

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 19/2015 OF 27th MARCH, 2015

BETWEEN

DISNEY INSURANCE BROKERS LIMITED.....Applicant

AND

COUNTY GOVERNMENT OF NYANDARUA.....Procuring Entity

Review against the decision of the County Government of Nyandarua in the Matter of Tender No. NYA/CG/PT/05/I4-15 for the Provision of Insurance Services.

BOARD MEMBERS PRESENT

- | | |
|---------------------------|-------------------------|
| 1. Mr. Hussein Were | - Member (In the Chair) |
| 2. Mrs. Gilda Odera | - Member |
| 3. Mr. Peter Ondieki, MBS | - Member |
| 4. Eng. Weche Okubo, OGW | - Member |
| 5. Mr. Nelson Orgut | - Member |

IN ATTENDANCE

- | | |
|--------------------------|---------------|
| 1. Mr. Henock K. Kirungu | - Secretary |
| 2. Mr. Stanley Miheso | - Secretariat |
| 3. Ms. Shelmith Miano | - Secretariat |

PRESENT BY INVITATION

Applicant - Disney Insurance Brokers Limited

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1. Moturi Dennis Anyoka - Advocate
 2. Sharon Mukami - Student
 3. Beatrice Mangi - Student
 4. Anthony Kingara - Student
 5. Martin Ciira - Underwriting Manager

Procuring Entity - County Government of Nyandarua

1. Lawrence Macharia Karanja - Advocate
2. Phillip King'ori - Director, SCM

Interested Parties

1. Phillip Omondi - Marketing Officer, Madison Ins. Co.
2. Andrew Wandabwa - Advocate, AMACO
3. Elizabeth Koskei - General Manager, AMACO
4. Dorothea Kinyua - Marketing Exec., Corporate Ins. Co.
5. Carol Kioria - Business Dev Manager, Sedgwick

Kenya Ins. Brokers

BOARD'S DECISION

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

BACKGROUND OF AWARD

The County Government of Nyandarua needed to procure Insurance services as the current Insurance Policy had previously expired and authority was sought to extend the policy to 30th March, 2015.

This was an open tender advertised on 27th February, 2015 in the local dailies: *Standard Newspaper*, *The Star* and in the County website.

The tenders were received and opened in the presence of tenderers and/or their representatives on 13th March, 2015, at 10:00 am at the County Headquarters offices.

Twenty (20No) tenderers submitted their bids for opening.

PRELIMINARY EVALUATION

The tender requirements were the determinant factors qualified at this level. The following table is the summary of the preliminary evaluation:-

Key of Tender Submission Checklist

- C1. Tender Form and Price Schedule
- C2. Registration with the Commissioner of Insurance
- C3. Fully filled Confidential Business Questionnaire (CBQ)
- C4. Fully filled Declaration Form
- C5. Copy of Company or Firm's Registration Certificate
- C6. Copy of PIN Certificates
- C7. Copy of Valid Tax Compliance Certificate
- C8. List of 3 reputable clients for the previous year
- C9. Professional indemnity Insurance Cover (Brokers only)
- C10. Membership of the Association Kenya Insurance (AKI) (Insurance Companies only)
- C11. Membership of the Association Insurance Brokers (AIB) (Brokers only)
- C12. Audited financial statements for the previous year
- C13. Bid bond of 1%

Table Key

1:- Compliant to Requirements

0:- Not Compliant to Requirements

An explanation of why the following bidders were found to be Non-Responsive in relation to the set requirements:-

1) British-American Insurance Company (K) Ltd

- a) Did not attach Bid Bond of 1%; Audited accounts were for the year 2010 and 2011; Did not fill Declaration Form; and Did not submit Confidential Business Questionnaire.
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2) Cannon Assurance Ltd

- Did not submit Tender Form.

3) Madison Insurance Company Kenya Ltd

- Submitted audited accounts of 2011 and 2012.

4) First Assurance Company Ltd

- a) Had no Tender Form; did not submit Declaration Form; did not submit Business Questionnaire; Lacked list of reputable clients; and did not give Bid Bond of 1%.

5) A-Plan Insurance Brokers

- Failed to submit Declaration Form.

