

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW**

**BOARD**

**REVIEW NO.34/2009 OF 20<sup>TH</sup> AUGUST, 2009**

**BETWEEN**

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

**AND**

**SOUTH NYANZA SUGAR CO. LTD.....PROCURING ENTITY**

Review against the decision of Tender Committee of the South Nyanza Sugar Company Ltd, Procuring Entity dated 7<sup>th</sup> August, 2009 in the matter of tender No. in the matter of tender No. SNSC/029/2009/2010 for Provision of Medical Scheme Services

**BOARD MEMBERS PRESENT**

Mr. Joshua W. Wambua	-	Member (In the Chair)
Mrs. Loise G. Ruhiu	-	Member
Mr. Sospeter Kioko	-	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. Bwire Miller - Advocate  
Mr. Edwin Odanga - Manager, Health  
Mr. Theodore Okoth - Manager

### **Procuring Entity, South Nyanza Sugar Co. Ltd**

Ms. Eunice Tithce Odour - Company Secretary  
Mr. Maurice Omondi - Legal Officer  
Mr. Felix Wambugi - Head of Procurement  
Mr. Otiono Bernard - Head of Manufacturing

### **Interested Candidates**

Mr. P. Munge - Advocates for Clarkson Notcutt Insurance Ltd  
Mr. Christopher Beti - Managing Director, Clarkson Notcutt Insurance Ltd  
Ms. Dorothy Githui - Head of Medical, Clarkson Notcutt Insurance Ltd  
Mr. Moses Odwa - Brokerage Manager, Miran Insurance Brokers Ltd

## **BOARD'S DECISION**

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

### **BACKGROUND**

This tender was initiated by the Procuring Entity by way of Expression of Interest (EOI). It was for Provision of Medical Scheme Services. The tender was advertised by the Procuring Entity on 8<sup>th</sup>

April, 2009. The EOI were opened on 30<sup>th</sup> May, 2009. Upon evaluation, the pre-qualified bidders were invited to submit their tenders vide letters dated 10<sup>th</sup> September, 2009. Tenders were later opened on 30<sup>th</sup> July, 2009 in the presence of the bidders' representatives who wished to witness the opening of the tenders. The tenderers who submitted their bids were as follows:

1. AAR Health Services Ltd
2. Clarkson Notcutt Insurance Brokers Ltd
3. Kenbright Insurance Brokers Ltd
4. Miran Insurance Brokers Ltd
5. Alexander Forbes Risk & Insurance Brokers Ltd
6. Resolution Health (EA) Ltd
7. Jubilee Insurance Co. of Kenya Ltd
8. Unipolar Insurance Brokers Co. Ltd
9. Eagle Africa Insurance Brokers
10. CFC Life Assurance Ltd
11. Channel Insurance Brokers Ltd
12. Liaison Group (IB) Ltd

### **Evaluation**

This was carried out by a committee chaired by Mr. Francis O. Mbai. It was conducted in three stages, namely preliminary, technical and financial evaluation stages in that order. The detailed outcome of the evaluation is as tabulated in the next page.

## Preliminary Evaluation

A summary of the preliminary evaluation was as follows:

Criterion	AAR Health Services Ltd	Resolution Health (EA) Ltd	CFC Life Assurance Ltd	Jubilee Insurance Co. of Kenya Ltd	Clarkson Notcutt Insurance Brokers Ltd	Kenbright Insurance Brokers Ltd	Miran Insurance Brokers Lt	Alexander Forbes Risk & Insurance Brokers	Unipolar Insurance Brokers Co. Ltd	Channel Insurance Brokers Ltd	Liaison Group (IB) Ltd	Eagle Africa Insurance Brokers
List of Contracted Hospitals	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Reference letters from hospitals	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓
Details of contact persons/chemist	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Evidence of payment for documents	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓
Bid Bond of Kshs.300,000.00	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Cover on pre-existing conditions	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Value added additions	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Relevant cover details (Exclusions)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

Premium	21,207,068	39,999,018	45,490,832	24,883,751	17,450,455	15,518,545	16,705,423	18,478,384	18,561,577	16,335,309	16,347,155	19,497,626
60 days tender validity period	30	60	120	120	90	60	90	60	60	X	120	X
Form of tender	Validity not indicated	√	√	√	√	√	√	√	√	√	√	√

