

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 26/2009 OF 21ST JULY, 2009

BETWEEN

KENBRIGHT INSURANCE BROKERSAPPLICANT

AND

**KENYA MEDICAL
TRAINING COLLEGE..... PROCURING ENTITY**

Appeal against the decision of the Tender Committee of the Kenya Medical Training College (KMTC) dated the 8th day of July, 2009 in the matter of Tender for the Provision of Medical Insurance Cover - Tender No. KMTC/7/2009-2010.

BOARD MEMBERS PRESENT

Mr. P.M Gachoka	-	Chairman
Mr. Sospeter Kioko	-	Member
Eng. Christine A. Ogut	-	Member
Amb. Charles M. Amira	-	Member
Ms. Judith Guserwa	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Ms. Kerina A. Rota	-	Secretariat
Mr. Gilbert Kimaiyo	-	Secretariat

PRESENT BY INVITATION

Applicant, Kenbright Insurance Brokers Ltd

- Mr. Chacha Odera - Advocate, Oraro and Company Advocates
- Ms. Daisy Ogembo - Advocate, Oraro and Company Advocates
- Mr. Theodore Okoth - General Manager
- Mr. Kesse Korowu - H. Manager
- Mr. Alex Obondo - Technical Director

Procuring Entity, Kenya Medical Training College (KMTC)

- Mr. Onsando Osiemo - Advocate, Onsando Okoth and Otieno Advocates
- Mr. Silas E. Njeru - Procurement Manager
- Mr. D. O. Ondeng - Administration Manager
- Dr. C. O. Onudi - Director
- Mr. J. O. Ombayo - Financial Manager
- Mr. Peter K. Tum - Chairman, Tender Committee

Interested Candidates

M/s Vikes Insurance Brokers

- Ms. Rosemary W. Chege - Advocate, R.W. Chege and Associates
- Mr. Francis Mwangi - Procurement Officer, Porim Insurance Brokers
- Ms. Rosalyne Mugoh - Assistant Manager, AON Minet Insurance Brokers

BOARD'S DECISION

Upon hearing the representations of the parties and upon examining the documents before it, the Board decides as follows: -

BACKGROUND OF THE AWARD

This tender No. No.KMTC/7/2009-2010 was advertised by the Procuring Entity on 27th April, 2009. It was for the Provision for Medical Insurance Cover. The tender closed/opened on 18th May, 2009 in the presence of the bidders' representatives.

The following bidders submitted their bids:-

1. M/s Vike Insurance Brokers Ltd
2. M/s Kenbright Insurance Brokers Ltd
3. M/s Resolution Health Care East Africa Ltd
4. M/s AON Minet Insurance Brokers Ltd
5. M/s Porim Insurance Brokers Ltd
6. M/s MTN Insurance Agencies

EVALUATION

After the tender documents were opened, they were handed to the technical Evaluation Committee for evaluation and analysis.

The Technical Evaluation Committee used the following technical evaluation criteria to undertake the evaluation of the tenders:-

TECHNICAL EVALUATION CRITERIA	MAX SCORE %
Full business names, Actual physical location, all addresses and telephone	1
Registration with commission of Insurance	1
Office layout and general appearance	2
Current insurance broking licence from Commission of Insurance	1
Professional Indemnity Insurance cover	5
List of five reputable firms/clients and values of transactions	5
Audited accounts for the last 2 years	10
Current member of A.I.B	1
Original quotations from preferred Underwriter	10
Bank guarantee/security of 2% of tender sum	10
Must have minimum 8 years experience	10
Compliance certificate-NSSF	1
Compliance certificate-NHIF	1
Tax Compliance certificate (PIN & VAT Certificates)	1
List of Directors with respective shareholdings	5
Current business permit from Local Authorities	2
Certificate of Registration/Incorporation	2
Current Trade Licence	2
Company profile	5
Profiles/qualification graduate	5
Profiles/qualifications fellow in insurance (London) FCII/Kenya	15
Total staff establishment of the firm over 5 employees	5
TOTAL	100

