

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO.38/2010 OF 28TH JUNE, 2010

BETWEEN

PELICAN INSURANCE BROKERS (K) LTD.....APPLICANT

AND

NZOIA SUGAR COMPANY LTDPROCURING ENTITY

Review against the decision of the Tender Committee of the Nzoia Sugar Company Ltd dated 15th June, 2010 in the matter of Tender No. NSC/T 07/2010-2011 for Provision of Insurance Brokerage Services for the year 2010/2011.

BOARD MEMBERS

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

IN ATTENDANCE

- Mr. P. M. Wangai - Holding brief for Board's Secretary
- Ms. Kerina Rota - Secretariat
- Ms. Juliet Wambulwa - Secretariat

PRESENT BY INVITATION

Applicant, Pelican Insurance Brokers (K) Ltd

- Mr. Alloys Kwengu - Advocate, Kwengu & Co. Advocates
- Mr. Kagwe Githui - General Manager, Pelican Insurance Brokers (K) Ltd

Procuring Entity, Nzoia Sugar Co. Ltd

- Ms. Wanja Wambugu - Advocate, W.G. Wambugu & Co. Advocates
- Ms. Wanjiku Njenga - Pupil, W.G. Wambugu & Co. Advocates
- Mr. Benson Khwatenge - Company Secretary, Nzoia Sugar Co. Ltd
- Mr. Dismas Muswahili - Legal Supervisor, Nzoia Sugar Co. Ltd

Mr. Edward Namasaka - Purchasing Manager Nzoia Sugar Co. Ltd

Interested Candidates

Mr. C.N. Kihara - Advocate for Leon Insurance Brokers Ltd

Ms. Peris Wanjohi - Pupil, C.N. Kihara & Co. Advocates

Mr. Isaac Wanjui - Broking Manager, Leon Insurance Brokers Ltd

Mr. Hesbon Okeyo - General Manager, Yess Insurance Brokers Ltd

Mr. Paul Omboro - Executive Officer, Yess Insurance Brokers Ltd

Ms. Lindsey Mugambi - Executive Officer, Yess Insurance Brokers Ltd

Mr. Evans Omondi - Executive Officer, Yess Insurance Brokers Ltd

Mr. D. Mulinge - Claims/ Underwriting Officer, Sifa Insurance Brokers Ltd

Mr. D. Nyongesa - General Manager, Four M Insurance Brokers Ltd

BOARD'S DECISION

Upon hearing the representations of the parties and interested candidate herein, 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 9th April, 2010. The tender was for Provision of Insurance Brokerage Services. The tender closed/opened on 30th April, 2010 in the presence of the bidders' representatives. Out of the fourteen bidders who bought the tender documents, twelve bidders submitted their tenders as follows:

S/No.	Bidder's Name	Tender Sum (Kshs.)
1.	Sapon Insurance Brokers Ltd	31, 428, 783.00
2.	Leon Insurance Brokers Ltd	39, 897, 447.00
3.	Sifa Insurance Brokers Ltd	24, 811, 500.00
4.	A-Plan Insurance Brokers Ltd	35, 157, 532.00
5.	Alexander Forbes Risk & Insurance Brokers Ltd	54, 013, 616.00
6.	Yess Insurance Brokers Ltd	30, 891, 038.00
7.	Eagle Africa Insurance Brokers Ltd	37, 395, 116.00
8.	Bafana Insurance Brokers Ltd	39, 347, 739.00
9.	Pelican Insurance Brokers (K) Ltd	56, 602, 536.00
10.	Fairsure Insurance Brokers Ltd	58, 838, 547.00

11.	Four M Insurance Brokers Ltd	44, 037, 436.00
12.	Vike Insurance Brokers Ltd	40, 815, 510.00

Evaluation

The Evaluation was conducted in three stages namely Preliminary, Technical and Financial evaluation stages.

Preliminary Evaluation

Preliminary Evaluation was based on the following requirements:

1. Company profile
2. Names of Directors
3. Certificate of registration
4. Trade License
5. VAT Certificate
6. P.I.N certificate
7. Physical address
8. Tender security
9. Clients
10. Referees

One bidder namely, Fairsure Insurance Brokers Ltd was found non-responsive for failing to provide a certificate of registration. Hence its

tender was disqualified from further evaluation. The tenders submitted by the other eleven bidders qualified for the Technical evaluation stage.