Arising from the above information, the following tenderers were disqualified at the preliminary evaluation stage for failing to comply with some of the above mandatory requirements:

- 1) Channel Insurance Brokers Ltd
- 2) Eagle Insurance Brokers Ltd
- 3) Liaison Insurance Brokers Ltd
- 4) Unipolar Insurance Brokers Ltd
- 5) Kenbright Insurance Brokers Ltd

## Technical Evaluation

The technical Evaluation was based on the following parameters:

- Required enhanced benefits
- Value added additions
- Non-Standard exclusion
- Limiting/unfair procedures
- Identification/card system
- Claim reporting period
- Any other remark/observations

## Financial Evaluation

This involved comparison of the tender prices quoted by the bidders. Thereafter, the evaluation committee recommended the award of the tender to Clarkson Notcutt Insurance Brokers Ltd.

In its meeting held on 7<sup>th</sup> August, 2009, the Tender Committee concurred with the recommendations of the Evaluation Committee and awarded the tender to M/S Clarkson Notcutt Insurance Brokers Ltd, at it tender sum of Kshs. 17, 450, 455.00.

Letters of notification of award to the successful and unsuccessful bidders are dated 7<sup>th</sup> August, 2009.

## THE REVIEW

This Request for Review was lodged by the Kenbright Insurance Brokers Ltd against the decision of the Tender Committee of the South Nyanza Sugar Co. Ltd, the Procuring Entity dated 7<sup>th</sup> August, 2009 in the matter of tender No.SNSC/029/2009/2010 for Provision of Medical Scheme Services. The Applicant was represented by Mr. Miller Bwire, Advocate, while the Procuring Entity was represented by Ms. Eunice Kitche Oduor, Company Secretary, South Nyanza Sugar Company. Clarkson Notcutt Insurance Ltd

and Miran Insurance Brokers Ltd, both Interested Candidates, were represented by Mr. P. Munge, Advocate and Mr. Moses Odawa, Brokerage Manager, respectively.

The Applicant raised three grounds of Review and urged the Board to make the following orders:

1. Nullify the award of the tender;
2. Re-award the tender to the lowest bidder in accordance with Clause 2.25 of the tender document and Regulation 52(1) and (2).

The Board deals with each ground of the Review as follows:

**Ground 1: Breach of Regulation 50(1),(2) & (3) and 52(1) &(2)**

In this ground, the Applicant submitted that the Procuring Entity breached Regulation 50(1), (2) and (3) by awarding the tender unfairly. It further submitted that its tender price of Kshs 15,518,545.00 was the lowest tender sum as read at the tender opening on 30<sup>th</sup> July, 2009. It argued that failure by the Procuring Entity to award the tender to the lowest bidder was a breach of Regulation 52(1) and (2).

The Applicant pointed out to the Board that one of the reasons for the enactment of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Act") was to ensure that public funds were preserved by awarding tenders to the lowest evaluated bidder.

It stated that this was not an open tender since a pre-qualification of tenderers had been carried out earlier, as per the notice in the Standard Newspaper of 8<sup>th</sup> April, 2009. It argued that having been pre-qualified, it ought to have been awarded the tender after offering the lowest bid. It further argued that the requirement by the Procuring Entity in the tender documents, that the bidders produce reference letters from various hospitals was far-fetched and could not fit in the request for specifications

as envisaged by Section 34 of the Act. The Applicant added that such letters were indeed peripheral to the tender process since they were not requirements of the Act and Regulations.

It concluded that, it was improper for the Procuring Entity to use the failure by the Applicant to submit such reference letters as a reason to disqualify its bid.

In response, the Procuring Entity denied that it breached Regulations 50(1), (2) & (3) and 52(1) and (2) by failing to award the tender to the Applicant. It submitted that the Applicant completed its tender document without perusing it so as to understand the requirements of the Procuring Entity. It accused the Applicant of failing to seek clarification, if any, on matters that were unclear to it, pursuant to Clause 2.1 of the Instructions to Tenderers read together with Regulation 43.

With regard to the award of the tender, the Procuring Entity admitted that the Applicant had submitted the lowest priced tender but was not the lowest evaluated bidder. It stated that the Applicant was disqualified at the preliminary evaluation stage for failing to comply with the following mandatory requirements:

- (i) Reference letters from hospital as required under clause 4 of section IV of the tender documents;
- (ii) Evidence of payments of accounts

The Procuring Entity argued that the basis for award of the tender was not price alone but rather responsiveness of the tenders to the tender requirements. It stated that a responsive tender has been defined at Clause 2.20.4 of the tender documents as "...one which conforms to all the terms and conditions of the tender documents without material deviation..."



