		-
		i. Existence of call Centres for enquiries, emergencies and other support services 1mk		1
		ii. Existence of staff customer and other support services. 1mk		1
		iii. Other customer service facilities. 1mk		0
H	Guarantees	i. Professional indemnity (ksh.100million) 1mk	2	1
		ii. Bank Guarantee (Ksh.3million) 1mk		1
TOTAL SCORE			70	65

Pass mark was set at 40 out of 70.

Observations on the bidder No. 03

- i) The bidder demonstrated willingness to work with five underwriters and provided documentation on the same. Four of these underwriters were subjected to technical and financial evaluation.

- ii) The bidder proposed provision of smart card @ Kshs. 200 and Kshs. 40 transaction cost per month.
- iii) The bidder provided the smart card to principal member and the spouse.
- iv) The bidder has provided negotiated tariff with the medical service providers for the various fees costs and packages.
- v) The bidder suggested alternative biometric solutions for consideration.

Therefore bidder 03 - AON Kenya qualified for financial evaluation under the category of insurance brokers/medical insurance provider.

The table below shows a summary of the Technical Evaluation results for *Insurance Underwriters- option 1(Administrator)*.

Table: Technical Evaluation Results for Insurance Underwriters under Option 1

S/ NO	CRITERIA	SUB-CRITERIA	BIDDERS			
			Max Score	2	5	7
A	Firms Financial Capability	i) Audited Accounts (2011, 2012,2013) 3 mks	10	3	3	3
		ii) Gross Profits Margin (positive Trends) 2mks		2	2	2
		iii) Current Ratio (2:1) 2mks		2	1	2
		iv) Premium Turnover of Ksh.1Billion (2012&2013) 2mks		1	1	2
		v) Group life minimum Ksh.500million life insurance premiums for the last two (2) years. 1mk		0	1	1
1B	Firms Experience/ References	i) Evidence of ability and experience to handle medical claims of Ksh.1Billion 1mk	12	1	1	1
		ii) List of at least five (5) reputable clients for both medical and group life insurance policies for the		5	5	5

S/ NO	CRITERIA	SUB-CRITERIA	BIDDERS				
			Max Score	2	5	7	
		last three (3) years. 5mks					
		iii) Reference letters from at least ten (10) large medical service providers showing willingness to offer outpatient services under the capitation model. 5mk		1	0	1	
		iv) Evidence of at least 100,000 lives managed under medical scheme. 1mk		0	1	1	
C	Firm's/ Management Profile	i) Firms profile 1mk	2	1	1	1	
		ii) Organizational Structure 1mk		1	1	1	
D	Qualifications of Professional personnel	Copies of academic Certificates submitted					
		i) Executive Managers 1mk	3	1	1	1	
		ii) Business Development Managers 1mk		1	1	1	
		iii) Underwriters/Actuaries 1mk		1	0	1	
E	Adequacy of ICT Infrastructure & Support Systems	i) Letter/installation certificate from Biometric Solution provider 2mks	6	2	2	2	
		ii) Narrative on capability and functionality of the Biometric solution 2mks		2	0	2	
		iii) Evidence of other ICT integrated Medical information and support systems (software) 2mks		0	1	2	
F	Geographical Distribution of Firms Services	Network and spread of service providers					
		i) Health care providers/ facilities country wide. 6mks	10	5	5	6	
		ii) Regional Presence (East Africa) 2mks		2	2	2	
		iii) Established panels for overseas referrals 2mks		1	1	2	
G	Methodology and Work Plan	1. Implementation Plan and Timelines. 2mks	25	1	1	1	
		2. Benefits structure for option one (1)					
		i) Scope of healthcare benefits per family. 8mks		6	5	5	
		ii) Exclusions 2mks		0	1	0	
		3. Group Life Cover 2mks		2	1	2	
		4. Last Expense Cover 2mks		2	2	2	
		5. Any additional benefits offered 2mks		1	0	1	
		6. Linkages with stakeholders					
		i) Scheme Governance structure 1mk	0	0	0		

S/ NO	CRITERIA	SUB-CRITERIA	BIDDERS			
			Max Score	2	5	7
		ii) Claims administration 1mk		0	1	1
		iii) M&E and reporting 1mk		0	1	1
		iv) Key Performance indicators 1mk		0	0	1
		7. Responsiveness on customer Service				
		i) Existence of call Centres for enquiries, emergencies and other support services 1mk		0	1	1
		ii) Existence of staff customer and other support services. 1mk		0	1	1
		iii) Other customer service facilities. 1mk		0	0	0
H	Re-insurance treaties	Letters/contract from a re-insurance Company 2mks	2	2	2	2
TOTAL MARKS			70	46	46	57

Pass mark was set at 40 out of 70.

NB. Bidder No. 1 did not present bids for Option 1.

