

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO.27/2009 OF 22<sup>ND</sup> JULY, 2009**

**BETWEEN**

**KENBRIGHT INSURANCE BROKERS LTD.....APPLICANT**

**AND**

**MUNICIPAL COUNCIL OF KISUMU..... PROCURING ENTITY**

Review against the decision of the Tender Committee of the Municipal Council of Kisumu, the Procuring Entity dated 6<sup>th</sup> July, 2009 in the Matter of tender No.MCK/17/2009/10 for Provision of General Insurance Brokerage Services for the Year 2009/10.

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Mrs. Loise G. Ruhiu	-	Member
Mr. Sospeter K. Munguti	-	Member
Ms. Natasha Mutai	-	Member
Mr. Akich Okola	-	Member

**IN ATTENDANCE**

Mr. P. M. Wangai	-	Holding Brief for Board Secretary
Ms. Kerina Rota	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Kenbright Insurance Brokers Ltd**

- Mr. Chacha Odera - Advocate, Oraro & Co. Advocates
- Ms. Daisy Ogembo - Advocate, Oraro & Co. Advocates
- Mr. Theodore Okoth - General Manager

### **Procuring Entity, Municipal Council of Kisumu**

- Mr. B. M. Orwa - Town Clerk
- Mr. Charles M. Andima - Town Treasurer
- Mr. Jared Kanyangi - Procurement Officer

### **Interested Candidates**

- Mr. Paul Amuga - Advocate for Miran Insurance Brokers Ltd
- Mr. G. Orora - Chief Executive Officer, Miran Insurance Brokers Ltd
- Mr. Moses Osore - Brokerage Manager, Miran Insurance Brokers Ltd
- Mr. Sammy Kiguru - Technical Broker, Alexander Forbes Risk & Insurance Brokers Ltd
- Mr. Sammy Kanyi - Account Executive, Alexander Forbes Risk & Insurance Brokers Ltd

## **BOARD'S DECISION**

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

## **BACKGROUND OF AWARD**

This tender was advertised by the Procuring Entity on 22<sup>nd</sup> May, 2009. The tender was for Provision of General Insurance Brokerage Services for the year 2009-2010. The tender opened on 11<sup>th</sup> June, 2009 in the presence of the bidders' representatives. The four bidders who responded to the tender notice were as follows:

1. Yess Insurance Brokers Ltd
2. Miran Insurance Brokers Ltd
3. Kenbright Insurance Brokers Ltd
4. Alexander Forbes Risk and Insurance Brokers Ltd

## **EVALUATION**

This was conducted in three stages namely preliminary, technical and financial evaluation stages in that order.

### **Preliminary Evaluation**

This based on the following mandatory requirements:

- Certificate of Incorporation
- Copy of the VAT certificate
- Copy of the current single business permit
- Bid Bond of Kshs. 150, 000.00

All the four tenderers were found responsive to the mandatory requirements and therefore qualified for technical evaluation.

### **Technical Evaluation**

Technical evaluation was conducted by a committee chaired by Mr. Samuel Oganda. The results of the technical evaluation were as follows:

<b>SPECIAL CONDITIONS</b>	<b>17(1)</b>	<b>17(2)</b>	<b>17(3)</b>	<b>17(4)</b>
Copy of Bank Guarantee of Kshs 3million deposited with the Commissioner of Insurance	5	10	10	10
Must have Professional Indemnity Insurance Cover	10	10	10	10
Must indicate names of at least 5 current reputable clients	5	10	10	10
Must submit a copy of Audited Accounts for previous years	12	12	12	12
Must be current member of AIBK	10	10	10	10
Must have been in operation for at least 3 years	10	10	10	10
Must provide Valid Tax Compliance Certificate	0	10		10
Must provide detailed Company Profile including C,Vs of all key personnel	7	10	10	10
Must provide copy of IRA Certificate	10	10	10	10
Service Proposal-schedule of activities	3	3	3	0
Past Experience with the Authority	3	0	(2)	0
Presentation:				
(i) Price Schedule duly filled, signed and stamped	1	1	1	1
(ii) Confidential Business Questionnaire duly filled, signed and stamped	1	1	1	1
<b>TOTAL MARKS</b>	<b>77</b>	<b>97</b>	<b>95</b>	<b>94</b>
<b>RANKING</b>	<b>4</b>	<b>1</b>	<b>2</b>	<b>3</b>