Technical Evaluation

Technical Evaluation was based on the following parameters:

1. Memorandum and Articles of Association
2. Membership Certificate with Association of Insurance Brokers of Kenya (AIBK)
3. Certificate of Insurance from Commissioner of Insurance (IRA)
4. Professional Indemnity Cover of Kshs.30, 000,000.00
5. C.V. for five (5) key personnel.
6. Audited Accounts for the last Three (3) Years.
7. Reputation -References of at least five (5) Clients and Income Tax Compliance Certificate.
8. Conformity of tender to Standards Premium Rates set by the Commissioner of Insurance.
9. Five (5) main government institutions you are currently dealing with and a summary of services being rendered.
10. Number of years in Brokerage Practice.
11. Letter of Authority from the Underwriter.
12. Minimum premium of Kshs. 8 million against Fire and Perils

Three bidders namely, Leon Insurance Brokers Ltd, Alexander Forbes Risk and Insurance Brokers Ltd and Four M Insurance were found responsive and hence they proceeded to the financial evaluation stage.

Financial Evaluation

Financial Evaluation involved comparison of the tender sum of the three bidders. The price comparison was as follows:

S/No.	Bidder	Tender Sum
1.	Leon Insurance	39, 897, 447.00
2.	Four M. Insurance	44, 037, 436.00
3.	Alexander Forbes	54, 013, 616.00

In view of the above information, the Evaluation Committee recommended the award of the tender to Leon Insurance Brokers Ltd at its tender sum of Kshs. 39, 897, 447.00 being the lowest evaluated bidder.

TENDER COMMITTEE DECISION

In its meeting No. 117 held on 15th June, 2010, the Tender Committee concurred with the recommendation of the Evaluation Committee and awarded the tender to Leon Insurance Brokers at Kshs. 39, 897, 447.00

Letters of notification of award to the successful and the unsuccessful bidders were written on 15th June, 2010.

THE REVIEW

This Request for Review was lodged on 28th June, 2010 by Pelican Insurance Brokers (K) Ltd against the decision of the Tender Committee, Nzoia Sugar Company Ltd, dated 15th June, 2010 in the matter of tender No.NSC/T 07/2010-2011 for Provision of Insurance Brokerage Services. The Applicant was represented by Mr. Alloys Kwengu, Advocate while the Procuring Entity was represented by Ms. W. Wambugu, Advocate. The Interested Candidates, Leon Insurance Brokers Ltd, Yess Insurance Brokers Ltd, Four M Insurance Brokers Ltd and Sifa Insurance Brokers Ltd were represented by Mr. C.N. Kihara, Advocate, Mr. Hesbon Okeyo, General Manager, Mr. D. Nyongesa, General Manager and Mr. D. Mulinge, Claims/Underwriting Officer, respectively.

The Applicant raised fourteen grounds of review and urged the Board to make the following orders:

- "1. The decision of the Respondent to award the tender for the provision of Insurance Brokerage Services for the year 2010/2011 be declared null and void and quashed.***

2. *That the award for the tender for the provision of Insurance Brokerage Services for the year 2010/2011 be made to the Applicant.*
3. *The cost of this review be awarded to the Applicant.*
4. *Any other relief that the Review Board deems fit to grant under the circumstances".*

The Board deals with grounds of the Review as follows:

Grounds 1, 2, 3, 7, 8, 9, and 12: Breach of Section 31(1) (a), (b), 39(1), 66(2), (4) and Regulation 50(1) and (3)

These grounds have been consolidated as they raise similar issues touching on the evaluation process.

At the commencement of the hearing, the Applicant alleged that the Procuring Entity irregularly awarded the tender to a bidder who was not the lowest. It submitted that the lowest bidder was Messrs Sifa Insurance Brokers Ltd at a bid price of Kshs. 24.8 million noted at the tender closing/opening date. It further submitted that the Procuring Entity breached Section 66(4) of the Public Procurement & Disposal Act, 2005 (the Act) as read together with Regulations 50(1) & (3) by awarding the tender to Leon Insurance Brokers Ltd, the Successful Bidder.

The Applicant stated that the Procuring Entity also breached Section 31 (1) (a) and (3) of the Act by awarding the tender to a tenderer who had not satisfied the qualification criteria set out in the tender documents. It further stated that the Procuring Entity evaluated the tenders using criteria that were not set out in the tender documents and in the process accepted a tender that was not based on the standard premium rates approved by the Commissioner of Insurance as stipulated in the tender documents. According to the Applicant, this was a breach of Sections 39(1), 66(2) and 66(4) of the Act.