Observations on the 3 bidders evaluated

A. Bidder 02: UAP

- i) The bidder stated that AON will be the Administrator of the scheme.
- ii) The bidder declared exclusions in critical areas such as Treatment of cancer, maternity services (cover delivery costs only and provision of photo-chromatic/antiglare lenses under the optical cover.

iii)The bidder provided alternative biometric solutions.

B. Bidder 05 - CIC General Insurance

- i) The firm presented a separate bid under the Group Life and Last Expense Cover.
- ii) Declared exclusions in critical areas on the outpatient benefits structure under the capitation model.

C. Bidder 07: Jubilee Insurance

- i)Declared exclusions in critical areas on the outpatient benefits structure under the capitation model.

Therefore bidders 02 - UAP Insurance, 05 - CIC General Insurance and 07 - Jubilee Insurance qualified for financial evaluation.

Financial Evaluation on option 1 - The HYBRID MODEL

Table: Summary of price/cost comparison for Insurance Brokers and Underwriters (Option 1)

NO.	ITEM	BIDDER 02	BIDDER 03	BIDDER 05	BIDDER 07
		UAP	AON	CIC	JUBILEE
		Cost - Ksh.	Cost - Ksh.	Cost - Ksh.	Cost - Ksh.
1	Outpatient cover (Under Capitation)	3,000,000,000	2,925,000,000	4,598,372,272	4,561,233,750
2	Other Benefits (Self-funded- Fee for service) - Maternity Cover - Dental Cover - Optical Cover Sub -total	160,000,000	225,000,000	- 15,576,100 62,296,359 77,872,459	1,042,731,000
3	a) Inpatient cover b) Excess of loss for inpatient and maternity covers	1,000,000,000 355,760,478	1,100,000,000	9,529,260,081	6,562,228,073 277,942,500
4	Group Life Last Expense Cover	730,482,500	500,000,708	- 289,356,270	884,081,269
5	Technology a) Biometric Member Identification solution b) Mobile USSD solution	100,000,000 * 203,000,000	342,791,400 200,000,508	829,612,800 -	- -
7	Administration Fee	265,000,000	300,440,000	-	2,134,294,136
8	Training Expenses	-	-	30,000,000	
Total Price		5,814,242,978	5,593,232,616	15,354,473,882	15,462,510,728

* Bidder No. 2 – UAP insurance provided an alternative biometric solution from Siltech Systems

Table: Financial Evaluation for Insurance Brokers and Underwriters (Option 1)

BIDDER NO.	BIDDER NAME	BID PRICE	TECHNICAL SCORE	FINANCIAL SCORE	TOTAL SCORE	RANK
02	UAP Insurance	5,814,242,978	46	28	74	2
03	AON	5,593,232,616	65	30	95	1
05	CIC General Insurance	15,354,473,882	46	10	56	4
07	Jubilee	15,462,510,728	57	10	67	3

Financial Evaluation Formula; Financial Score = L.B Price x 30

Bid price

Where L.B. = Lowest Bid price Quoted

TECHNICAL AND FINANCIAL EVALUATION ON THE FULLY INSURED COVER - OPTION 2

Technical Evaluation for Option 2

In undertaking Technical evaluation for this option the evaluation committee used the technical scores for Option 1 for the same bidders

Table: Price/cost comparison for various components under Option 2

B/ NO.	BIDDER NAME	GROUP LIFE & LAST EXPENSE Ksh.	IN PATIENT Ksh.	MATERNITY/ DENTAL/ OPTICAL Ksh.	OUTPATIENT Ksh.	FULLY INSURED PREMIUM COST Ksh.
02	UAP Insurance	730,482,500	8,909,216,194	1,513,623,495	7,462,399,897	18,615,722,085.58
03	AON	884,081,269	8,925,172,362	1,418,200,312	6,203,654,758	17,431,108,701
07	Jubilee Insurance	884,081,269	8,925,172,362	1,418,200,312	6,203,654,758	17,431,108,700.37

Table: Financial Evaluation for Option 2

BIDDER NO.	BIDDER NAME	TECHNICAL SCORE	FINANCIAL SCORE	TOTAL SCORE	RANK
02	UAP	46	28.09	74.09	3
03	AON KENYA	65	30	95	1
07	JUBILEE	57	30	87	2

Financial Evaluation Formula; Financial Score = L.B Price x 30/ Bid price

Where L.B. = Lowest Bid price Quoted

OBSERVATIONS (OPTION 2)

1. Bidder no. 05 namely CIC General did not present a quotation for option 2.
2. All the three (3) Bidders;- No. 02 – UAP Insurance, 03-AON and 07- Jubilee Insurance presented a quotation that combined Maternity, Dental and Optical components.