6) Xplico Insurance Company Ltd

- Did not submit a copy of 1% Bid Bond.

7) Southern Sahara Insurance Brokers Ltd

- Submitted audited accounts of 2011 & 2012, failed to submit following year audited accounts

Fourteen bidders were found to be responsive and proceeded to the next level.

TECHNICAL EVALUATION

Table B: Technical Evaluation

NO	NAME OF THE BIDDER	ADDRESS	T.a	T.b	T.c	T.d	REMARKS
1	CIANCERY WRIGHT INSURANCE BROKERS LTD	BOX 55537-00200 NRB	1	1	1	1	RESPONSIVE
2	TRIDENT INSURANCE COMPANY LIMITED	BOX 61599 - 00200	1	1	N/A	N/A	RESPONSIVE
3	CORPORATE INSURANCE COMPANY LTD	BOX 34172 - 00100 NRB	1	1	N/A	N/A	RESPONSIVE
4	AFRICA MERCHANT ASSURANCE COMPANY LTD	BOX 61599 - 00200 NRB	1	1	N/A	N/A	RESPONSIVE
5	CIC GENERAL INSURANCE LTD	BOX 59485 -00200 NRB	1	1	N/A	N/A	RESPONSIVE
6	JUBILEE INSURANCE	P.O BOX 30376-00100 NAIROBI	1	1	N/A	N/A	RESPONSIVE
7	REAL INSURANCE COMPANY LIMITED	P.O BOX 40001-00100 NAIROBI	1	1	N/A	N/A	RESPONSIVE
8	DISNEY INSURANCE BROKERS LTD	3600-00200 NRB	1	1	1	1	RESPONSIVE
9	AMRO INSURANCE BROKERS	40896-00100 NRB	1	1	1	1	RESPONSIVE
10	HERITAGE INSURANCE COMPANY	30390-00100 NRB	1	1	N/A	N/A	RESPONSIVE
11	SEDGWICK KENYA INSURANCE BROKERS LTD	BOX 40709 - 00100 GPO	1	0	1	1	NON-RESPONSIVE
12	SAKAKA INSURANCE BROKERS (K) LTD	P.O BOX 685-20100 NAKURU	1	0	1	1	NON-RESPONSIVE
13	ZEBRA TRACK INSURANCE BROKERS LTD	1987-00502 NRB	1	0	1	1	NON-RESPONSIVE

Key of Requirement

T.a:- Confirmation of and considering Price Schedule duly completed and signed.

T.b:- Must have done annual gross premiums in the previous year of Ksh 100,000,000.00

T.c :- Must have a Bank guarantee of Ksh 3,000,000.00 deposit with the Commissioner of Insurance and a copy submitted. (Brokers only)

T.d:- Must have a professional Indemnity Insurance cover of a least 50,000,000.00 and a copy submitted (Brokers only)

An explanation of why the following bidders were found to be Non-Responsive in relation to the set requirements:-

a) Sedgwick Kenya Insurance Brokers Ltd

- Did not have an annual Gross Premium in previous audited accounts of Kshs 100,000,000.00 and above.

b) Sakaka Insurance Brokers (K) Ltd

- Did not have an annual Gross Premium in previous audited accounts of Kshs 100,000,000.00 and above.

c) Zebra Track Insurance Brokers Ltd

- Did not have an annual Gross Premium in previous audited accounts of Kshs 100,000,000.00 and above.

A total of ten bidders proceeded to the next level.

FINANCIAL EVALUATION

The Financial statements, Quoted amount and the Actual amount were the determining factors.

