

SCHEDULE 1

FORM 4

**PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS
BOARD**

APPLICATION NO. 38/2006 OF 11TH AUGUST 2006

BETWEEN

LEON INSURANCE BROKERS LIMITED... APPLICANT

AND

CITY COUNCIL OF NAIROBI... PROCURING ENTITY

Appeal against the award of the Tender Committee of the City Council of Nairobi, Procuring Entity as per the notification of award letter dated the 21st day of July 2006 in the matter of tender number 27/DOP/C T/2006-2007 for provision of general insurance cover for the financial year 2006-2007.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. J. W. Wamaguru	-	Member
Mr. P. M. Gachoka	-	Member
Mr. J. W. Wambua	-	Member
Mr. Kenneth N. Mwangi	-	Secretary, Director, Public Procurement Directorate

IN ATTENDANCE

Mr. I K. Kigen - Secretariat
Mr. D. M. Amuyunzu - Secretariat

PRESENT BY INVITATION FOR APPEAL NO. 38/2006

Applicant, Leon Insurance Brokers Limited

Mr. Kiragu Kimani - Advocate, Hamilton Harrison and Matthews
Mr. Edwin Karwanda - Advocate, Hamilton Harrison and Matthews
Mr. J.G. Murichu - Director
Mr. Moses Okello - Manager

Procuring Entity, City Council of Nairobi.

Mr. E.N. Omotii - Advocate, E.N. Omotii and Company Advocates
Mr. M.N.Ngethe - Advocate
Mr. Peter Gichuhi - Legal Clerk
Ms. Irene Maina - Pupil
Mr. G.K.Njamura - Director of Procurement
Mr. George Mwangi - Chief Technical Officer

Interested Candidates

Mr. Anthony Thuo - Advocate, Prime Mover Insurance Brokers
Limited
Mr. T.N.Ngahu - Managing Director, Prime Mover Insurance
Brokers Limited.

- Mr.L.M.Mochai - General Manager, Consolidated Insurance Brokers.
- Mr. D.N.Njenga - General Manager, Getrio Insurance Brokers
- Ms. Njeri Marambu - Assistant Manager, CIC Insurance Company.
- Mr. Isaac Maina - Manager, Kenya Alliance
- Mr. Isaac Kitur - Advocate, Standard Assurance Company
- Mr. Kiplangat Kitur - Advocate, Standard Assurance Company
- Mr. Simon Musembi - Underwriter Manager, Standard Assurance Company
- Mr. Davies Kairu - Manager, Risk Management Insurance Brokers Limited.

BOARD'S DECISION

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

BACKGROUND OF AWARD

The tender was advertised in the local dailies on 3rd May 2006 and opened on 2nd June 2006. At tender opening, 9 bids were opened. The record of tender opening is as shown below:

No.	Firm	Amount quoted Kshs.	Tender validity
1.	Getrio Insurance Brokers	40,601,617	150 days
2.	Prime Movers Insurance	37,173,774	30-09-2006
3.	Mercantile Insurance	-	-
4.	Consolidated Insurance Brokers	-	23-10-2006
5.	Madison Insurance Brokers	39,125,923	29-09-2006

6.	Leon Insurance Brokers Limited	37,811,397	Bankers Cheque
7.	Risk Management Insurance Brokers Limited	-	02-09-2006
8.	CIC Insurance	41,351,617	29-10-2006
9.	Standard Assurance	54,746,014	30-06-206

The evaluation exercise started on 15th June 2006. During evaluation for responsiveness, the following firms were disqualified for the various reasons given against each:

1. Mercantile Insurance Brokers Limited did not purchase the tender documents from the City Council of Nairobi.
2. Consolidated Insurance Brokers did not avail a Certificate of Good Conduct for its Directors and further, did not provide a re- insurance programme.
3. Madison Insurance Company Limited did not have the following: a certificate of membership of the Association of Kenya Insurers, clearance letter from NHIF, Certificate of Good Conduct for its Directors, and letter of recommendation from the Commissioner of Insurance.
4. Risk Management Insurance Brokers Limited did not have the following: a profile of its Directors, Certificate of Good Conduct for its Directors, letter of recommendation from the Commissioner of Insurance, a re-insurance programme, did not fill the form of bid and failed to disclose its Underwriter.

5. The Co-operative Insurance Company Limited did not have a letter of recommendation from the Commissioner of Insurance.
6. Standard Assurance Company Limited did not have the following: Certificate of Good Conduct for its Directors and recommendation by the Commissioner of Insurance. It gave a bid bond validity period of 30 days instead of 120 days.

