

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 36/2004 OF 30TH AUGUST, 2004

BETWEEN

MOMENTUM INSURANCE BROKERS (APPLICANT)

AND

OFFICE OF THE PRESIDENT (POLICE) (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of the Office of the President (Police) (Procuring Entity) dated 9th August 2004 in the matter of Tender No. KPAW(6) 2004-2005

BOARD MEMBERS PRESENT

1. Mr. Richard Mwongo (Chairman)
2. Prof. N. D. Nzomo
3. Eng. D. W. Njora
4. Mr. Adam S. Marjan
5. Ms Phyllis Nganga
6. Mr. John Wamaguru
7. Mr. Kenneth N. Mwangi (Secretary)

BOARD'S DECISION

Having heard the representations of the parties and the Interested Candidates herein and having considered the information in the documents availed to it, the Board hereby makes its decision as follows:-

BACKGROUND

The tender herein was advertised on 31st May, 2004, in three national dailies. The tender was for provision of Aviation Insurance for the Kenya Police Department (Air Wing).

Tenders were initially scheduled to close on 29th June, 2004 but the closing was duly extended to 8th July, 2004 on account of an amendment to the tender documents. Eighteen bidders bought the tender document and fourteen submitted their completed bids. Tenders were opened in the presence of tenderers on 8th July, 2004, at 10.00 a.m., immediately after closing time.

The tender evaluation was conducted in three stages as follows;

Stage 1 Determination of Responsiveness

Stage 2 Technical Evaluation

Stage 3 Commercial Evaluation

The following firms were disqualified at stage 1 of evaluation.

1. APA Insurance Company
2. Kenbright Insurance Brokers
3. Getrio Insurance Brokers
4. Utmost Insurance Brokers
5. Momentum Insurance Brokers – (the Applicant)

6. Disney Insurance Brokers
7. Alexander Forbes Insurance Brokers
8. Astra Insurance Brokers

The following five firms passed the first stage and were subjected to Technical Evaluation, stage 2.

1. Consolidated Insurance Brokers
2. Prime Movers Insurance Brokers
3. Sedgwick Kenya Insurance Brokers
4. Assured Insurance Brokers
5. Canopy Insurance Brokers

At this stage, Consolidated and Assured were disqualified leaving the following firms to undergo Commercial Evaluation at stage 3:

1. Prime Movers Insurance Brokers
2. Sedgwick Kenya Insurance Brokers
3. Canopy Insurance Brokers

The summary of premium quotes for these three bidders is as follows:

	<u>Total Premium</u>
Prime Movers Insurance Brokers Ltd.	- 49,350,581
Sedgwick Kenya Insurance Brokers Ltd.	- 44,881,334
Canopy Insurance Brokers Ltd.	- 45,085,619

Upon the recommendation of the Technical Evaluation Committee, the Tender Committee at its Meeting No. 2/2004-2005 held on 9th August, 2004, determined Sedgwick Kenya Insurance Brokers as the lowest evaluated bidder and awarded them the tender.

The Appeal

The Applicant has filed an appeal against the award of the Tender Committee of the Procuring Entity. Since there is only one ground of appeal, we set it out in full hereunder:

“Under the Special Conditions of Contract in the Tender Document, brokers were to propose Reinsurers who must be registered with the Commissioner of Insurance for the last five years. The Reinsurer proposed by Sedgwick Kenya Insurance Limited is not registered with the Commissioner at all. In breach of Regulation 30(4).”

Regulation 30(4) concerns examination and evaluation of tenders and provides as follows:

“Subject to sub-regulation (5) the procuring entity may regard a tender as responsive only if it conforms to all requirement set forth in the tender documents.”

During the hearing, Mr. Gakuru, Advocate for the Applicant, referred the Board to Section D Special Conditions of Contract in the Tender Documents. In particular, he highlighted the parts on Eligibility of Bidders items A.1 and A.5.

Item A covers underwriters and provides as follows;

“Where brokerage firms propose underwriters and re-insurers, they must attach the following information when submitting their bids. Otherwise the underwriters bidding:

1. *Must be legally registered by the Commissioner of Insurance for the last five years*
- 2.....
5. *Must submit a list of their proposed Reinsurers and indicate as evidence the period the Reinsurers have been in Aviation Insurance by providing evidence of their certificate of registration, their country of origin and their clients."*

The Applicant's key argument was that under Sec. 20(2) of the Insurance Act, Cap 487, anyone wishing to carry on reinsurance business must do so with a company registered in Kenya and the reinsurer must be under a current treaty approved by the Commissioner of Insurance. Contravention of this section amounts to a criminal offence under Sec. 20(4) of the Insurance Act.