The Applicant argued that the tender was modified to its detriment. It submitted that pursuant to Clause 2.3.1 (xii) of the Instruction to Tenderers, bidders were required to provide a Manufacturers Authorization Form. It further argued that it did not seek clarification on this requirement as the clause was not applicable.

The Applicant further alleged that the Procuring Entity breached Regulation 11 (2) in that the Tender Committee changed the recommendations of the Evaluation Committee.

In addition, the Applicant stated that the tender documents were contradictory as they required the Successful Bidder to have submitted the lowest bid and at the same time to base its quotation on the premium rates approved by the Commissioner of Insurance. It argued that the lowest

tender need not be necessarily in accordance with the approved premium rates. It further alleged that the tender documents were also in breach of the Act in that they allowed the Procuring Entity to place the services with an underwriter of its choice if it found that the underwriter proposed by a bidder was not qualified. According to the Applicant, this was improper as a new underwriter would not be subjected to the same evaluation criteria.

Finally, the Applicant alleged that the Procuring Entity breached Regulation 46 and Clause 2.23.2 of the tender documents by carrying out the evaluation of tenders beyond the statutory 30 days period.

In response, the Procuring Entity submitted that the Request for Review was vague and general and did not disclose the reasons it was based on. It further submitted that the lowest evaluated price was that of the Successful Bidder namely, Messrs Leon Insurance Brokers Ltd.

The Procuring Entity submitted that it evaluated all tenders using the criteria that were set out in the tender documents. It stated that this was done within ten days from the date of tender opening and the award was made to the lowest evaluated bidder, Leon Insurance brokers Ltd, pursuant to Section 66(4) of the Act. It further stated that no bidder was discriminated against in the procurement process. It submitted that the Applicant was disqualified for not meeting the requirements of the tender as set out Section V on Technical Specifications at paragraph 5.2 of the tender documents as follows:

Page 58: ***“Conditions:***

“1... ..

2.

3.

4.

5. The Bidder must show proof that the quotation presented originated from the proposed underwriter.”

Page 59: “Please provide the following information about your company:-

1... ..

... ..

6. State whether your quotation conforms to the standard premium rates set by the Commissioner of Insurance”.

The Procuring Entity stated that the Applicant had not provided any evidence to show that the tender committee changed the evaluation criteria. It further stated that notification to all bidders was done vide letters dated 15th June, 2010. It also submitted that it notified all bidders of the tender committee’s decision by telephone and for those bidders who failed to collect their letters of notification, the letters were dispatched by G4S Courier Services. It further submitted that the tender documents had no contradictions as alleged by the Applicant. It argued that the Applicant

having failed to seek for clarification on the alleged contradictions in the tender documents earlier, it was estopped from raising the same issue of contradictions in the tender documents at the hearing. It further pointed out that though the tender documents had a provision for a reserve price, this was a usual practice in the industry. It argued that the said requirement did not prejudice the Applicant in any way.

The Procuring Entity further submitted that the Applicant had not demonstrated how the Successful Bidder had contravened the requirements of the tender documents. It further submitted that the Applicant had not shown that the Standard Premium Rates approved by the Commissioner of Insurance had not been complied with by the Successful Bidder. It further argued that the Applicant's bid did not conform to the requirements as set out in the standard premium rates approved by the Commissioner of Insurance which was a requirement of the tender.

The Successful bidder, Messrs Leon Insurance Brokers Ltd submitted that the Applicant had not provided evidence that it was the lowest evaluated tender. It further submitted that whereas Sifa Insurance Broker Ltd had the lowest quotation at the opening of the bids, it was not the lowest evaluated bidder. It stated that its bid satisfied the criteria set out in the tender document.

With regard to the Standard Rates as set out by the Commissioner of Insurance, the Successful Bidder argued that these rates were the bare minimum for the industry and that it quoted the approved rates as required. It submitted that the spirit of the Act is clear in terms of transparency and fairness, and that all bidders were treated fairly. It argued that the allegation that the tender document was in breach of Section 31 of the Act was misleading. It pointed out that the Applicant's argument that the tender document allowed the Procuring Entity to place the insurance services with an underwriter of its choice was an afterthought and had no merit. It argued pursuant to Section 31(1) of the Act, the Procuring Entity was obligated to enter into a contract only after satisfying itself on the legal capacity and financial ability of the body it was contracting with.

The Board has carefully considered the submissions by the parties and all documents placed before it.