Only three firms namely Getrio Insurance Brokers Limited, Prime Mover Insurance Brokers Limited and Leon Insurance Brokers Limited proceeded to the next stage of evaluation.

The detailed evaluation was to be carried out on 19th June 2006 based on the following parameters:

1. Mega Risk (fire premiums)
2. Motor Premiums Undercut
3. Checking whether bidders tendered for all policies
4. Lowest valid bidder

The Evaluation Committee meeting of 19th June 2006 observed the following:

- a) That Getrio Insurance Brokers Limited had undercut on all motor premiums as compared to the Commissioner of Insurance recommendations on Motor premium rates for the year 2006.

- b) That Prime Mover Insurance Brokers Limited had given a tender validity period of 120 days in contrast to the tender document requirement of a tender validity period of 150 days.

The Evaluation Committee recommended that the award be made to Leon Insurance Brokers Limited at its tender price of Kshs. 37,811,397.00 “being the lowest valid bidder.”

The tender committee held two meetings. The first was held on 6th July 2006 at which it noted the following:

- (i) That the 30 days tender security validity period over and above the 120 days price validity period was to allow for contract processing.
- (ii) That there was more than ample time to process the contract before the expiry of the 120 days price validity period.
- (iii) That if the lowest evaluated bidder was to be considered the savings would be approximately Kshs. 600,000.
- (iv) Further, the failure by Prime Mover Insurance Brokers Limited to provide the 150 days tender security was considered as a minor deviation pursuant to Clause 32.4.

- (v) That there was no confirmation from the Commissioner of Insurance that all the technically recommended firms had the capacity to undertake that kind of work.

Arising from the above observations, the tender committee resolved that confirmation be sought from the Commissioner of Insurance on the economic viability of the recommended firms before the next Tender Committee meeting.

The second tender committee meeting was held on 17th July 2006. At the meeting the committee noted that the Commissioner of Insurance had given the three firms a “clean bill of health.”

The Commissioner had also noted that the Insurance Act now requires that premiums under both Motor and Fire be paid directly to the Insurance Company and not the Insurance Broker.

The Tender Committee awarded the tender to Prime Mover Insurance Brokers Limited at a total sum of Kshs. 37,173,775 only for the period stated in the tender document, which was one year. It also resolved that premia be paid directly to the Underwriters.

Letters of notification of award were written to all the bidders on 21st July 2006.

THE APPEAL

At the hearing, the Applicant was represented by Mr. Kiragu Kimani, Advocate, while the Procuring Entity was represented by Mr. E.N. Omotii, Advocate. The

interested candidates were represented by Mr. Anthony Thuo, Advocate, Mr. Kiplangat Kitur, Advocate and Mr. D.N. Njenga.

The Appeal was lodged on 11th August 2006 by Leon Insurance Brokers Limited against the award of the tender process by the City Council of Nairobi for the provision of General Insurance Services for the financial year 2006-2007.

The Applicant has sought prayers that the Board should :

1. Set aside the award of the Procuring Entity.
2. Direct the Procuring Entity to proceed lawfully by awarding the tender to the Applicant, and
3. Revise the unlawful decision of the Procuring Entity and substitute it with a decision to award the tender to the Applicant.

At the hearing the Applicant submitted that the whole Appeal was based on four breaches of the Regulations. These were presented as breach of Regulation 27 on bid security, Regulation 30(6)(c) on responsiveness, Regulation 10(1)(c) and 10(2) on release of a summary of evaluation details, and Regulation 31(2) on unsolicited communication during tender evaluation.

Breach of Regulations 27 and 30(6)(c).

In respect of this consolidated complaint, the Applicant submitted that the tender notice and documents issued to bidders required that bids be accompanied by tender security. It argued that Clause 23 of the tender document provided that each tenderer should furnish a bid security of Kshs. 1,000,000 either in form of a banker's cheque or a guarantee from a reputable bank. Further, the standard tender

security form, which was an integral part of the tender document provided that the bid security was to remain in force up to, and including 30 days after the bid validity period. This translated to a requirement that the bid security should be in force for 150 days. It submitted that under Clause 22 of the tender document, the bid validity period was to be 120 days from the date of tender opening.