General Observations

A number of the major medical service providers were not willing to offer outpatient services under the capitation model. However, Bidder No. 3 provided a list of four (4) hospitals and a consortium of hospitals called Afrocentric who expressed willingness to offer services under the capitation model.

RECOMMENDATIONS

From the analysis above, the committee recommends as follows:-

1. Bidder 03, namely AON Kenya, be considered for award on the provision of Healthcare administration under the Hybrid model (option 1) having been evaluated as the bidder with the highest combined technical and financial score, subject to the following:
 - i) The bidder be invited for clarification on the actual cost of managing maternity, dental and optical components.
 - ii) Negotiations and concurrence of the TSC on the scope of exclusions.
 - iii) For the Group Life and Last Expense Cover, the bidder awarded should work with the most responsive underwriter as provided in Appendix 1(a) and 1(b).
2. Bidder 03 namely AON Kenya be considered for award, being the bidder with the highest combined technical and financial score under this option, in the event that the Commission chooses **Option 2**.

THE TENDER COMMITTEE'S DECISION

The Tender Committee on 5th November, 2014 awarded AON Kenya Ltd the contract as an administrator of the scheme. The firm was notified on 17th November, 2014 and their acknowledgement was received by the Procuring Entity on 18th November, 2014. The notification of award was subject to negotiations, which commenced on 24th November, 2014 but

was not concluded and there has been no formal communication to the firm in that regard.

The Procuring Entity carried out a review of the entire procurement process thus far which resulted in the termination of the award of the contract. This was communicated to the bidder in a letter dated 16th January, 2015.

REQUEST FOR REVIEW

This Request for Review was lodged by M/s AON Kenya Insurance Brokers Limited, whose address for the purposes of this review is c/o Simba & Simba Advocates of P.O. Box 10312 - 00100 Nairobi, on 23rd January, 2015, in the matter of Tender No. TSC/T/45/2014-2015 for the Provision of Medical Healthcare Cover and Group Life Insurance (Including Last Expense) Cover for All Teachers in the Employment of TSC and their Dependants. At the hearing of the Request for Review, the Applicant was represented by Muthomi Thiankolu Advocate and Anthony Khamala Advocates while the Procuring Entity was represented by Mr, Allan Sitima Advocate, M/s Stella Ruto and M/s Cavin Anyuor Advocates. The Interested Party M/s Smart applications Ltd was represented by Mr. Steve Kimathi Advocate.

The Applicant requested the Board for the following orders:-

- 1. THAT the Procuring Entity's decision purporting to terminate the tender, which is set out in the letter dated 16th January, 2015, be annulled;**

2. THAT the Procuring Entity be ordered to enter into and execute a contract with the Applicant in accordance with the relevant provisions of the Act, including Sections 68, 84 and 85 of the Act;
3. THAT the Procuring Entity be ordered to pay the Applicant the costs of and incidental to this Request for Review;
4. Such other additional, further, incidental and /or alternative orders as the Honourable Board may deem just and expedient.

The Applicant in its oral and written submissions stated that the Procuring Entity's decision purporting to terminate the tender awarded to the it vide a letter dated 17th November, 2014 under the Provisions of Section 36(1) of the Act was illegal and irregular. The Applicant further argued that the impugned decision was made and communicated to it after the award of the tender, acceptance of the award and after a draft contract was forwarded to the Applicant. It was the Applicant's contention that the Law does not permit Procuring Entities to invoke Section 36(1) of the Act after the award and the acceptance of a tender. The Applicant made reference to the High Court decision in the case of *Republic v Public Procurement Administrative Review Board & 2 Others ex-parte Selex Sistemi Integrati (2008) (eKLR)* where the issue of termination of a tender after an award was extensively addressed and stated that the Court held that a Procuring Entity cannot terminate a contract under the Provisions section 36 (1) of the Act where an award of tender had already been made. The Applicant therefore stated that the Procuring Entity's decision to terminate the subject Tender under the Provisions of Section 36(1) of the Act was legally untenable.

Counsel for the Applicant additionally argued that the termination of the tender award to the Applicant by the Procuring Entity was also unwarranted and unlawful as the tender had passed through all stages including the negotiation stage without any party bringing forth a complaint anywhere including with the Board and that the Procuring Entity's decision was ill informed and was actuated by bad faith. The Applicant further argued that the inclusion of strangers, such as KNUT, KUPPET and the TSC Commissioners was illegal and amounted to a violation of the Public Procurement and Disposal Act, 2005 which clearly outlines who or what teams are responsible for carrying out evaluation of tenders and the extent of each team's role. These strangers, the Applicant argued were invited to the procurement process by the Procuring Entity after the procurement process had passed all the necessary stages and when the parties were preparing themselves to execute the contract. The Applicant submitted that this conduct was in clear violation of the Provisions of sections 5(2) and 26(4) of the Act and Regulation 58(2) of the Regulations which clearly segregates duties and responsibilities by the evaluation and tender committees of the Procuring Entity.