The Board has noted that out of fourteen bidders who responded to the tender notice, twelve bidders submitted their bids before the closing/opening date of the tender which was 30th April, 2010. Thereafter, the tenders were subjected to an evaluation process which was in three stages namely, preliminary, technical and commercial evaluation stages. The evaluation was based on the evaluation criteria that were set out at page 59 of the tender document.

The Board notes that according to the evaluation report one bidder, namely Fairsure Insurance Brokers Ltd was disqualified at the Preliminary Evaluation stage for failing to provide a copy of its Certificate of Registration. The other eleven bidders proceeded to the technical evaluation stage. Eight of them, including the Applicant were disqualified at the technical evaluation stage for failing to comply with specific technical requirements of the tender.

The Board further finds that the Applicant, having failed to provide an authority letter from their proposed underwriter, was properly disqualified and therefore could not have been the lowest evaluated bidder. The Board notes that only three bidders namely, Leon Insurance Brokers, Alexander Forbes Insurance and Four M. Insurance Brokers qualified for commercial evaluation which involved comparison of prices of the three bidders as follows:

S/No.	Bidder	Tender Sum
1.	Leon Insurance Brokers Ltd	39, 897, 447.00
2.	Four M. Insurance	44, 037, 436.00
3.	Alexander Forbes	54, 013, 616.00

Leon Insurance Brokers Ltd was recommended by the Evaluation Committee for the award of the tender after emerging the lowest evaluated

bidder. This recommendation was presented to the tender committee in its meeting No.117 held on 15th June, 2010. The tender committee concurred with the recommendations of the evaluation committee and awarded the tender to Leon Insurance Brokers Ltd at Kshs. 39, 897, 447.00. The Board therefore finds that the tender committee did not modify the recommendation of the evaluation committee as alleged by the Applicant.

On the breach of Regulation 46 of the Act, the Board notes that the tenders were opened on 30th April, 2010. The Board notes that the minutes of the evaluation report were not dated. However, the evaluation and the award of the tender was done within the bid validity period and the Applicant have not suffered any prejudice.

The Board has perused the original bid document submitted by the Applicant and confirmed that the Applicant had provided a copy of its quotation bearing a stamp of First Assurance Co. Ltd and signed by Mr. Nelson Chege, the Marketing Manager. However, it did not provide a Letter of Authority to prove that the quotation originated from their proposed Underwriter. The Board has also perused the copy of the tender document that was issued to the bidders and noted that bidders were required to provide the name of their underwriters and prove that their quotations originated from their proposed Underwriters. The Board observes whereas the Procuring Entity stated that the proof was to be in

form of a letter of authorization from the underwriter, the Applicant did not provide the letter of authority as required by the tender documents.

On the issue of contradictions in the tender documents, the Board notes that the tender documents allowed the Procuring Entity to satisfy itself that the underwriter proposed by the Successful Bidder is qualified to perform the contract prior to signing of the contract. The Board further notes that the tender document also allowed the Procuring Entity to place the services with an insurance company of its choice if the underwriter proposed by the successful bidder was found unqualified.

Accordingly, these grounds of Review fail.

Grounds Four and Five: Breach of Section 67 (2) of the Act

These grounds have been consolidated as they raise similar issues touching on notification of award to the bidders.

The Applicant stated that it received a letter dated 15th June, 2010 on 22nd June, 2010 informing it that its tender was not successful. It argued that the Procuring Entity failed to notify all bidders simultaneously thus breaching Section 67(2) of the Act and Clause 2.27.2 of the tender documents.

In response, the Procuring Entity denied that it breached Section 67(2) of the Act as alleged by the Applicant. It stated that the all the bidders were duly notified of the decision of the tender committee by the letters dated

15th June, 2010. It submitted that the bidders were called to collect their letters of notification of award. It further submitted that it sent letters by G4S Courier Services to the bidders who failed to collect their letters of notification. It argued that this was done in accordance with Section 67(2) of the Act read together with Clause 2.27.2 of the tender documents.

On its part, the Successful Bidder stated that this was a mere statement. It further stated that the Applicant had suffered no prejudice as it was able to file its Request for Review within time.

The Board has perused the copies of notification letters to both the Successful and unsuccessful bidders. The Board notes that all letters are dated 15th June, 2010. The Board further finds that the information availed by the Procuring Entity proves that notification was done at the same time as required under Section 67(2) of the Act and Clause 2.27.2 of the tender documents.