The Applicant further submitted that Clause 23.2 of the tender document required that the Procuring Entity reject any bid of a candidate whose bid security was not acceptable. Accordingly, the tender of Prime Mover Insurance Brokers Limited should have been rejected since its security was in force for 120 days only, rendering it unacceptable.

It argued that Regulation 27(1) was worded in mandatory terms pursuant to which a bid security, once requested by the Procuring Entity, should have been within the limits specified in the tender document. Failure by Prime Mover Insurance Brokers Limited to observe the limits was a fatal breach of this Regulation.

Finally, the Applicant submitted that it was the lowest responsive bidder yet it was not awarded the tender. It argued that the Evaluation Committee had recommended it for award having faulted the bid of Prime Mover Insurance Brokers Limited who were nevertheless declared the winner by the Tender Committee.

In response, the Procuring Entity denied the allegations, stating that the tender was awarded to the lowest responsive bidder. It submitted that the Applicant had never been recommended by the Tender Committee to be awarded the tender as alleged. It submitted that the Applicant had been relying on press reports which amount to hearsay.

Further, the Procuring Entity submitted that there was no breach of Regulation 27 or clause 23.2 of the tender document in relation to the tender security of the successful bidder. It submitted that the status of the security presented a minor deviation, which it dealt with in the manner permitted by Regulation 30(5).

The Board has observed that clause 22.1 of the tender document and paragraph 4 of the form of bid provided that bids were to be valid for 120 days from the date of tender opening. The tender security form, which also formed part of the tender document, had a clause, which required that the tender security remain in force up to and including 30 days after the period of tender validity. The successful bidder's tender security was valid up to 30th September 2006, representing a validity of 120 days from the date of tender opening. This was contrary to the requirement of 150 days stipulated in the standard tender security form.

The Board has further noted that the tender document had some ambiguity in it, which resulted in the bidders interpreting the bid security provision differently. The form of bid on which bidders were to indicate their total price had a footnote, which read as follows

“the bidder may complete either this form or Bank guarantee as a form of bid or other acceptable security”

Some of the bidders understood this instruction to mean that the bid security was to be in the terms stated on the form of bid.

In addition, the tender security form had a clause that read as follows “ the guarantee will remain in force up to and including thirty (30) days after the period

of tender validity, and any demand in respect thereof should reach the Bank not later than the above date.” The Board has noted that this ambiguity could have been the reason behind bidders having securities whose period of enforcement greatly varied from each other as manifested in the extracts of the Minutes of the Tender Committee shown below:

No.	Bidders name	Amount quoted Kshs.	Tender validity period
1.	Getrio Insurance Brokers	40,601,617	150 days
2.	Prime Mover Insurance Brokers Limited	37,173,774	30-09-2006(120 days)
3.	Mercantile Insurance	-	-
4.	Consolidated Insurance Brokers	-	23-10-2006(143 days)
5.	Madison Insurance Brokers	39,125,923	29-09-2006(119 days)
6.	Leon Insurance Brokers Limited	37,811,397	Bankers cheque (180 days)
7.	Risk Management Insurance Brokers Limited	-	02-09-2006(92 days)
8.	CIC Insurance	41,351,617	29-10-2006(149 days)
9.	Standard Assurance	54,746,014	30-06-2006(28 days)

Whereas the Procuring Entity argued that this should be treated as a minor deviation under Regulation 30(5), the Board is not convinced that this should not be the case. Regulation 27(1) is clear that once a Procuring Entity opts to require bidders to provide tender security, then it is mandatory that the tender securities submitted must be within the limits specified. Further, the manner in which this requirement was presented was subject to many interpretations and was misleading to the bidders. The Board therefore finds that Regulation 27(1) was breached.

The Board has further observed that Regulation 30(6) (c) provides that the Procuring Entity shall not accept a tender that is non-responsive. We find that the

tender document was ambiguous and that the determination of responsiveness based on such a document could not have been objective.

Accordingly this ground of appeal succeeds.

Breach of Regulations 10(1)(c) and 10(2).

The Applicant argued that the Procuring Entity failed to supply it with information on the identity and details of the successful bidder and a summary of the evaluation report as requested in its letter of 28th July 2006.

In response, the Procuring Entity argued that the Applicant was not entitled to any information pursuant to Regulations 10(1) and (2), since the request was being made prior to the signing of the contract agreement contrary to Regulation 31(2).

The Board noted that Regulation 10(2) provides that the Procuring Entity may release to the bidders a summary of the following specified information in Regulation 10(1)(c):

“.... the evaluation stipulated criteria and applied, and a summary of the evaluation and comparison of tenders, proposals or quotations received...”