Table C: Financial Analysis/Evaluation

NO	NAME OF THE BIDDER	ADDRESSES	TENDER SUM	ARITHMETICAL CORRECTION	DEVIATION FROM ACTUAL	ACTUAL	REMARKS
1	AFRICA MERCHANT ASSURANCE COMPANY LTD	BOX 61599 - 00200 NRB	13,722,546 00	13,722,546 00	0	13,722,546 00	The Premium Price found lowest and in favour of cost
2	HERITAGE INSURANCE COMPANY	30390-00100 NRB	14,096,938 50	14,096,938.49	(+) .49	14,096,938.49	Premium price Higher in relation to the lowest quoted bidder price
3	CHANCERY WRIGHT INSURANCE BROKERS LTD	BOX 55537-00200 NRB	14,359,353 00	14,359,355 00	(+9) 2.00	14,359,355.00	Premium price Higher in relation to the lowest quoted bidder price
4	CIC GENERAL INSURANCE LTD	BOX 59485 -00200 NRB	14,528,326 00	14,528,326 70	(+) 0.70	14,528,326.00	Premium price Higher in relation to the lowest quoted bidder price
5	DISNEY INSURANCE BROKERS LTD	3600-00200 NRB	17,230,740 00	17,230,746 00	(+) 6	17,230,746.00	Premium price Higher in relation to the lowest quoted bidder price

NO	NAME OF THE BIDDER	ADDRESSES	TENDER SUM	ARITHMETICAL CORRECTION	DEVIATION FROM ACTUAL	ACTUAL	REMARKS
6	CORPORATE INSURANCE COMPANY LTD	BOX 34172 - 00100 NRB	15,403,415.00	17,847,202.00	(+) 2,443,787.00	17,847,202.00	Premium price Higher in relation to the lowest quoted bidder price
7	TRIDENT INSURANCE COMPANY LIMITED	BOX 61599 - 00200	6,568,598.00	18,556,312.57	(+) 11,987,714.57	18,556,312.57	Premium price Higher in relation to the lowest quoted bidder price
8	AMRO INSURANCE BROKERS	40896-00100 NRB	6,684,388.00	23,395,940.00	(+) 16,711,552.00	23,395,940.00	Premium price Higher in relation to the lowest quoted bidder price
9	REAL INSURANCE COMPANY LIMITED	P O BOX 40001-00100 NAIROBI	17,847,192.00	23,395,940.00	(+) 5,548,748	23,395,940.00	Premium price Higher in relation to the lowest quoted bidder price
10	JUBILEE INSURANCE	P O BOX 30376-00100 NAIROBI	47,671,769.00	47,671,771.00	(+) 2.00	47,671,771.00	Premium price Higher in relation to the lowest quoted bidder price

EVALUATION COMMITTEE RECOMMENDATION

The tender for Provision of General Insurance to the County Government of Nyandarua be awarded to the most responsive/compliant lowest bidder M/S Africa Merchant Assurance Company Ltd, at their quoted price of Kshs 13,722,546.00 (Thirteen million, seven hundred and twenty two thousand, five hundred and forty six shilling only), VAT Inclusive.

TENDER COMMITTEE RECOMENDATION

The Ministerial Tender Committee in its meeting held on 17th March, 2015, minute No. MIN/TC/83/15 approved the award to evaluation report for provision of general insurance for County Government of Nyandarua to bidder M/s Africa Merchant Assurance Company Ltd, at a total cost of Thirteen Million, Seven Hundred and Twenty Two Thousand, Five Hundred and Forty Six shillings only (Kshs 13,722,546.00) VAT Inclusive.

REQUEST FOR REVIEW NO 19/2015

The Request for Review was lodged by M/s Disney Insurance Brokers Limited on 27th March, 2015 in the matter of the tender for the provision of insurance services.

The Applicant sought the following orders:

1. The Respondent's decision to award Tender No. NYA/CG/PT/05/I4-I5 to the alleged successful bidder be set aside and nullified.
2. The Respondent's decision notifying the Applicant that it had not been successful in Tender No. NYA/CG/PT/05/I4-I5 by way of the letter dated 18th March 2015 be set aside and nullified.
3. The Board be pleased to review all records of the procurement process relating to Tender No. NYA/CG/PT/05/I4-I5 and do substitute the decision of the Review Board for the decision of the Respondent.
4. The Respondent be ordered to negotiate and sign a contract with the Applicant in accordance with the Tender and the decision of the Board.
5. Further and/or in the alternative and without prejudice to any of the other prayers sought herein the Review Board to direct the Respondent to undertake fresh evaluation of all bids received in strict adherence to the Tender, the Act and the Regulations and award Tender No. NYA/CG/PT/05/I4-I5 to the highest competitive bidder.