Further, Mr. Gakuru pointed out that there were only two insurance companies or underwriters involved in the tender. APA Insurance Co. Ltd. (hereinafter APA) and AMACO Ltd. (hereinafter AMACO). In the case of APA, 12 brokers submitted bids supported by APA, whilst APA itself also tendered directly. In the case of AMACO, it supported a bid by Sedgwick Kenya Insurance Brokers. These facts are not disputed. The concern was whether AMACO had a reinsurance treaty issued by the African Aviation Pool approved by the Commissioner of Insurance for the current period and, if so, how could the Pool, with which APA also had a treaty, offer different insurance rates? Mr. Gakuru pointed to the tender opening register showing that APA was offering the cover at Sh.49,350,581, via the Pool whilst AMACO was offering cover at Sh.44,881,334 and that this was highly improbable.

In the Applicant's submission, Sedgwick, the successful tenderer, did not submit the name of its reinsurer. Otherwise, it must have circumvented the

reinsurance treaty so as to undercut everyone else, with the aim of avoiding fair competition between the brokers.

The Applicant and Interested Candidates requested that we peruse the tender documents carefully in order to resolve this issue.

The Procuring Entity, on its part, argued that upon opening the tender documents the prices quoted by each bidder were registered and not all the figures from bids supported by APA under the Pool were similar. The items recorded at tender opening were referred to on this point.

The Procuring Entity also pointed out that during Technical Evaluation, since most bidders did not comply with Condition A.1 and A.5 in Section D Conditions of Contract, they sought advice from the Commissioner of Insurance on the provisions. In the Commissioner's reply of 6th August, 2004, he indicated that:

- The Insurance Act does not require reinsurance firms to register with his office.
- Reinsurance firms are required to obtain approval to their treaties with insurance companies.
- That the requirement of Condition A.1 and A.5 was superfluous.

The Procuring Entity therefore decided that breach of Condition A.1 and A.5 had no material effect and were minor deviations. As such no tenderer was penalised on the ground of non-compliance therewith.

Further, the Procuring Entity pointed out that the Commissioner had indicated that the reinsurers for both AMACO and APA were not registered with the Commissioner but both had approved arrangements with the underwriters for

the year 2004. As such, the reinsurance arrangements for both underwriters were on the same footing.

We have considered the parties representations carefully. In our view the main issue for determination is whether Sedgwick Insurance brokers Ltd provided a reinsurer who was registered with the Commissioner or had approved treaty arrangements.

Before we proceed further, there are two observations that we find necessary to make. First, that the Applicant has no real complaint concerning the tender process itself, except that it desires satisfaction that the reinsurer for Sedgwick, if any, has complied with the law. Second, we make the observation that the question of compliance with Sec. 20 of the Insurance Act is, strictly speaking, not a matter on which this Board has authority to adjudicate and grant remedies under Reg. 42(5). That is to say, the primary role of this Board is to adjudicate upon grievances and complaints concerning the procurement process itself under the Regulations, and not compliance or non-compliance with other statutes.

We have perused the original tender documents and proceedings of the Procuring Entity in this matter.

The issue of pricing by bidders supported by the two underwriters, we note from the tenders as follows. Out of the 12 bids underwritten by APA Insurance, only the following four (4) bids contain a similar final price quote to that of APA Insurance. These are:

Chancery Insurance Brokers	-	49,350,581/=
Prime Insurance Brokers	-	“
Assured Insurance Brokers	-	“
Astra Insurance Brokers	-	“

Even the quote for the Applicant as contained in its form of tender Sec. G Tender Form and Price Schedule was Shs.48,119,280/=, whilst that quoted to them by APA in the Executive Summary shows a quote of 49,350,581/=. As such the Applicant's allegations on undercutting and arguments about similarity of prices from the same reinsurer cannot stand.