After the technical evaluation was completed, the Evaluation Committee summarized the scores of various bidders as follows:-

1. M/s Vike Insurance Brokers Ltd - 100%
2. M/s Kenbright Insurance Brokers Ltd - 90%
3. M/s Resolution Health Care East Africa Ltd - 51%

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|--|---|-----|
| 4. M/s AON Minet Insurance Brokers Ltd | - | 90% |
| 5. M/s Porim Insurance Brokers Ltd | - | 82% |
| 6. M/s MTN Insurance Agencies | - | 45% |

The Technical Evaluation Committee disqualified M/s Resolution Health East Africa Ltd and M/s MTN Insurance Agencies Brokers as they are not Insurance brokers. It further recommended the remaining four Bidders who scored 80% and above for further evaluation. The bidders included:-

- M/s Vike Insurance Brokers Ltd
- M/s Kenbright Insurance Brokers Ltd
- M/s AON Minet Insurance Brokers Ltd
- M/s Porim Insurance Brokers Ltd

The Evaluation Committee further disqualified M/s Kenbright Insurance Brokers Ltd, AON Minet Insurance Brokers Ltd and M/s Porim Insurance Brokers Ltd due to the following reasons:-

1. That M/s Kenbright Insurance Brokers Ltd submitted a Bid bond of Kshs.700,000 which is equivalent to 1.8% of the tender sum instead of the required Bid Bond of 2% of the tender sum.
2. That AON Minet Insurance Brokers Ltd failed to submit the 2008 audited report and the original quotes provided to it by his underwriters.
3. M/s Porim Insurance Brokers Ltd submitted a quotation which was not in original form from the underwriters. The underwriter's account was also not provided.

In view of the above, the Evaluation Committee noted that M/s Vike Insurance Brokers Ltd had fulfilled all the tender requirements and was therefore recommended for the award of the tender.

The Tender Committee in its Meeting No.25 of 2008-2009 held on 26th June,2009 awarded the tender to M/s Vike Insurance Brokers Ltd at Kshs. 75,623,838/= .

The Procuring Entity notified the successful bidder on 29th June 2009, the unsuccessful bidders were notified on 8th July 2009.

THE REVIEW

This Request for Review was lodged by Kenbright Insurance Brokers Ltd on 21st July, 2009 against the decision of the Tender Committee of Kenya Medical Training College in the matter of tender No. KMTC/7/2009-2010 for Provision of Medical Insurance Cover for the year 2009-2010.

The Applicant was represented by Mr. Chacha Odera, Advocate while the Procuring Entity was represented by Mr. Onsando Osiemo, Advocate. The Interested candidate M/s Vike Insurance Brokers was represented by Ms. Rosemary W. Chege, Advocate.

The Applicant has raised two grounds of Appeal and urged the Board to make the following orders:

1. The Award Committee's decision be reversed and the award nullified forthwith.

2. The Tender be awarded to the lowest bidder as adjudged at the opening and as provided for under clause 2.25 of the tender document, Regulation No.50 (3).

GROUND 1 - Breach of Regulation 50 (1), (2) & (3) of the Public Procurement and Disposal Regulation 2006

The Applicant stated that the tender was unfairly awarded by the Procuring Entity as it was not done in accordance with Regulation 50 (1), (2) & (3) of the Public Procurement & Disposal Regulations 2006 (Hereinafter referred to as "the Regulations"). It submitted that the Procuring Entity did not award the tender to the lowest bidder in line with clause 2.25 of the tender document. It further submitted that it had given an offer of Kshs. 38,814,000 with its underwriter being APA Insurance Company. It stated that it had recorded the results of Tender opening which were read by the Procuring Entity as follows:-