6. Further and in the alternative, the entire tender process be nullified and the Respondent be ordered to re-tender afresh.
7. The Respondent be ordered to pay the costs of and incidental to these proceedings; and
8. Such other or further relief or reliefs as this board shall deem just and expedient.

The Applicant raised nine grounds in support of the request for review as follows:

1. Grounds 1, 2, 3 and 4 are the Applicant's statements of fact and do not disclose any breach.
2. Ground 5:- The Applicant challenged the entire tender process, the design of the tender document as well as the evaluation process on the basis: -
 - a) That the tender document lacked the procedures and the criteria to be used to evaluate and compare the tenders contrary to section 52(3) of the Act.
 - b) That here was no technical evaluation of any tender.
 - c) That the tender document was uncertain for want of particulars and led to different interpretations by different bidders.
 - d) That the tender document and design thereof and the evaluation process lacked integrity, was unfair and raised suspicion as to the legitimacy and/or bona fides of the decision reached by the Respondent.
 - e) That the tender document was missing the necessary clauses for the various policies.

- f) That the said evaluation was skewed.
 - g) That the total sum insured was not properly segregated hence the tender was misleading.
 - h) That the underwriting guidelines were not adhered to by some tenders as provided for by the Insurance Regulation Authority.
 - i) That the tender document was not clear as to whether the award was to be a block amount or policy by policy. The Applicant understood it to mean that the award was to be on policy by policy.
 - j) That there is a wide discrepancy between the highest financial bid and the lowest financial bid suggesting an incurable bad tender document.
 - k) That the Respondent failed to utilize the guidelines and/or the standard document issued by the Public Procurement Oversight Authority thus falling into error.
 - l) That the signatory of the notification letters was not authorised.
 - m) That the design and evaluation of the tender was flawed and will lead to loss of public confidence.
 - n) That the alleged evaluation of the entire tender was done haphazardly and hurriedly and within a very short time hence prone to errors.
 - o) That the respondent failed to comply with Section 31 of the Act in issuing the tender.
 - p) That the tender document did not comply with Section 35 of the Act.
3. Ground 6: - Breach of Article 227 of the Constitution of Kenya 2010 arising from the breaches sited above.
 4. Ground 7:- Breach of Section 2 of the Act arising from the breaches sited above.
 5. Ground 8 and 9 do not disclose any breach.

THE APPLICANT'S CASE

The Applicant submitted that the tender document lacked the technical evaluation criteria which should have been Part 2 at page 33 of the tender document. It submitted further that there were gaps and inconsistencies in the tender document pointing out the issue of amounts provided for group personal accident insurance of 1508 employees for a monthly salary sum insured of Kshs 19,746,560; work injury benefit insurance for the same number of employees; quotation on WIBA based on monthly earnings instead of annually, as per the Insurance Underwriting Guidelines; the part of estimated annual carry for the cash in transit policy being left blank.

The Applicant submitted that as a result of the gaps and inconsistencies in the tender document, the requirement of public confidence being the guiding factor of every procurement process under Section 2 (e) and transparency and accountability under Section 2(d) were undermined. It averred that the Act makes the specific provisions under section 34 in terms of requirement to have clarity and complete descriptions of goods and services to allow for fair and open tendering process. It stated that

the same section gives details on what is required in the technical evaluation process adding that that failure to have the set down criteria amounted to having an incomplete document.

The Applicant argued that Section 52 of the Act restates the position that the tender document must contain enough information to allow for fair competition. The missing information, it argued further, left the individual tenderers to estimate which affected their bids and that this flies in the face of the requirement of fair procedures as provided for under Section 2 of the Act and constitutionally protected under the principles of good governance in Article 10 of the Constitution of Kenya.

On the issue of clear procedure for technical evaluation the Applicant submitted regulation 49 of the Act provides that technical evaluation has to be conducted after the mandatory evaluation has been done arguing that there ought to be a technical evaluation committee and financial evaluation committee, separate committees in accordance with Regulation 16 (1) of the Act. Another committee is then set up that comprises the technical and financial evaluation committees so that the process is not muddled up.