This information may be released once the proceedings have resulted in a contract or have been otherwise terminated. Regulation 31(2) prohibits tenderers from making any unsolicited communications to the Procuring Entity until the contract is signed. It is clear that the Regulations open a window to bidders to lawfully seek only the specified information in Regulation 10(1)(c) once a contract has been formed pursuant to Regulation 33(2).

We however note that Regulation 10 does not specify the time limit for releasing such information, but it is clear that it must be given within a reasonable time.

Breach of Regulation 31(2)

In this ground, the Applicant alleged that there was a breach of Regulation 31 (2) as well as clauses 33.1 and 33.2 of the tender document. It argued that Prime Movers Insurance Brokers Limited wrote to the Procuring Entity on 21st June 2006 complaining about certain requirements of the tender document after the tenders had been opened. It further argued that the said letter was intended to influence the evaluation of the tenders to waive certain requirements for the benefit of the successful bidder.

In response, the Procuring Entity submitted that there was no breach of the Regulations by the writing of this letter. It argued that the letter did not amount to unsolicited communication as it was ignored and therefore did not influence the Procuring Entity.

Further, the Procuring Entity disclosed that the Applicant had also written an unsolicited communication dated 7th June 2006 requesting the Procuring Entity if it could substitute its banker's cheque with a guarantee. The Procuring Entity had produced the said letter in the bundle of documents submitted to the Board which read as follows:

"07/06/06

*The Town Clerk
City Council of Nairobi
P.O. Box 30075-00100
Nairobi*

Dear Sir

***REF: TENDER NO. 27/DOP/CT/2006-07
PROVISION OF INSURANCE BROKERAGE SERVICES***

We refer to the above tender, which was submitted to your offices on 2nd June 2006.

We were unable to obtain a Bid Security bond from our bank as one of the signatories was not available at the time and to avoid being late in submission of the tender, we submitted a Banker's cheque for Kshs. 1 million which was the only option as per your requirement in the tender document.

The purpose of writing to you is to request you to allow us to replace the Banker's cheque with the Bank's bid bond, which has already been issued to us. This is however, if the replacement will not be in contravention of the Tender conditions.

We look forward to hearing from you.

Yours faithfully,

Signed

*J.K MWANGI
MANAGING DIRECTOR"*

The Board has also read the letter in which Prime Mover Insurance Brokers Limited expressed its dissatisfaction with certain elements of the tender documents. The letter read as follows:

"21st June 2006

*Director of Procurement
City Council of Nairobi,
P.O Box 30075-00100
NAIROBI*

Dear Sir,

REF: TENDER NO. 27/DOP/CT/2006-07
PROVISION OF GENERAL INSURANCE BUSINESS

We refer to the above referenced matter and wish to comment as hereunder:

1. The tender referenced as No 27/DOP/CT/2006-07 Provision of General insurance Business has the following anomalies:

a) Item No 22 Bid Validity

In contrast with the opening date of 2nd June 2006 and the Renewal date of General Insurance policies that is 1st July 2006, makes the requirement of 120 Days to be of no basis. Due to the following pertinent issues: -

(i) The provision of performance bond as per item 23.4 of the tender renders the bid security period of 120 days irrelevant and the requirement as self-defeating.

In essence taking the opening date of the tender of 02/06/2006 and the commencement date of the cover being 01/07/2006, the actual bid validity would have at most been 30 days, plus 30 days beyond the validity period making it 60 days in total.

(ii) Further it is important to take note that a Performance bond as highlighted by item 23.4 and clarified by item No 24, normally retires the bid security naturally, rendering it irrelevant as the contract will now have been assumed by the Underwriter who will have committed to perform the contract for a period of 365 days (one year) by executing the performance as per item 24.0 of the tender document.

By this we wish to state that the bid requirement of 150 days points a lot of mischief on the part of the author of the document as the City Council of Nairobi is not exposed in any way by non-performance by the binder. This clearly sets out a fertile ground for an appeal and consequent litigation.

It is important that The City Council of Nairobi set its records straight and should know that a performance bond when introduced into a tender document is paramount than a bid security.

b) Secondly the issue of mega risk should be noted clearly.