It was the Applicant's case that the Procuring Entity in convening a meeting that included KNUT, KUPPET and TSC Commissioners whose role is not defined by the Act, the Procuring Entity was in clear violation of the Law. The Applicant therefore submitted that any issues raised by the above bodies could not form the basis of termination since the evaluation and the tender committees, had already done their work and approved the award of the tender to the Applicant.

The Applicant therefore urged the Board to allow the Request for Review in view of the fact that the tender award had not been challenged and since it had already commenced preparations towards the implementation of the tender and had committed itself to the tune of Kenya Shillings One Billion and risked to lose a lot if the termination of the award was allowed to stand.

In its Response, the Procuring Entity stated that it was a constitutional commission established under the Constitution of Kenya 2010 and that it was mandated to observe the national values and principles espoused under chapter 10 of the said constitution and ensure that it carried out its oversight role properly and in accordance with the Provisions of section 11 of the TSC Act, which mandated the Commissioners to give strategic direction, leadership and oversight to the Procuring Entity. The Respondent argued that in carrying out of the said functions, it identified some irregularities in this procurement process. The Procuring Entity further submitted that following the notification of the award to the Applicant on 17th November, 2014, the Procuring Entity, in performing its oversight role, became aware of an element of conflict of interest by the Applicant in that the Applicant had indeed been involved extensively with the material substance relevant to the procurement proceedings prior to the floating of the tender and that the Applicant had inside information in respect of the substance of the procurement proceedings.

The Procuring Entity additionally submitted that the Applicant had an unfair advantage over other bidders who had participated in the tendering process and that the Applicant had in conjunction with the

Kenya National Teachers Union (KNUT) initiated the registration and sensitisation of teachers and their dependants (beneficiaries of the medical scheme) countrywide and that this information was neither ~~disclosed or made available to those participating in the process.~~ The Procuring Entity therefore submitted that this gave the Applicant advantage over other bidders.

The Procuring Entity further submitted that it also emerged that during the preparation of the proposal, the Applicant accessed critical information relating to the levels of budgetary allocation designed for the medical scheme. The Procuring Entity submitted that one of the illustration of this alleged access to information was the fact that the Applicant's bid price was in tandem with the budget allocated to the teachers' medical scheme which was approximately Kshs. 5.6 Billion while the bid price was Kshs. 5,593,232,616/=. The Procuring Entity submitted that this information was not available to other bidders. The Procuring Entity additionally stated that this amounted to a corrupt and fraudulent practice on the Applicant's part contrary to provisions of the Act, and subsequently the Procuring Entity exercised its option under Section 40(2) and 41(2) of the Act by disqualifying the Applicant from entering into a contract with it and thus opted to terminate the award made to the Applicant.

It was the Procuring Entity's further submission that the provisions of section 36(1) of the Act allowed it to terminate the tender at any time during the procurement proceedings. The Procuring Entity referred the Board to the American decision of *Morewood Vs. Hollister*(6 NY 1852) in its attempt to define the term "proceedings" and stated that it was

therefore entitled to terminate the tender proceedings and had notified both the Applicant and the other bidders of its decision therein. The Procuring Entity submitted that it was exempted from any liability by virtue of the Provision of section 36 of the Act.

The Procuring Entity in its submissions further stated that it found that the applicant had not met some of the specifications set out in its technical conditions of the tender and these issues emerged when it sought clarification after the tender award and during negotiations. Being a responsible public body institution therefore, the Procuring Entity therefore felt compelled to terminate the tender forthwith. The Procuring Entity therefore urged the board to dismiss the Request for Review.

THE BOARDS FINDINGS

The Board has considered the Request for Review, the responses filed in answer thereto together with all the documents that were placed before it by the parties. The Board has also considered the written and the oral submissions made to the Board by the parties.

The Board finds on the basis of the above that this Request for Review raises only one issue for determination, namely; whether or not the purported termination of the above tender by the Procuring Entity was lawful and proper under the Provisions of Section 36 of the Public Procurement and Disposal Act (2006). The Applicant and the Procuring Entity put up several arguments in support and or opposition to their respective positions and the Board will therefore address each of the

arguments put forward by the parties in determining whether the Procuring Entity acted lawfully in the circumstances of this case.

In navigating through this process, it is useful for the Board to first consider the basis upon which the decision to terminate the subject tender was premised.

It was common ground during the hearing of this Request for Review that the Procuring Entity placed an advertisement inviting eligible firms to express interest for the Provision of an innovative and cost effective financial model and solution for healthcare for all teachers in the employment of the commission and their dependants countrywide in the Daily Nation Newspaper of 2nd July, 2014.