"KMTC TENDER OPENING 18/5/2009 REPORT

PRESENT:-

1. **PETER TUM** **CHAIRMAN**
2. **SILAS NJERU** **PROCUREMENT**
3. **JACOB OMBAYO**
4. **DAVID ODENG**

MEDICAL INSURANCE TENDER

	BROKER	BID BOND	BID PRICE
1	KENBRIGHT	0.7M	38,814,000
2	PORIM	1.0M	50,000,000
3	AON MINET	2.4M	69,893,973
4	VIKE	1.6M	75,623,838
5	RESOLUTION HEALTH	1.8M	81,287,123
6	MTN INSURANCE AGENCIES	2.0M	98,738,931

GENERAL INSURANCE TENDER

	BROKER	BID BOND	BID PRICE
1	VIKE	1.0M	NOT READ
2	PELICAN	0.5M	NOT READ
3	AON MINET	1.0M	NOT READ
4	SAPON	0.5M	NOT READ
5	MIRAN	0.8M	NOT READ
6	VICTORIA	0.6M	NOT READ
7	PORIM	0.150M	NOT READ
8	KENBRIGHT	0.250M	NOT READ

TENDERS DONE BY T.A. OKOTH/JESSE KIRIWO AND DELIVERED BY MURILA/KIROWO"

It argued that it was wrong for the Procuring Entity to award the bid to a bidder which had quoted a sum of Kshs. 75,628,838 as it was higher than its tender sum of Kshs. 38,814,000. It submitted that this was contrary to the objectives of the Act as set out in Section 2.

It argued that where a Procurement Entity does not award a tender to the lowest priced bidder, it has an obligation to give reasons for doing so. It stated that it had the lowest price and the Procuring Entity did not give any reasons why it awarded the tender to a bidder who had quoted a higher price.

The Applicant further submitted that it submitted a Bid bond of Kshs.700,000 together with its tender document. However, it revised the bid upwards to Ksh.1,040,000 and submitted the enhanced Bid bond before the deadline of submitting the tenders. It argued that this was permissible under Section 59 (1) of the Act which provides as follow:-

“Before the deadline for submitting tenders, a person who submitted a tender may change or withdraw it in accordance with the following-

(a) the change or withdrawal must be in writing; and

(b) the change or withdrawal must be submitted before the deadline for submitting tenders and in accordance with the procedures for submitting tenders.”

In conclusion, the Applicant submitted that the Procuring Entity breached the Act and the Regulations by disqualifying it on the basis that it had not provided a sufficient Bid bond.

In response, the Procuring Entity submitted the Applicant submitted a Bid bond dated 15th May, 2009 of Ksh.700,000. It denied that the Applicant had submitted a Bid bond dated 18th May, 2009 amounting to Kshs.1,040,000. It argued that the letter dated 18th May, 2009 which the Applicant was arguing was its Bid bond was not part of the tender documents that were submitted by the Applicant.

The Procuring Entity urged the Board to note that the document dated 18th May, 2009 was secured on the day that the tender was to close at 10.00 am. It therefore argued that the Applicant could not have had time to obtain the Bid bond from the Bank and thereafter submit the tender document before the deadline of submitting the tenders.

The Procuring Entity further submitted that the tender was awarded in accordance with Section 66 (4) of the Act and Regulation 50 (1) (2) and 3 which states that:-

Section 66(4)

"The successful tender shall be the tender with the lowest evaluated price"

Regulation 50(1)(2)&(3)

"Upon completion of the technical evaluation under Regulation 49, the evaluation committee shall conduct a financial and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by-

- (a) taking the bid price, as read out at the bid opening;*
- (b) taking into account any corrections made by a Procuring Entity relating to arithmetic errors in a tender;*
- (c) taking into account any minor deviation from the requirements accepted by a Procuring Entity under Section 64(2) (a) of the Act;*
- (d) where applicable, converting all tenders to the same currency, using a uniform exchange rate prevailing at the date indicated in the tender documents;*
- (e) applying any discounts offered in the tender;*

(f) applying any margin of preference indicated in the tender documents.