Arising from the above results, all the four bidders qualified for financial evaluation after scoring above the cut-off mark of 75 %.

### **Financial evaluation**

This involved comparison of the prices indicated by the bidders in their respective price schedules. The prices were as follows:

<b>S/No.</b>	<b>Bidder' s Name</b>	<b>Tender Sum (Kshs)</b>
<b>1.</b>	Yess Insurance Brokers Ltd	4, 661, 044.00
<b>2.</b>	Miran Insurance Brokers Ltd	4, 102, 395.00
<b>3.</b>	Kenbright Insurance Brokers Ltd	3, 958, 327.00
<b>4.</b>	Alexander Forbes Risk & Insurance Brokers Ltd	5, 066, 526.00

### **Past Experience**

The evaluation committee noted that the Applicant is current service provider of the same services at a contract sum of Kshs. 5.3 million and its past record with Procuring Entity was poor as it failed to handle claim within reasonable time of 90 days. In addition, the Applicant had failed to justify why its tender Kshs. 3, 958, 327.00 was lower than the price at which the same was awarded to it in the last financial year.

In view of the above observations, the evaluation committee declined to recommend the award of the tender to the Applicant. Instead, it recommended the award of the tender to Miran Insurance Brokers Ltd at Kshs. 4, 102, 395.00

In its meeting held on 2<sup>nd</sup> July, 2009, the Municipal Tender Committee concurred with the recommendations of the evaluation committee and

awarded the tender to Miran Insurance Brokers at its tender sum of Kshs. 4,102,395.00

Letters of notification of award to successful and unsuccessful tenderers dated 6<sup>th</sup> July, 2009 were dispatched on 10<sup>th</sup> July, 2009.

### **THE REVIEW**

This Request for Review was lodged by Kenbright Insurance Brokers Limited on 22<sup>nd</sup> July, 2009 against the decision of the Procuring Entity dated 7<sup>th</sup> July, 2009 in matter of tender No.MCK/17/2009/10 for Provision of General Insurance Brokerage Services for the year 2009/10. The Applicant was represented by Mr. Chacha Odera, Advocate while the Procuring Entity was represented by Mr. Jared O. Kanyangi, Procurement Officer. Miran Insurance Brokers Ltd, an Interested Candidate, was represented by Mr. Paul Amuga, also an Advocate.

### **PRELIMINARY ISSUE BY THE INTERESTED CANDIDATE, M/S MIRAN INSURANCE BROKERS**

**At the commencement of the hearing, the Board noted preliminary issues raised by the Successful Tenderer in its written response filed on 13<sup>th</sup> August 2009 namely:-**

- 1. That the appeal was not filed within the 14 days appeal window as provided for by Regulation 73(1)(c) and**
- 2. That the Board lacked jurisdiction on this matter pursuant to Section 93(2)(c) since a contract was already in place between the Procuring Entity and the Successful Tenderer, M/S Miran Insurance Brokers and that the insurance covers had been issued by the underwriter.**

**The parties did not address the parties on the two issues. However, as the two issues touch on the jurisdiction of the Board, it is important for the Board to make a determination on them.**

**The Board notes that the letters of notification of award were dated 6<sup>th</sup> July 2009 and were dispatched on 10<sup>th</sup> July 2009 as evidenced by the postage stamps. Accordingly, the Board finds that time started running from the 11<sup>th</sup> July 2009 and therefore the last date to file the Request for Review would have been the 25<sup>th</sup> July 2009. The Review, having been filed on the 22<sup>nd</sup> of July 2009 was therefore within the 14 days appeal window as provided for by Regulation 73 (1) (c).**