It was also not in dispute that the Applicant submitted its tender for the said services which was evaluated by the Procuring Entity and that the Procuring Entity's tender committee awarded the subject tender to the Applicant on 17th November, 2014. It was also generally agreed by the parties to this Request for Review that the Applicant was notified that its tender was successful via a letter dated 17th November, 2014. The Applicant acknowledged receipt of the said letter on 18th November, 2014 and unconditionally accepted the award made to it by the Procuring Entity on the same date. The Applicant stated that upon accepting the award of the tender to it, the Applicant and the successful bidder commenced negotiations on 24th November, 2014 but the negotiations were not concluded. The documents placed before the Board further show that the Applicant and the Procuring Entity

exchanged a written draft agreement which was to form the basis for the agreement which was to be entered into by the said parties.

All was then quiet until 16th January, 2015 when the Procuring Entity wrote to the Applicant informing it that it had terminated the tender which it had awarded to the Applicant. It is this turn of events that precipitated the filing of the present Request for Review.

The Board has considered all the issues raised and will first address the issue of the Board's jurisdiction which was raised by the Procuring Entity.

On the issue of jurisdiction, the Board has previously held that the power to terminate an award of a tender under the Provisions of Section 36 of the Act is not absolute and further that the Board has jurisdiction to inquire into the circumstances leading up to the termination of the an award of a tender to a successful bidder.

The position taken by the Board on the issue of jurisdiction in cases of termination follows several decisions by the High Court such as the case of **Selex Sistemi Intergretti -vs- The Public Procurement Administrative Review and the Kenya Civil Aviation Authority (NAI HC Misc. Application No. 1260 of 2007)** where the High Court (both Justices G. Nyamu and G. Dulu) held that the Board has jurisdiction to hear and determine any grievance arising from the exercise of the power conferred upon a Procuring Entity under the Provisions of Section 36 (6) of the Act. The High Court has further held that the said Section 36 (6) does not oust the jurisdiction of the Court or the Board to hear any grievance under the Provisions of Section 36 of the Act.

The Board has affirmed this Position in several of its past decisions as illustrated by the case of **Horsbridge Network Systems (E.A) Ltd -vs- Central Bank of Kenya (PPARB APPL. No. 65 of 2012)**.

Where the Board held that it has jurisdiction to investigate the circumstances under which a Procuring Entity has exercised the powers of termination under the Act.

For the purposes of this review, the first ground on the basis of which the Applicant challenged the Procuring Entity's decision to terminate the award of the subject tender to it was that the Procuring Entity could not lawfully terminate the award of a tender to a successful bidder once the award of the tender was made, notified and was accepted by the successful bidder. The Applicant relied on the High Court decision in the case of **Republic =vs= The Public Procurement Administrative Review Board and 2 Others Exparte Selex Sistemi Interatti (2008) eKLR** in support of the argument that such a tender cannot be terminated. The Applicant relied on the following extract from the judgment of the Honourable Justice G. Dulu in the above case.

"In our present case the purported termination was done after award of Tenders was communicated as confirmed by both the Applicant and the Interested Party, and even the 2nd Respondent. This cannot be a situation covered by the ouster clause under Section 36(1) of the Act. It is my finding and decision that the ouster clause under Section 36(1) of the Act does not apply to the

present case as the tender was already awarded. There is no subsequent event from parties other than the Procuring Entity that actuated the proceedings. I therefore hold that both the 1st Respondent and this court has jurisdiction to consider and review the decision of the 2nd Respondent, the Procuring Entity to terminate the awarded Tender”.

The Board has considered the court’s judgment and finds that what the court held was that a Procuring Entity cannot purport to terminate an award once a successful bidder is notified that it’s tender was successful. As the Board has already stated, the Applicant in the case before the Board was notified that it’s tender was successful on 17th November, 2014 and accepted the award to it on 18th November, 2014 while the letter of the purported termination was issued on 16th January, 2015. This was done long after the date of notification to the Applicant and after the Applicant had unconditionally accepted the award of the tender to it.

The Board therefore finds on the basis of the above decision which is binding on the Board that the Applicant could not lawfully terminate the award made to the successful bidder on 17th November, 2014 via the letter of termination dated 16th January, 2015. The decision of the Procuring Entity was therefore a decision made in vain since it is not allowed by law.

Turning to the next fundamental issue, Counsel for the Procuring Entity informed the Board that the decision to terminate the Applicant’s tender was made by the commissioners of the Teachers Service Commission. The Board has perused the entire bundle of the documents supplied to it

by the Procuring Entity and was unable to find any minutes of the Teachers Service Commission containing the decision by the Commissioners to terminate the award of the tender in any of the documents supplied to it. All that the Board came across was the letter informing the Applicant of the purported termination which is dated 16th January, 2015.