It further submitted that responsiveness has also been defined at Section 64(1) of the Act, which states as follows:

***"A tender is responsive if it conforms to all the mandatory requirements in the tender documents".***

The Procuring Entity argued that it was improper for the Applicant to argue that the requirement for hospital references was peripheral since it had classified them as mandatory requirements owing to the sensitive nature of the subject tender. It explained that the Procuring Entity is located in a remote area and being a labor intensive establishment, meant that its medical insurance requirements were very sensitive, especially in view of the fact that its staff were living close to each other, where there was a high risk of outbreak of diseases. In such a case, it added, effective relationship between the Broker and the Hospitals was paramount for effective delivery of the medical services.

The Procuring Entity pointed out that, the Applicant failed at the preliminary evaluation stage to comply with all the mandatory requirements of the tender. It stated that the Applicant's letter forwarding its tender document was not signed, which was in breach of Regulation 47(1) (c). The Procuring Entity further stated that the Applicant's failure to submit all the required forms and documents was in contravention of Regulation 47(1) (f).

On the issue of prequalification, the Procuring Entity stated that each Broker had been requested to present a list of the respective Underwriters who would provide the required medical cover. A preliminary due diligence exercise was then carried out on the Underwriters, after which the Procuring Entity came up with a list of the acceptable Underwriters, from which the Brokers could obtain the necessary quotations. It pointed out that, at that stage no evaluation was carried out to determine the capability of the Brokers. Consequently, an evaluation had to be carried out to determine which brokers were capable of providing the required service.

The successful candidate, Clarkson Notcutt Insurance Brokers associated itself fully with the submissions of the Procuring Entity. In addition, it submitted that parties are bound by their pleadings and the documents filed with the Board in accordance with Regulation 73. It therefore requested the Board to ignore the Applicant's submission in regard to Section 34 of the Act since this was not raised in its initial pleadings.

It further submitted that the Applicant could not rely on Regulation 50 since this Regulation applies to the tenderers who have passed in the technical evaluation. Having been disqualified at the preliminary stage, the Applicant was not illegible for financial evaluation.

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

The Board notes that the Act provides for carrying out a preliminary examination of tenders to determine the responsiveness of the bids. Section 64(1) defines a responsive tender as follows:

***"64(1) a tender is responsive if it conforms to all the mandatory requirements in the tender documents".***

Further Section 66(1) and (2) states as follows:

***"66 (1) the procuring Entity shall evaluate and compare the responsive tender other than tenders rejected under section 63(3).***

***(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 Regulations also provide guidance on these matters as follows:

**Regulation 47(1)**

“Upon opening of the tenders under Section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether-

- “a).....
- b) .....
- c) The tender has been signed by the person lawfully authorised to do so;
- d) .....
- e) .....
- f) All required documents and information have been submitted”;

**Regulation 48(1)**

“A Procuring Entity shall reject all tenders, which are not responsive in accordance with section 64 of the Act”.

The Board notes that Section 66(2) is very clear that any evaluation is to be based only on the criteria set out in the tender documents. It is the Procuring Entity which determines the criteria based on its specific needs as long as the criteria is objective and clear. The Applicant could not therefore rightfully ignore part or all of the criteria set by the Procuring Entity merely by referring to it as “peripheral”. Clauses 2.20 and 2.22 of the Instruction to Tenderers in the tender document provide for the evaluation criteria namely the “Preliminary examination and responsiveness” and the “Evaluation and comparison of Tenders” respectively. Further, Section IV of the tender document (Special Conditions) provided several conditions which were to be met by the bidders.

These conditions included submission of;

- (i) Reference letters from hospitals from at least three hospitals in Nyanza and five in Nairobi;
- (ii) Evidence of payment of accounts by way of debit notes/ cheques copies or any relevant evidence.

The Board has perused the original bid documents submitted to the Procuring Entity by the Applicant and notes that the Applicant had attached to its tender document several copies of letters of notification of award but had no reference letters from hospitals as required in the tender document. This fact was conceded by the Applicant at the hearing.