**With regard to the issue of the alleged contract entered into between the Procuring Entity and the successful tenderer, the Board notes that the notification letters were dispatched on 10<sup>th</sup> July, 2009 as evidenced by the postage stamp. Accordingly, the Board holds that the Procuring Entity could not have entered into a valid contract with the successful tenderer before 25<sup>th</sup> July, 2009 when the 14 day appeal window lapsed. In the circumstances, the Procuring Entity contravened Section 68 (2) of the Act by signing the contract on 20<sup>th</sup> July 2009 before the lapse of the appeal window. Accordingly, the alleged contract is therefore null and void.**

**The Board therefore finds that it has Jurisdiction to hear the Request for Review and hereby proceeds to deal with the grounds of Review on their merit as follows.-**

**Ground 1- Breach of Regulations 50(1), (2) and (3) of the Public Procurement & Disposal Regulations, 2006.**

The Applicant argued that the Procuring Entity awarded the tender unfairly in contravention of Regulations 50(1) (2) (3) (hereinafter referred to as "the Regulations"). It submitted that, out of the four Brokers who had responded to the invitation to bid, its Bid price was the lowest at Ksh.3,956,326.00. It further submitted that, this notwithstanding, the Procuring Entity had awarded the tender to Miran Insurance Brokers, whose bid price was Ksh. 4,102,395.00. Further, it argued that the Procuring Entity had not adduced any evidence as to how it had arrived at the lowest evaluated price and what that price was.

In response, the Procuring Entity denied that it breached Regulations 50(1), (2) and (3) as alleged by the Applicant. It stated that it constituted an evaluation committee to evaluate the tenders. It further stated that the evaluation committee carried out its mandate and made a report within the stipulated period of thirty days from the date of tender opening. The Procuring Entity averred that, after evaluation, tenders were ranked and the tender awarded to the lowest evaluated Tenderer in accordance and in full compliance with Regulation 50(2) and (3).

Further, the Procuring Entity submitted that there were criteria set for Technical and Financial Evaluations for the Bidders who had met the mandatory requirements as required in the Tender documents. It averred that there were other factors such as: budgetary considerations; the Underwriters proposed by the Brokers and the fact that it had some previous bad experience in dealing with the Applicant particularly with regard to delays in processing of claims.

Finally, it urged the Board to note that the lowest price is not always the lowest evaluated price.

On its part, the successful tenderer M/S Miran Insurance Brokers submitted that the Tender document, under Clause 2.24.2 provided that the Council will take into account other considerations as may be appropriate.



Further, it submitted that the mere fact that the Applicant's bid price was the lowest could not be a ground for award.

Finally, it submitted that it had placed its bid and met all the requirements and therefore the tender was awarded to it procedurally in accordance with the tender requirements.

The Board has carefully considered the submissions of the Parties and perused the documents submitted before it. The Board notes that the tenders were evaluated in three stages namely preliminary, technical and financial evaluation in that order.

The Board further notes that the Procuring entity set up a cut off Mark of 75% for the technical evaluation and all the 4 bidders passed and were therefore technically responsive having scored as follows:-

1. Yess Insurance Brokers Ltd - 77%
2. Miran Insurance Brokers Ltd - 97%
3. Kenbright Insurance Brokers Ltd - 95%
4. Alexander Forbes Risk and Insurance Brokers Ltd - 94%

The Board notes the Provisions of Regulation 50(1) (2) and (3) which states as follows:-

***50 (1) upon completion of the technical evaluation under regulation 49, the evaluation committee shall conduct a financial evaluation 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;***