The Board however finds on the basis of the Provisions of the Teachers Service Commission Act that the Commission can only discharge its functions through its relevant committees and that the Commissioners cannot base their decision on verbal pronouncements which are not supported by any minutes.

The Board therefore finds that in the absence of such minutes authorising termination, the Commissioners or any other officer or employee of the Teachers Service Commission could not purport to terminate the Applicant's tender since such an action would not have foundation.

The Board further finds that the Procuring Entity had constituted a tender processing/evaluation committee and a tender committee which evaluated and awarded the subject tender to the Applicant and further that pursuant to the award of the said tender, the tender committee constituted a negotiation committee whose members were:-

- i) Mrs. Nancy Macharia,
- ii) Mr. Cheptumo Ayabei,
- iii) Mrs. Josphine Maundu,

iv) Mr. Ibrahim Mumin,

v) M/s Agnes Gatere,

vi) And the Tender Processing Committee Members.

The Board has not been able to find any document that appointed the Commissioners of the Teachers Service Commission as part of the Procuring Entity's tender evaluation committee or the negotiation team. It was therefore improper for the Commissioners or any other officer or employee of the Teachers Service Commission to interfere with the functions of the tender processing/evaluation committee, the tender committee or the tender negotiations committee. The Board therefore accepts the Applicant's submission that the Commissioners or any other Officer or employee of the Teachers Service Commission were "strangers" to the Procurement Proceedings and their decision to terminate the award of the tender made in favour of the Applicant was therefore unlawful.

Under the Provisions of Section 26 (4) of the Act, every Procuring Entity is required by law to establish a Procuring unit, a tender evaluation/processing team, the tender committee and such other bodies as are required by the Regulations for the purposes of making decisions on behalf of the Public entity as are specified in the Act and the Regulations. Once such bodies have been established, it is only the said bodies which are empowered to undertake any tender process to the exclusion of everybody else.

The Board finds that pursuant to the Provisions of Section 26 of the said Act, the Procuring Entity appointed a tender processing/evaluation

committee, a tender Committee and a negotiation team and placed the mandate to evaluate the tender and to make all the necessary recommendations and or decisions as respects the subject tender on the ~~said committees. The three committees proceeded diligently with the~~ said exercise leading up to the award of the tender and the negotiations with the Applicant.

As the Board has already observed, the Board has perused all the documents submitted to it by the Applicant and the Procuring Entity but did not come across any minute or document which appointed the Commissioners of the Teachers Service Commission or any other employee or body as part of the bodies that would undertake the Procurement process or terminate the award of the tender to the Applicant.

The Board further finds that Commissioners of the Teachers Service Commission stayed away from the proceedings relating to the subject tender until 15th December, 2014 when the Procuring Entity invited a total of 29 people to a meeting to ostensibly discuss certain issues relating to the award of the subject tender to the Applicant. The Board has perused the previous minutes of the tender processing/evaluation committee, the tender committee and the negotiation committee and it has established that most of the people, who attended the meeting of 15th December, 2014 were not members of either committee. The Board has further established that after the meeting held on 15th December, 2014, the Procuring Entity convened another meeting on 18th December, 2014 to discuss the same issues. A total of 28 people attended the second meeting but a majority of them were again not members of the tender

processing/evaluation committee, the tender committee or the negotiation committee.

The Applicant produced the letter of invitation to the participants in the meeting of 18th December, 2014 which is dated 17th December, 2014 together with the minutes of the said meeting as annexures "AKB - 10".

It was the Applicant's position that it is permissible under the Provisions of the Public Procurement Act and the Regulations made thereunder for strangers to participate in the evaluation process or in any other proceedings related to the award of the tender and that such a participation was unlawful.

The Board has considered the above submissions in view of the Provisions of Section 26 of the Act and Regulations 10 and 11 of the Regulations and finds that the law does not permit persons who are not members of the tender processing/evaluation committee or the tender committee to participate in a tender process unless their participation is expressly permitted under the provisions of Section 26 of the Act. Such persons cannot therefore purport to convene meetings and make decisions to terminate a tender which has already been awarded. The Board considered a similar situation in the case of **M/s Wamo Construction Co. Ltd -vs- The District Tender Committee Ijara District (PPRB Application No. 18 of 2010)** where the Board held that it was unlawful for a body which had not been lawfully constituted under the Provisions of Section 26 of the Act to participate in proceedings touching on the evaluation of a tender or any process relating to the said tender.

The Board stated as follows in the said decision:-

“The Board finds that according to the requirements set out in clause 1.5 of the instruction to tenderers, the evaluation committee determined the Applicant to be the lowest evaluated bidder and recommended for award to the tender committee.