On the question of the reinsurer proposed by Sedgwick we note the following. The tender document for Sedgwick contains a Memo from J.C. Izgebu of African Aviation Pool addressed to Africa Merchant Ass. Co. dated 16th June, 2004 quoting the Kenya Police Airwing 2004 renewal. The Memo is similar to one contained in the original APA tender. We quote the Memo as follows:

"We refer to you e-mail of 15th June, 2004 and the attached documents in respect of the above and please find below our terms:

<i>Hull Rate</i>	:	<i>2.60%</i>
<i>Flat Discount</i>	:	<i>5%</i>
<i>TPLL (Kshs.60,000,000) a.oa</i>	:	<i>Kshs.61,200</i>
<i>PLL (Kshs.5,000,000)</i>	:	<i>Kshs.540 per pas</i>
<i>Deductible</i>	:	<i>US\$ 50,000 or Kshs.500,000/=</i>
<i>Crew Personnel Accident</i>	:	<i>1.00% (inclusive of Medical Expenses)</i>
<i>PTD and TT Disab</i>	:	<i>0.75%</i>

Loss of Licence Cover (Permanent and Temporary Total Disablement)

<i>Age</i>	<i>Occupation</i>	<i>Capital Sum (Per person)</i>	<i>Rate</i>
<i>Up to 40</i>	<i>Pilots & Licensed Engineers</i>	<i>Kshs.1,000,000/=</i>	<i>0.80%</i>
	<i>Trainee Pilots & Others</i>	<i>Kshs. 700,000/=</i>	<i>0.80%</i>
<i>41 - 55</i>	<i>Pilots & Licensed Engineers</i>	<i>Kshs.1,000,000/=</i>	<i>2.25%</i>
	<i>Trainee Pilots & Others</i>	<i>Kshs. 700,000/=</i>	<i>2.25%</i>

The NCBOR on Hull is 10%.

The above terms are subject to premium payments within 30 days from inception.”

In the Sedgwick tender there is also an original letter from AMACO in which, amongst other matters, are the following:

“5....

Note this risk will be placed with African Aviation Pool – Nigeria whose securities are:

- Lloyds Syndicates
- GE Frankona
- Hannover Re

6. Non-claim Bonus (NCBOR) – Note that no claim has been paid or reported within the period 2002-2003 and 2003-2004 then the NCBOR collected will be 10% of the Hull Premium for each period.

In answer to the main issue for determination it is clear that Sedgwick provided a reinsurer, namely African Aviation Pool. Evidence was also given by the representative of the Commissioner of Insurance who the Board had requested to attend to give expert evidence. From that evidence we are satisfied that the Insurance Act does not require the reinsurers to be registered. We are also satisfied by the Commissioner’s letters confirming that both APA and AMACO have approved arrangements with reinsurers, and that the contentious requirement in the tender document were, to that extent, superfluous.

We have one further observation to make. This is on the Procuring Entity's request for waiver on the 21 days notice to sign the contract. The matter was raised by the Procuring Entity, and rightly commented upon by the Applicant's counsel.

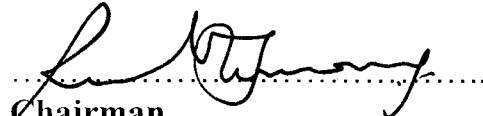
The information was that soon after award of the tender the Procuring Entity sought a waiver of the 21 days appeal window to allow one aircraft to be covered to enable the carrying out of national security duties. This was granted by the Treasury. Upon approval, the Procuring Entity then extended the cover to all 12 aircraft purportedly on the same national security grounds.

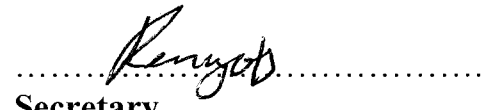
We wish to reiterate that the Regulations do not provide for interference in the procurement process by any person or authority outside the Tender Committee. In this case, the Treasury was wrong to grant the authority requested for prior to execution of contract. The Board is zealous concerning the issue of confidentiality and non-interference, particularly in respect of safeguarding the tender evaluation process.

In this case, however, we note that the actions engaged in by the Treasury were after tender adjudication and the award. Further, the appeal was filed as no contract was signed although evidence was given that provisional temporary cover was provided for all 12 aircraft. Taking into account the nature of work of the Procuring Entity, particularly the Kenya Police Air Wing and the explanation given as to national security, we are satisfied that the interference did not lead to prejudice in the tender adjudication or appeal process.

Taking into account all the foregoing matters we hereby dismiss the appeal and order that the tender process be concluded.

Delivered at Nairobi this 29th Day of September, 2004.


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Chairman
PPCRAB


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Secretary
PPCRAB