***(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 is clear to the Board that Procuring Entity found all the four bidders to be technically responsive, and therefore they ought to have gone to the next stage

of financial evaluation on equal footing. With regard to the Bid prices, the Boards find that the Applicant's price was Ksh 3,956,326.00 whereas that of the Successful Bidder was Ksh. 4,102,395. Therefore, the determination of the successful bidder should have been based on the lowest price pursuant to Regulation 50 (1) (2) (3). Accordingly, the use of criterion not stated in the tender document namely the choice of underwriters should not have been considered as it was not among the criteria set out in the tender documents. The Board notes that the choice of the underwriters as evaluation criteria was tantamount to introduction of new criteria contrary to Section 66(2) of the Public Procurement and Disposal Act (Hereinafter referred to as "the Act").

Further, the Board notes that the advertisement was clear that the Procuring Entity was looking for the services of Insurance Brokers and that the advert had no mention of the choice of underwriters.

With regard to the past experience, there was no evidence adduced to demonstrate that the Procuring Entity had experienced delays in the processing of its claims by the Applicant. In any case, the issue of past experience was considered in the technical evaluation where the Applicant had scored above the cut off mark. The Board therefore finds that the Procuring Entity breached Regulation 50 (1) (2) (3) in the procedure it used to identify the successful Bidder.

Accordingly, this ground of appeal succeeds.

### **Ground Two-Breach of Regulations 66 (1) (2) (3)**

The Applicant submitted that its letter of notification of award dated 6<sup>th</sup> July, 2009 was posted on 10<sup>th</sup> July, 2009. It further submitted that it received the letter on 21<sup>st</sup> July, 2009, which was two weeks from the date of the letter. It argued that this was a breach of Regulation 66(1), (2) and (3). It averred that the delay was intended to bar it from raising an objection against the award.

In its response, the Procuring Entity admitted that the notifications of award letters to all bidders are dated 6<sup>th</sup> July, 2009 and were all posted on 10<sup>th</sup> July,

2009. It argued that it had complied with Regulation 66(1) (2) and (3) and had no intention to bar the Applicant from exercising its right to raise an objection.

The Board has carefully perused the documents submitted and the submissions of the parties.

The Board notes that although the parties argued on the breach of Regulation 66(1), (2) and (3), the correct provision which the Applicant should have cited is section 67(1) and (2) which deals with notification. It is clear that the letters of notifications to all bidders are dated 6<sup>th</sup> July, 2009. It is not in dispute that said letters of notifications to all bidders were posted on 10<sup>th</sup> July, 2009 as evidenced by copies of the certificate of posting.

The Board therefore finds that both the successful and the unsuccessful Bidders were notified at the same time pursuant to Section 67 (2) of the Act.

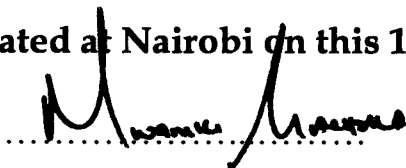
The Board notes that, notwithstanding the claim by the Applicant that it had received its notification letter on 21<sup>st</sup> July 2009, it was nevertheless able to file its Request for Review within time and suffered no prejudice.

Accordingly, this ground of appeal fails.

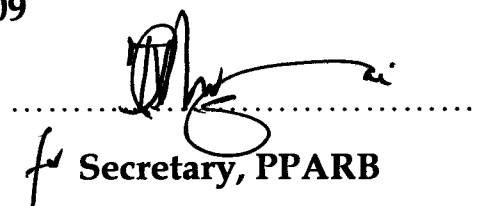
Taking into account all the above matters, the Request for Review succeeds and the Board orders, pursuant to Section 98 (a) and (b) of the Act that :-

1. The award to the successful tenderer is hereby annulled.
2. The Board further orders the Procuring Entity to re-evaluate the tender using the Criteria as set out in the Tender Documents and extend the tender validity period as necessary.

**Dated at Nairobi on this 18<sup>th</sup> day of August, 2009**



**Chairman, PPARB**



**Secretary, PPARB**