Notwithstanding this recommendation, the secretariat which is a body that is not established in accordance with Section 26 of the Act and part 11 of the Regulations and therefore not empowered to play any role in the tender process recommended to the tender committee to award the tender to the successful bidder. The Board finds that the recommendation by the secretariat was a nullity and should not have been acted upon by the tender committee. The secretariat did an evaluation after the technical evaluation committee had finished its part and by extension the tender committee also did an evaluation contrary to the Provisions of Regulation 11 (2)”.

It is clear from the above decision that the law does not permit the participation of what the Board terms as “strangers” in a tender process even if they are employees of the Procuring Entity. The Board therefore holds that all the people who participated but were not members of the tender evaluation/processing committee, the tender committee and the tender negotiation committee in the meetings of 15th December, 2014 and 18th December, 2014 were in the same shoes as the secretariat in the decision that the Board has cited above.

The Board has also gone through the minutes of the meetings held on 15th December, 2014, and 18th December, 2014 and has compared the Resolutions passed in the said meetings with the contents of the letter of

termination dated 16th January, 2015 and which was produced by the Applicant as annexure "AKB -15". The Board finds that the reasons given by the Procuring Entity in the letter dated 16th January, 2015 were not part of the recommendations made by those who attended the two meetings. Minutes of the meeting held on 15th December, 2014 and minutes of the meeting held on 18th December, 2014 shows that the Procuring Entity and the respective Unions were infact in agreement that a contract should be executed with the Applicant.

The Board further wishes to observe that neither the Tender processing/evaluation committee nor the tender committee raised any complaint relating to the award of the tender the subject matter of this Request for Review to the Applicant and further that the tender evaluation committee and the tender committee seem to have been satisfied with the outcome of the Process.

During the hearing of this Request for Review, the Applicant attacked the reasons for termination as set out in the letter dated 16th January, 2015 and stated that the decision to terminate the tender awarded to it had no basis in law or fact. Inview of the Board's finding that there are no minutes evidencing the termination and inview of the Board's further finding that strangers were allowed to participate in meetings leading to the purported termination of the subject tender, the Board holds that the purported termination as contained in the letter dated 16th January, 2015 together with all the reasons contained therein are a nullity *ab-initio*.

The above finding notwithstanding, the Board has examined the reasons set out by the Procuring Entity in support of the decision to terminate

the tender awarded by the Procuring Entity to the Applicant. The reasons were essentially three and they are that:-

- i) The Applicant was guilty of conflict of interest since it had been extensively involved with the material substance relevant to the Procurement of the medical scheme for teachers as early as in December, 2013. The Procuring Entity therefore contended that the Applicant had inside information in respect of the substance of the Procurement proceedings and that it was the party that had conceived the scheme that was being implemented in the subject tender.
- ii) The Applicant did not meet the specifications set out in the tender documents as it did not demonstrate and provide a biometric infrastructure with a member identification solution that identifies members through finger capture and enables member utilization, monitoring and reporting.
- iii) That there was a material variation to basic components of the scheme namely maternity, optical and dental components from free fee to service to capitation allegedly contrary to specifications set out in the tender document.

The Board has examined all the above reasons and finds that on the issue of conflict of interest, the Procuring Entity did not produce any evidence to show that it had entered into a contract with the Applicant relating to the conceptualization of the alleged scheme in December, 2013. The Board further finds that if this was true, this issue was alive during evaluation and it was the duty of the tender

processing/evaluation committee and the Tender Committee to deal with it during evaluation but not that of the commissioners or any other officer or employee of the Procuring Entity who were not members of any committee or other body established under Section 26 of the Act.

On the issue of the alleged failure to meet the specifications set out in the tender document and the alleged variation of specifications, the Procuring Entity did not provide any evidence to back up this allegation and this was at any rate not the domain of the commissioners but that of the tender evaluation committee, the tender committee and the tender negotiation committee.

The Board further finds from the minutes of the various meetings which it has set out above that the proposals for any change or variation of any specification came up at the various meetings and some of these changes were proposed by the Procuring Entity. The Procuring Entity cannot therefore be right in seeking to terminate the award of the tender to the Applicant based on suggestions which were made by it.

The Board further finds that the award of this tender was made to the Applicant on the basis of specific tender requirements and conditions. The Board however notes that no formal agreement has to date been entered into by the parties. Nothing therefore prevents the Procuring Entity from insisting on compliance with the requirements of the tender document at the point of executing the contract.

It is therefore premature for the Procuring Entity to allege that the Applicant has changed specifications or made variations in the tender

documents when a contract pursuant to the tender award has not been executed.

The reasons given by the Procuring Entity seeking to terminate the award of the subject tender to the Applicant are therefore an afterthought and the Board therefore rejects them.