In addition, the Board did not find evidence of payments of accounts in the Applicant's bid documents.

The Board therefore finds that the Applicant was properly disqualified at the preliminary stage as it did not comply with some of the mandatory requirements, thus being rendered non-responsive.

Further, being non-responsive, the Applicant could not subsequently proceed to technical and financial evaluation as this would have been contrary to Section 66(1) of the Act and Regulation 48(1). In this regard the Board notes that although the Applicant presented the lowest priced bid it could not have been the successful candidate as it did not submit the lowest evaluated bid in accordance with Section 66(4).

Accordingly this ground of appeal fails.

### **Ground No.2**

At the hearing, the Applicant abandoned this ground and the Board need not make any finding on it.

### **Ground 3: Breach of Regulation 66(1), (2) and (3)**

The Applicant submitted that the Procuring Entity breached Regulation 66(1), (2) and (3), by failing to return the Applicant's bid security simultaneously with the letter of notification.

In response, the Procuring Entity submitted that Regulation 66(1) should be read together with Clause 2.12.6 of the tender document, which required it to return the tender security to the bidders after the expiry of tender validity period. It argued that the tender validity period had not lapsed and therefore it was not obligated to surrender the Applicant's tender security at the time of communicating the award of the tender.

In conclusion, the Procuring Entity submitted that the Request for Review was malicious, frivolous and vexatious and merely intended to derail the tendering process. It therefore urged the Board to dismiss it to facilitate the conclusion of the procurement process.

The Board has read Regulation 66 (1), (2) and (3) which the Applicant claimed was breached by the Procuring Entity and note that Regulation 66(1) required the Procuring Entity to return the tender security of the unsuccessful tenderers. This Regulation does not specify the period within which the release of bid security should be effected. However, the Board notes that Clause 2.12.6 of the ITT provided as follows:

***"Unsuccessful tenderer's tender security will be discharged or returned as promptly as possible but not later than thirty (30) days after the expiration of the period of tender validity".***

Since the tender opened on 30<sup>th</sup> July, 2009, the 60 days tender validity period will lapse on 28<sup>th</sup> September 2009. In the Board's view, the latest the Procuring Entity would have to discharge the tender security to the unsuccessful tenderers would be 28<sup>th</sup> October, 2009 which is 30 days after expiry of the tender validity period. The Board further notes that the tender

was awarded on 7<sup>th</sup> August, 2009 and that the communication of award was done vide letters dated 7<sup>th</sup> August, 2009. The Procuring Entity could therefore not have dispatched the tender securities of the unsuccessful tenderers at the time of communicating the award, as Section 57(4) (c) of the Act requires it to release them after a contract is entered into.

The Board has also perused the Request for Review filed by the Applicant and noted that the Applicant had not provided any evidence of having sought reasons for not being awarded the tender. Without such request, the Procuring Entity could not have breached regulation 66(2) as alleged by the Applicant. Similarly, Regulation 66(3) could not have been breached since no information touching on other bidders was availed to the Applicant by the Procuring Entity.

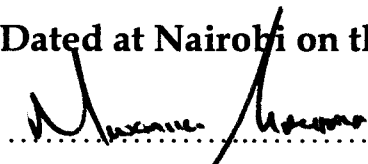
The Board therefore finds that the Procuring Entity did not breach Regulation 66(1), (2) and (3) as claimed by the Applicant.

Accordingly, this ground of appeal also fails.

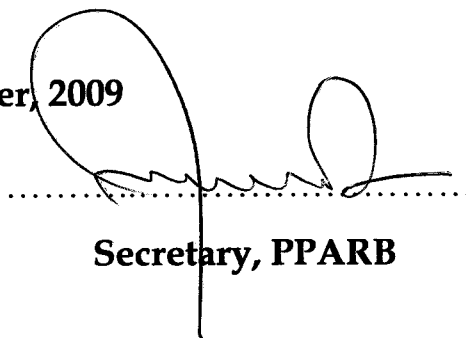
With regard to the issue of costs of the review, the Board holds that each party should bear its costs.

Taking into account all the foregoing matters, the Request for Review fails and is hereby dismissed. Accordingly, the procurement process may proceed.

**Dated at Nairobi on this 22<sup>nd</sup> day of September, 2009**



**Chairman, PPARB**



**Secretary, PPARB**