The Applicant argued on the substantive issues of the request for review that the evaluation process was hurried and that it took only five days after tender submission date for the letter of notification to be issued. It argued further that the speed at which the process was carried out gave an impression that due process was not followed and that the whole process was suspect and flawed in its entirety. It also argued that Mr. Kingori, the Director Supplies Chain Management services who signed the letter of notification lacked the authority to pass such communication on tendering process on behalf of the Procuring Entity. It averred that Section 27 of the Act provided for persons responsible for procurement matters in a public institution, including notification of award and refusal to award. Regulation 7, the Applicant argued further, fortifies the position stated under Section 27 and that in the case of the County Government the governor can appoint Accounting Officers who are the Chief Officers appointed in various ministries.

THE PROCURING ENTITY'S RESPONSE

The Procuring Entity submitted, in response, that the tender document complied with Section 52 (3) of the Act in that Section V of the tender document provided a summary of the evaluation process showing the mandatory requirements. It submitted further that Section 4 of the standard tender document issued by the Public Procurement Oversight Authority contains the conditions to be met by insurance companies and insurance brokers and that these conditions appear at Section IV of the tender document as Schedule of requirements and at Section V as price schedule.

It averred that the tender document provided at Clause 2.4.1 for a candidate to seek clarification regarding the tender adding that the provision was in line with Section 53 (2) and Regulation 43 of the Act, and that no clarification was sought by the Applicant. It averred further that the Applicant put in a bid having been satisfied that the tender document was proper and that the Applicant turned around to complain that the document was not clear only after it had lost the bid. The Procuring Entity also averred that the evaluation criteria were clearly outlined at Sections IB and V of the tender document and that bidders who did not adhere to the underwriting guidelines were disqualified. It

added that every item had its value of the sum to be insured and that the award was as a block in line with industry practice and not policy by policy and maintained that the evaluation was not skewed.

On the issue of the signatory to the letter of notification the Procuring Entity submitted that the county secretary was out of the office for a whole week and since the Procuring Entity had to meet the timelines, the Director of Supply Chain Management service signed for the county secretary. It argued that under Section 27 (5) of the Act the Accounting Officer may use the procurement unit or tender committee or any other procuring entity which shall carry out the procurement in accordance with the Act and Regulations. It added that the person who signed the notification letter is the procuring unit of the county government, thus the director of supply chain has the authority. The letter signed by the Director of Supply Chain Management was a notification and not a contract and the director issued the notice also in his capacity as the secretary to the tender committee, the Procuring Entity argued further.

The Procuring Entity averred that the evaluation was done within the statutory period of 15 days and that the law does not provide the

minimum number of days for carrying out the evaluation but only the maximum period. It added that there was need to do the evaluation within the shortest time possible because the existing contract was expiring on 31st March, 2015. The Procuring Entity averred further that it complied with Section 31 of the Act because the lowest responsive bidder, African Merchant Assurance, met all the requirements to be awarded the contract. It submitted that it complied with Section 35 of the Act because the declaration form had been attached and that the Applicant had filled, signed and stamped the form as required.

On the issue raised by the Applicant that there were supposed to be two evaluation committees, one for financial and the other for technical the Procuring Entity submitted that regulation 16 (2) (a) provides for separate financial and technical committees or a combined financial and technical evaluation committee and that in this case the Procuring Entity opted for a combined technical and financial committee. On the issue raised that there was no specification on what was required in technical evaluation the Procuring Entity pointed out that what was evaluated was against tender submission checklist at page 5 of the tender

document and the criteria was from paragraph f – k at page 33 of the tender document and which was supposed to be Part II.

The Procuring Entity submitted that the application for review was unmerited, it had no basis and it ought to be dismissed since the County Government of Nyandarua was exposed for lack of insurance.

INTERESTED PARTIES' RESPONSES

The Interested Party associated itself with the submissions of the Procuring Entity. It added that Section 66 of the Act sets out what an evaluation process entails and a procuring entity needs to make sure that the evaluation process is in keeping with the criteria set out in the tender document, and that the criteria set out is to the extent possible objective and quantifiable, and that the criteria must take into consideration the price and quality of the services for purposes of evaluation, and that the criteria should be such that it is the lowest evaluated bidder who is awarded the bid. It also added that Section 66 makes it mandatory for an evaluation report to be prepared and that the evaluation is carried out within the specified period. It submitted that the tender document met the threshold set out in Section 66 of the Act.