The Board has severally held and wishes to restate that every Procuring Entity exercising the powers conferred upon it by the Provisions of Article 227 of the Constitution and the Public Procurement and Disposal Act does so on behalf and in trust for the members of the public and is therefore bound to act within the law and in good faith. The Board further finds that the present Procurement process was undertaken for the sole purpose of promoting the welfare of teachers and their dependants on matters relating to health and their well being. It is therefore regrettable that what the Board finds as a noble idea was derailed by what appears to be a disagreement or a scontestation by various organs of the Procuring Entity. This state of affairs is not healthy especially where it involves the rights of third parties or the rights of a large Section of members of the Public such as teachers and their dependants.

Further, the Board has previously held that any party seeking to rely on the Provisions of Section 36 of the Public Procurement and Disposal Act must establish that it complied with all the Provisions of Section 36 of the Act in seeking to terminate the award of a tender made to a bidder who participates in a Procurement process.

One of the requirements set out in Section 36 of the Act is that a Public Entity that terminates Procurement Proceedings shall give the Director General of the Public Procurement Oversight Authority a written report of the termination. Section 36 (8) of the Act requires that such a report shall include the reasons for the termination and shall be made in accordance with any direction of the Authority with respect to the contents of the report.

The Procuring Entity did not produce any evidence during the hearing of the Request for Review to show that it had complied with the above requirements of the Act. The only explanation given by the Procuring Entity to justify the absence of the report was that it did not give it because the Board had issued an order of stay in respect of the Procurement process. The Board however finds that the Procuring Entity ought to have given such a report timeously upon giving a notice of the purported termination and further that the order of stay did not affect the giving of reasons since it was not a Procurement process capable of being stayed.

It is also noteworthy that upon the conclusion of this exercise, no bidder who had participated in the tender process lodged any complaint with the Board or with the Procuring Entity's Commissioners challenging the award of the tender to the Applicant. The purported termination and the reasons justifying it were all raised by the Procuring Entity's Commissioners. The Commissioners therefore constituted themselves as the complainants, prosecutors and judges in their own cause which is against the rules of natural justice. The Board further notes that before making the decision to terminate, the Procuring Entity's Commissioners

did not offer the Applicant an opportunity to be heard on the reasons for the termination which again was contrary to the same rules of natural justice.

The Board further wishes to state that the course taken by the Procuring Entity contravened the Provisions of Section 84 (1) and (2) of the Act which enjoined it to invite the second best evaluated bidder for negotiations in the event that it was not able to reach any agreement with the successful bidder but not to terminate the entire tender process. Such an action would have led to a waste of public funds through a fresh but entirely unnecessary tender process.

The Procuring Entity dedicated a considerable amount of time in arguing that it is a Constitutional Commission which is mandated by the Provisions of Section 11 and 46 of the Teachers Service Commission to Review any of its decision. The Procuring Entity also submitted that it has a duty to observe National values and the principles of Public service as expounded by Provisions of Article 10, 201 and 232 of the Constitution.

The Procuring Entity further stated in the written response dated 5th February, 2015 that it is a Constitutional Commission and that in terms Article 249 (2) (b) of the Constitution, it is not subject to the direction and/or control of any other body and that it is only answerable to the law and not to any other person or body.

The Board however respectfully holds that the fact that the Procuring Entity is a Constitutional Commission does not preclude it from observing the Provisions of the Public Procurement and Disposal Act

(2005). The above status does not also entitle the Procuring Entity to trample upon the rights of other legal persons such as the Applicant. The Procuring Entity is therefore enjoined to act lawfully, its status notwithstanding.

The upshot of all the above findings is therefore that the Procuring Entity's decision purporting to terminate the Applicant's tender was unlawful and is hereby set aside.

FINAL ORDERS

In the light of the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 98 of the Public Procurement and Disposal Act (2005) the Board makes the following orders in this Request for Review:-

1. Request for Review filed by M/S Aon Kenya Insurance Brokers Limited against the decision of the Teachers Service Commission in the matter of Tender No. TSC/T/45/2014-2015 for Provision of Medical Healthcare Cover and Group Life Insurance (Including Last Expense) Cover for All Teachers in the Employment of TSC and their Dependants is hereby allowed and the Procuring Entity's decision purporting to terminate the said tender as set out in its letter dated 16th January, 2015 is hereby annulled.
2. The Board directs the Procuring Entity to complete the Procurement process and execute a contract with the Applicant, M/s AON Kenya Insurance Brokers Limited in accordance with

the relevant provisions of the Public Procurement and Disposal Act within Fourteen (14) days from the date hereof.

3. In view of the nature of the orders which this Board has made above which will lead to the existence of a contractual relationship in future between the Applicant and the Procuring Entity the Board directs that each party shall bear it's own costs of this Request for Review.

Dated at Nairobi on this 20th day of February, 2015


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CHAIRMAN
PPARB


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SECRETARY
PPARB