The actual premium should be as hereunder: -

Total Sum insured	11,626,342,848
Less	<u>30,000,000</u> , -for swimming pool
	<u>11,596,342,848</u>

Recommended rate 2.192 % = **Kshs 25,419.184/-**

Swimming pool rate 0.25 % as this can only be affected by earthquake and the recommended rate is 0.25%

Sum insured Kshs 30,000,000 recommended rate 0.25%=Kshs. 7, 500/-

Total Premium	=	25,426,684
Taxes (.45%)	=	114,420
S/ Duty	=	<u>40</u>
		<u>25,541,144</u>

It is paramount to note that any binder with the premium below the figures shown as Kshs 25,541, 144 have gone against the requirement stipulated by the mega risks rates as per the Commissioner of Insurance.

Note that if the Council had previously been charged below the shown figure it has been flouting the recommended mega risks rates, or has been misled into calculating the resultant premiums as per the recommendations or the commissioner or insurance on the mega risks rates.

In conclusion Sir, we on our part are doing this in good faith.

We are only pointing the anomalies in the tender, which needs to be rectified now and in the future.

On our part as bidders for both tenders we are only cautioning that the above stated anomalies with the exclusion of the issue on mega rates should not be used against any binder.

Given the history of this account we wish to retaliate that we should all endeavor to avoid appeals and litigations.

Yours faithfully,

Signed

T.N. Ngahu
Managing Director

CC Town Clerk, Nairobi City Council
 Permanent Secretary- Ministry of Local Government
 Chairman Finance Committee
 City Treasurer -Nairobi City Council
 Commissioner of Insurance
 Director of Public Procurement”

The Board observed the following regarding the two letters:

1. The letter by the Applicant sought to replace its bank guarantee with a bid security.
2. The letter by Prime Mover was written on 21st June 2006 two days after completion of the tender evaluation.
3. Prime Mover asserted that there was no rationale for the bid security validity period to be any longer than the tender validity period. It had argued that this requirement was irrelevant, mischievous and self-defeating since the submission of performance bond would retire the bid security once the contract was entered into.
4. On Mega risks, Prime Mover it argued that any candidate who had quoted below the recommended rate of Kshs. 25,541,144 had gone against the requirements of the Commissioner of Insurance and if the Procuring Entity had been charged such amounts previously then it had been flouting the recommended rates.

As earlier pointed out, Clauses 33.1 and 33.2 provided that no tenderer was to contact the Procuring Entity on any matter from the time of tender opening to the award, and if this happened then the bid of such a candidate was to be rejected.

The letter by the successful bidder clearly commented on the issues under evaluation and matters to be considered when making an award, contrary to Regulation 31(2) and the aforesaid clauses.

The Board finds the writing of the letter by the successful bidder irregular and accordingly this ground succeeds.

However, the writing of the unsolicited letter by the Applicant was equally irregular.

Losses suffered

The Applicant alleges it had suffered loss and damage through the loss of its effort put in the preparation and that it had been deprived of a legitimate right to be awarded the tender having been the lowest responsive bid.

The Board rules that losses suffered at this time of tendering are considered as normal business risks taken by bidders. At the time of tendering no one is assured that it will win the tender. Further, the tender advertisement and the tender document, clause 36 provided that the Procuring Entity was not bound to accept any tender and that bidders would meet the cost associated with preparation of their bids.


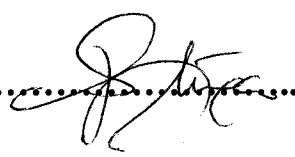
The Board observed that the whole process was marred by irregularities. In addition, the submission by the Applicant that it had obtained unsigned minutes of both the Evaluation Team and the Tender Committee seriously compromised the confidentiality of the process. The Board therefore considers that this is not an appropriate case for granting the Applicant's prayers to be awarded the tender.

The Board further observed that Clause 18 of the tender document providing for the Procuring Entity and the tenderers to invoke an informal dispute resolution

mechanism during the tender process was contrary to the Regulations and ought not to have been included in the Instructions to Tenderers.

Taking into account all the above matters, the Board annuls the award of the tender to Prime Mover Insurance Brokers Limited. The Board orders the Procuring Entity to re-tender for the Provision of General Insurance Services using restricted procurement method limited only to the bidders who participated in this tender. In order not to expose the Procuring Entity's assets to risk the Board further orders the Procuring Entity to extend the contract in force at the end of the previous financial year, for 90 days from the date hereof.

Delivered at Nairobi this 8th day of September 2006

CHAIRMAN..........**SECRETARY**..........
PPCRAB.....**PPCRAB**