The Interested Party averred that regulation 49 of the Act provides for technical evaluation which took place arguing that if there was no such technical evaluation, to the extent that the requirement for a technical evaluation was set out in regulation 49 and not Section 66, it can only be interpreted within the meaning of the mother section which is Section 66 and would not make it mandatory that there be a technical evaluation. It argued further that regulation 49 cannot be interpreted as to make a technical evaluation mandatory since it is a subsidiary legislation and that under Interpretation of General Provisions Act Cap 22 Laws of Kenya, any subsidiary legislation which is inconsistent with enabling statute is a nullity to the extent of the inconsistency. The Interested Party averred that no prejudice had been suffered by the Applicant because of the omission, if there was such an omission.

The Interested Party stated that the Applicant had relied on Section 34 of the Act to say that technical evaluation is mandatory and yet the section does not refer to technical evaluation but makes reference to the technical requirements which need to be in the tender document and that the technical requirements for the sought insurance covers were, in fact, adequately specified in the tender document and that there was no

gap at all. If there were gaps so as to affect any bidder from appropriately entering their bid then they ought to have sought a clarification which was not sought by the Applicant and the same would apply to uncertainty which the Applicant pointed out in the tender document, argued the Interested Party.

On the issue of the signatory to the letter of notification the Interested Party submitted that Section 27 did not assist the Applicant's argument stating that Sub-section (3) allows a member in their area of responsibility to take responsibility for matters under the Act. It averred that this is a technical issue which has nothing to do with the tender document itself or the evaluation process and to allow it would amount to being shackled by technicality which goes against the constitution and even the Act itself.

APPLICANT'S REPLY

In reply, the Applicant reiterated that Sections 66 and 34, as read with regulation 49 provide specific requirements so that if there is any evaluation where technical evaluation is provided for then that must be provided for in the evaluation process. It maintained that irregularities

in the tender document went to the root of the document and indeed affected the bid of the Applicant and that was why its bid was very high.

It argued that that the Procuring Entity's submission that part f - k of page 33 of tender document was the technical part amounted to an amendment from the bar insisting that the heading was very clear that those were mandatory examinations and had nothing to do with the technical specifications.

It argued that an evaluation of technical requirement provided for under statute cannot be restructured in a tender document in a way that it amends the law to make it not compulsory.

THE BOARD'S FINDINGS

The Board having carefully considered oral and written submissions of the parties and examined all the documents that were submitted to it has identified the issues for determination in this Request for Review as follows: -

- (i) Whether the tender document lacked the procedures and the criteria to be used to evaluate and compare the tenders contrary to Section 52 (3) of the Act.
- (ii) Whether the letter of notification was signed by an unauthorised official thereby offending Section 27 of the Act.
- (iii) Whether the evaluation of the tenders was flawed and not done in accordance with the evaluation criteria set out in the tender document contrary to Section 66 (2) of the Act.

1. **As to whether the tender document lacked the procedures and the criteria to be used to evaluate and compare the tenders contrary to the provisions of Section 52 (3) of the Act.**

The Board notes the following facts evident in the documents and submissions presented before it:

- a) The County Government of Nyandarua invited bids in Tender No. NYA/CG/PT/05/14-15 for Provision of Insurance Services. The current insurance policy had previously expired and had been extended to 30th March 2015.
- b) The tender was advertised on 27th February 2015 in *The Standard* and in *The Star* newspapers and on the county website.
- c) The tenders were opened on 13th March, 2015 in the presence of bidders and/or bidders' representatives.