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be the tender with the lowest evaluated price in accordance with Section 66(4) of the Act.

It argued that the lowest evaluated price is not the price that is read at the tender opening, but the price that is awarded at after taking into account the criteria set out in the tender document.

In conclusion, the Procuring Entity submitted that the Clause 4.2.8 of the tender document required bidders to submit a Bid bond equivalent to 2% of the bid price. The Applicant Bid bond of Kshs.700,000 did not meet the requirement of this Clause and therefore it was eliminated at the preliminary evaluation stage in accordance with Regulation 47.

Vike Insurance Brokers Ltd, the successful candidate, associated itself with the submissions of the Procuring Entity. In addition it stated that the tender opening committee was constituted in accordance with Section 60(1) of the Act which requires the tender opening committee to have at least three members. It stated that the Tender Opening Committee comprised of four members.

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

The Board has noted that the Procuring Entity conducted a preliminary evaluation as required by Regulation 47. The Board has also noted that the Applicant's tender price was Kshs.38,814,000 as indicated in its tender document.

The Board has further noted that the tender security included in the Applicant's tender document was Kshs.700,000. The document dated 18th May, 2009 which the Applicant alleged was the enhanced Bid bond was not included in the tender document. Indeed, at the hearing the Board allowed the Applicant to examine its tender document and it confirmed that the said revised Bid bond was not part of its tender document. The Board further finds that the Applicant did not adduce evidence on how it submitted the said revised Bid bond.

Accordingly, the Board holds that the Applicant was properly disqualified at the preliminary evaluation stage as the Bid bond it provided was less than 2% of its tender sum. The Board notes that 2% of its tender sum would have amounted to Kshs.776,280.

Accordingly this ground fails.

Ground 2 -Breach of Section 67(2) and Regulation 66(1), (2) & (3)

The Applicant submitted that the letter of notification was dated 8th July 2009. However, the Procuring Entity dispatched the letter 8 days from that date. It received it on 16th July, 2009 and argued that the delay to

despatch the letter was an attempt by the Procuring Entity to deny it an opportunity to challenge the decision of the Procuring Entity.

The Applicant further submitted that it wrote a letter dated 17th July, 2009 requesting for the reasons why it was disqualified but to-date the Procuring Entity has not replied. It argued that this was a breach of Regulation 66 (1) (2) and (3).

In response, the Procuring Entity stated that dispatching notification letter to the Applicant was not deliberate and was not intended to deny the Applicant an opportunity to challenge its decision.

On its part, Vick Insurance Brokers Ltd, the successful bidder, stated that there was not any preferential treatment in the dispatch of the notification letters. It urged the Board not to annul the award of the tender as it had already obtained cover from British American Insurance Company Ltd.

The Board has noted that the successful tenderer was notified by a letter dated 29th June, 2009. The letters to the unsuccessful bidders are dated 8th July, 2009. This is contrary to Section 67(2) of the Act which provides 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”.

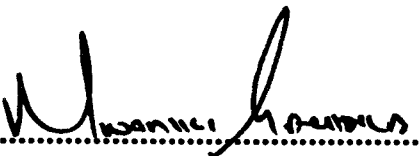
However, although the Procuring Entity breached Section 67(2) of the Act, the Applicant has not suffered any prejudice as it was able to file its Request for Review within time.

The Board also notes that the Procuring Entity did not reply to the Applicant's letter dated 7th July, 2009 requesting for reasons for disqualification of its tender contrary to Regulation 66(2).

In future the Procuring Entity should ensure it communicates to the bidders in accordance with the Act and Regulations. But as the Board has noted, the Applicant did not suffer any prejudice.

Taking into consideration all the above matters, this Request for Review fails and is hereby dismissed. The Procurement process may proceed.

Dated at Nairobi on this 18th day of August, 2009



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CHAIRMAN
PPARB



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SECRETARY
PPARB