Accordingly, this ground of Review also fails.

Ground Six: Breach of Section 45(2) (e) and (3) of the Act and Regulation 66(2)

The Applicant submitted that the Procuring Entity breached Section 45(2)(e) and (3) of the Act read together with Regulation 66(2) by failing to provide it with a summary of evaluation report and reasons for rejection of

its tender. It informed the Board that it received an e-mail on 28th June, 2010 containing the evaluation report from the Procuring Entity. This was after filing its Request for Review.

In response, the Procuring Entity stated that the Applicant was furnished with the evaluation report as it had requested by a letter dated 24th June, 2010. The evaluation report was sent to the Applicant by e-mail as requested by its letter.

The Board has perused the documents submitted by the parties and notes that after notification of award, the Applicant wrote a letter dated 23rd June, 2010 requesting the Procuring Entity to provide it with a copy of the evaluation report. The Board notes that the Applicant was not entitled to the evaluation report as it is a confidential document. The Board further notes that the Applicant was entitled to a summary of the evaluation report and comparison of tenders pursuant to Section 44(3) of the Act which provides as follows:

“Notwithstanding the provisions of subsection (2), the disclosure to the applicant seeking a review under Part VIII shall constitute only the summary referred to in section 45(2) (e)”.

The Board notes that Section 45(3) of the Act cited by the Applicant deals with documents which could be availed after the signing of a contract or termination of procurement proceedings. Therefore, Section 45(3) of the

Act was not applicable since neither the contract had not been signed nor were the procurement proceedings terminated. The Board finds that the Procuring Entity responded to the Applicant's request on 28th June, 2010 which was within 14 days pursuant to Regulation 66(2). Indeed, the Applicant acknowledged receipt of the same.

Accordingly, this ground of review also fails.

Ground 13: Breach of Sections 2(b), (c), (d), (e)

The Applicant alleged that the decision of the tender committee was unfair, arbitrary, unjust and contrary to the spirit and purpose of Section 2 (b), (c), (d) and (e) of the Act in that;

- a) The Procuring Entity failed to promote competition by treating the Applicant unfairly and thus withheld crucial information when it knew or ought to have known that the Applicant did not have the said information.
- b) The Procuring Entity failed to promote the integrity and fairness of the procurement process by ensuring that there was a level playing field for all the bidders.
- c) The Procuring Entity failed to display transparency and accountability in its procurement procedures by failing to give adequate responses to the Applicant as required by the law.
- d) The Procuring Entity failed to increase public confidence in its procurement procedures.

In response, the Procuring Entity submitted that this ground had no merit. It stated that it had awarded the tender to the lowest bidder in accordance with the evaluation criteria set out in the tender document.

As the Board has held in its past decisions, Section 2 of the Act sets up the objectives of the Act. The Board further notes that the Applicant has not demonstrated how the Procuring Entity breached Section 2 of the Act. As the Board has noted the Procuring Entity conducted the procurement process in accordance with the tender document, the Act and the Regulations.

Consequently, Section 2 of the Act could not have been breached in isolation.

Accordingly, this ground of appeal also fails.

Ground Fourteen: Loss and Damages

The Applicant stated that it had expended large sums of money in its participation of the tender and therefore it was likely to suffer further financial loss and damage if this Request for Review was not allowed as prayed.

The Procuring Entity did not make any submission on this ground.

On its part, the Successful Bidder requested to be awarded costs since it argued that half of the grounds of the review were speculative. It further argued that the Applicant should have sought clarification under Clause 2.4 of the tender document.

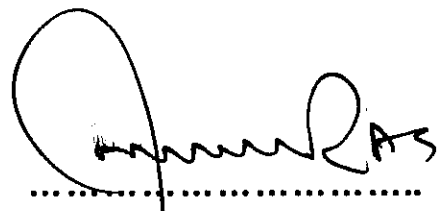
The Board notes that this is not a ground of appeal but the applicant's statements on loss/damages it is likely to suffer. The Board notes that the tendering process is a business risk. Further in open competitive bidding, there is no guarantee that a particular tender will be accepted and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing it cannot claim the loss associated with the said process.

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

Dated this 26th day of July, 2010

A handwritten signature in black ink, appearing to be 'M. M. M.', written over a horizontal dotted line.

CHAIRMAN, PPARB

A handwritten signature in black ink, appearing to be 'M. M. M.', written over a horizontal dotted line.

SECRETARY, PPARB