- d) Twenty (20) firms including the Applicant submitted bids for the tender.
- e) The bids were evaluated by the Procuring Entity's Tender Evaluation Committee in three stages of preliminary evaluation, technical evaluation and financial evaluation.
- f) Six firms were found to have been non-responsive and were therefore disqualified at the preliminary evaluation stage.
- g) Fourteen firms, including the Applicant, were evaluated for technical responsiveness and four did not pass this stage.
- h) Ten bids, including the Applicant's bid, were subjected to Financial Evaluation.
- i) The Procuring Entity's tender evaluation committee recommended the award of the tender to Messrs Africa Merchant Assurance Company Limited at their quoted price of Kshs 13,722,546.00. The Applicant's bid price was Kshs 17,230,746.
- j) On 17th March 2015 the Procuring Entity's Tender committee approved the recommendation of the evaluation committee and awarded the tender to Messrs Africa Merchant Assurance Company Limited at a price of Kshs 13,722,546.00.
- k) The Procuring Entity notified the Applicant vide letter dated 18th March 2015 signed by Mr. Philip King'ori, Director of Supply Chain Management Service, on behalf of the County Secretary, that the Applicant's bid was not successful at the financial stage as its prices were not competitive.
- l) The Applicant filed this request for review on 27th March 2015.

In determining this issue the Board takes cognizance of the following Sections of the Act: -

Section 52 (3) "The documents shall set out the following:

- a) *The specific requirements prepared under section 34 relating to the goods, works or services being procured and the time limit for delivery or completion;*
- b) *.....*
- c) *The general and specific conditions to which the contract will be subject, including any requirement that performance security be provided before the contract is entered into;*
- d) *.....*
- e) *.....*

The Board observes that the tender was processed using the open tendering method. The Applicant submitted its bid along with other bidders on time. The Board further observes that the Applicant was not represented at the tender opening held on 13th March 2015 although it was free to attend. The Board also observes that the evaluation was conducted using criteria set out in Section IB on tender submission checklist and Section V on evaluation process of the tender document. The Board notes that the Applicant's tender was evaluated through all the stages of evaluation - preliminary, technical and financial. The Board

further notes that the Applicant participated in the tender without raising any objection on lack of clarity of the tender document or seeking clarification on any aspect of the document or evaluation criteria despite this avenue being open to the Applicant under Clause 2.4 of the tender document.

The Board finds that the tender documents prepared by the Procuring Entity were sufficient to enable the Applicant to submit a tender. The Board finds that the Procuring Entity utilised the standard tender document for procurement of insurance services issued by the Public Procurement Oversight Authority in January, 2007. The Board holds the view that a bidder who has submitted a tender based on a tender document and the tender has been evaluated in accordance with the criteria set out in the same tender document, that bidder, having not raised any objection on the architecture of the tender document cannot turn around when it loses the tender and claim that the tender document was flawed. The Board reasonably surmises that had the bidder been successful it would not have raised any issue against the tender document. Anyone who goes into a bidding process expects to win or lose but one who does not accept to lose in a fair contest is a sour loser. The Board frowns upon bidders who exhibit tendencies of a sour loser. This ground of request for review is therefore disallowed.

2. As to whether the letter of notification was signed by an official not authorised to sign thereby offending the provisions of Section 27 of the Act:

The Board observes that the Procuring Entity notified the Applicant vide letter dated 18th March 2015 and signed by Mr. Philip King'ori, Director of Supply Chain Management Service on behalf of the County Secretary, that the Applicant's bid was not successful at the financial stage as its prices were not competitive. The Board notes that the provision for notification of unsuccessful tenders is found at Section 67 (2) of the Act which states as follows: -

"At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful".

The Board notes that Section 67 (2) of the Act does not prescribe the designation of the person who signs the letter of notification. The Board however notes that responsibility for complying with the Act and regulations in matters of procurement is spelt out under Section 27 of the Act, which states as follows:

(1) "A public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurements.

(2) The accounting officer of a public entity shall be primarily responsible for ensuring that the public entity fulfills its obligations under sub-section (1).

(3) *Each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member, that this Act, the regulations and any directions of the Authority are complied with.*

(4)

Further, Regulation 7 of the Act states as follows:

“In addition to the responsibilities stipulated under Section 27 (2) of the Act, the accounting officer shall be responsible for:

- a)
- b)
- c) *Signing contracts for the procurement and disposal activities on behalf of the procuring entity for contracts entered into in accordance with the Act and these regulations;*
- d)

The Board finds that the responsibility for ensuring that the Act, the regulations and any directions of the Authority are complied with in respect of each of a procuring entity's procurements is vested in the accounting officer. It is the view of the Board that the accounting officer can ably discharge this responsibility under Section 27 of the Act without having to personally sign every document save for contracts for the procurement and disposal activities on behalf of the procuring entity. The Board therefore finds and holds that no section of the Act or regulation made under it was breached by the act of the Procuring

Entity to have the Applicant's letter of notification signed by an officer other than the accounting officer. The Board further finds that Mr. Philip King'ori, being the Secretary of the Tender Committee that adjudicated the tender subject of this request for review, was well placed to communicate the decision of the tender committee to the bidders. It is also the view of the Board that no prejudice was suffered by the Applicant as a result of the letter being signed by Mr. King'ori. The Board is therefore satisfied that this ground of the request for review cannot succeed.

3. As to whether the evaluation of the tender was flawed and not done in accordance with the evaluation criteria set out in the tender document contrary to the provisions of Section 66 (2) of the Act.

The Board notes that the tender document provided a summary of the evaluation process at page 33 which formed the evaluation criteria adopted by the Procuring Entity's Tender Evaluation Committee. The summary of the evaluation process provided for evaluation of duly submitted tenders along three main stages which were given as Preliminary Evaluation (Part I) and Financial Evaluation (Part III). Technical Evaluation (Part II) was missing from the page of summary of the evaluation process. Counsel for the Procuring Entity submitted that the criteria for technical evaluation was listed under Part I in error and that all the items starting from (f) to (k) were technical evaluation items.

The Board having perused the evaluation report notes that the Procuring Entity's Tender Evaluation Committee evaluated the tenders in three stages of preliminary evaluation, technical evaluation and financial evaluation. The Board takes cognizance of the provisions for evaluation of tenders found at Section 66 (2) of the Act, which states as follows: -

Section 66 (2) "The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used."

The Board notes that the tender document set out the procedure and criteria for evaluation of tenders at section V (page 33) of the tender document. The evaluation stages were preliminary evaluation, technical evaluation and financial evaluation. The Board notes that the summary of evaluation process page did not show the heading for technical evaluation which the Board finds to be an act of carelessness on the part of the Procuring Entity. The Procuring Entity must ensure that, in future, tender documents are properly and correctly laid out for the bidders to be able to comply with its requirements without difficulty.

The omission did not however affect the evaluation process and neither was any bidder prejudiced. Indeed the Applicant submitted its bid which was passed at both the preliminary evaluation stage and the technical evaluation stage and failed at the financial evaluation stage. The Board has also pointed out in its findings in the preceding grounds that the Applicant did not seek clarification before the date for submission of tenders on the matter as required under clause 2.4 of the tender document.

The Board also takes note of the provision of Regulation 16 (5) (b) as amended, which states as follows:

“.....
*(b) evaluate the tenders within a period of fifteen days after
the opening of the tenders; and*
.....”

The Regulations do not specify the minimum period for an evaluation. The Board therefore cannot infer wrongdoing on the Procuring Entity for supposedly hurrying the process by conducting the evaluation in five days. The explanation by the Procuring Entity that it needed to have a policy in place since the existing policy was expiring on 31st March 2015 is plausible.

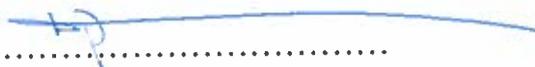
The Board finds that the evaluation of tenders was done in accordance with the criteria set out in the tender documents and therefore Section 66 (2) of the Act was not breached. This limb of the request for review also fails.

DECISION OF THE BOARD

In exercise of the powers conferred upon the Board by Section 98 of the Act, the Board makes the follows orders: -

1. The Request for Review filed by the Applicant on 27th March 2015 in respect of Tender No. NYA/CG/PT/05/14-15 is hereby dismissed.
2. The Procuring Entity is directed to proceed with procurement process to its logical conclusion.
3. The Board makes no orders as to cost.

Dated at Nairobi on this 24th day of April, 2015


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CHAIRMAN

PPARB


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SECRETARY

PPARB