

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 46/2010 OF 30TH JULY, 2010

BETWEEN

CO-OPERATIVE INSURANCE COMPANY OF KENYA.....Applicant

AND

THE CITY COUNCIL OF NAIROBI.....Procuring Entity

Review against the decision of the City Council of Nairobi to open and read the Financial Bids without the Applicant's Financial Bid in the matter of Tender No. CCN/T/068/2009-2010 for Provision of General Insurance for the year 2010/2011.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mrs. Loise Ruhiu	-	Member
Amb. C. M. Amira	-	Member
Mr. Akich Okola	-	Member
Mr. Joshua W. Wambua	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Mrs. Pamela K. Ouma	-	Secretariat
Ms. J. Wambulwa	-	Secretariat

PRESENT BY INVITATION

Applicant, Co-Operative Insurance Company of Kenya

- Mr. Anthony Kiprono - Advocate, Kwengu & Co. Advocates
Mr. Kiarie James -
Ms. Njeri Maramba - Business Development Manager

Procuring Entity, The City Council of Nairobi

- Mr. J.K. Ndichu - Advocate
Mr. Abwao Erick O. - Advocate
Mr. Patrick Murage - Advocate
Mr. Joseph Kohogo - Director of Procurement

Interested Candidates

- Mr. Dennis Abincha - Advocate, Kenindia Assurance Co. Ltd
Mr. Leo Tolles - Manager, Kenindia Assurance Co. Ltd
Mr. George Ndungu - Insurance Company of East Africa (ICEA)
Nelson Chege - Manager, First Assurance Co. Ltd

BOARD'S DECISION

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

BACKGROUND

The tender for the provision of General Insurance Services for the year 2010 - 2011 was advertised by the City Council of Nairobi in the daily newspapers. The tender closed/opened on 9th July, 2010. Out of the ten tender documents bought, seven tender documents were received from the following firms.

1. First Assurance Company Ltd
2. Co-operative Insurance Company Ltd (CIC)
3. Jubilee Insurance (K) Ltd
4. Trident Insurance Company Ltd
5. Madison Insurance Company (K) Ltd
6. Insurance Company of East Africa (ICEA)
7. Kenindia Assurance Company Ltd

The Tender Opening Committee recorded the documents received as tabulated below:

S/No	Name of The Bidder	CCN Perm	Vat Cert	Pin Cert	Reg Cert	Bid Bond	Remarks
i)	First Assurance	Yes	Yes	Yes	Yes	1,000,000 CBA	1 Original Doc , and 1 Copy
ii)	Cooperative Insurance (CIC)	Yes	Yes	Yes	Yes	1000,000 Co-Op Bank	1 Copy Of Doc, 1 Original
iii)	Jubilee Insurance	Yes	Yes	Yes	Yes	No Bond	1 Original and 1 Copy
iv)	Trident Insurance	Yes	Yes	Yes	No	No Bond	1 Original and 1 Copy
v)	Madison Insurance Company (K) Ltd	Yes	Yes	Yes	Yes	Provided 1,000,000 BBK	1 Original and 1 Copy Document
vi)	Insurance Company Of East Africa Ltd(ICEA)	Yes	Yes	Yes	Yes	Provided 1,000,000 NIC	1 Original , Copy and Financial Bid
vii)	Kenindia Assurance.	No	Yes	Yes	Yes	Provided 1,000,000 Prime	1 Original Doc, And 1 Copy

The Tender Opening Committee noted that Madison Insurance Company Ltd had provided both its financial and technical bids in the same envelope.

EVALUATION

The Evaluation was conducted in three stages; Preliminary; Technical; and Financial as follows:

Preliminary Evaluation:

The bids were evaluated on responsiveness and the summary results were as tabulated below:-

S/n	Area Of Examination	First Assurance	Cooperative Insurance (CIC)	Jubilee Insurance	Trident Insurance	Madison Insurance Company (K) Ltd	Insurance Company Of East Africa Ltd (ICEA)	Kenindia Assurance
1.	Registration with the Commissioner of Insurance from IRA	YES	YES	YES	YES	YES	YES	YES
2.	Annual gross premiums	YES	YES	YES	YES	YES	YES	YES
3.	Paid up capital (300m and above)	YES	YES	YES	NO	YES	YES	YES
4.	Performance recommendation from at least 5 No reputable clients	YES	YES	NO	NO	YES	No	No
5.	Copy of the audited accounts for the last 3 years	YES	YES	YES	NO	YES	YES	YES
6.	Senior Management staff, at least Four (4No.)	YES	YES	YES	YES	YES	YES	YES
7.	PIN certificate	YES	YES	YES	YES	YES	YES	YES
8.	Tax Compliance Certificate	YES	YES	YES	YES	YES	YES	YES
9.	Certificate of Registration/Incorporation	YES	YES	YES	NO	YES	YES	YES
10.	Valid Single Business permit from CCN or other regions.	YES	YES	YES	YES	YES	YES	NO
11.	Company profile.	YES	YES	YES	YES	YES	YES	YES
12.	Member of the Association of Kenya Insurance	YES	YES	YES	YES	YES	YES	YES
13.	Proof of handling of an equivalent mega risk of fire and perils	NO	YES	NO	NO	YES	NO	YES
14.	Bid security (Kshs 1 million)	YES	YES	NO	NO	YES	YES	YES
15.	Document Handling	NO	YES	NO	NO	YES	YES	YES
16.	Copy of receipt	YES	YES	YES	YES	YES	YES	YES

Two bidders namely, Jubilee Insurance (K) Ltd and Trident Insurance Company were disqualified at this stage for not submitting a requisite bid security. The

bidders had provided a bid security from their own company and not from a third party.

Technical Evaluation:

The bids were then evaluated on responsiveness to the following technical parameters:

- i) be registered with the Commissioner of Insurance for the current year
- ii) Must have done annual gross premiums in previous year of Kenya Shillings six hundred Million. (Kshs. 600M) under general insurance business (excluding motor vehicles portfolio)
- iii) Must have paid up capital of at least Kenya shillings Three Hundred Million (300 M) as per I.R.A Act.
- iv) Must give performance recommendation from at least five (5 No.) reputable corporate clients covered for at least two years (2) with a minimum premium portfolio of Kenya shillings Ten Million (10M) each.
- v) Must submit a copy of the audited accounts for the previous three years.
- vi) Must have total number of management staff of at least 4 No. Professionally qualified.
- vii) Must submit copies of the following documents;
 - (a) Pin certificate
 - (a) Tax Compliance Certificate
 - (b) Certificate of Registration/Incorporation
 - (c) City Council of Nairobi Single Business Permit or any such valid Single Business permit from other regions.
 - (d) Company profile.
- viii) Must be a member of the Association of Kenya Insurance (AKI),

ix) Proof of handling of an equivalent mega risk of Fire and Perils policy, (at least two (2) fire policies currently running with a minimum premium of Kshs. 5 million each).

The bidder's overall scores after the technical evaluation was as follows:

Bidder		Score
First Assurance	-	85
Cooperative Insurance (CIC)	-	100
Madison Insurance Company (K) Ltd	-	100
Insurance Company of East Africa Ltd (ICEA)	-	80
Kenindia Insurance	-	87
Maximum Score	-	100

All the bidders qualified for financial evaluation after scoring above the required 70% pass-mark and were recommended for the financial opening.

Financial Evaluation:

The financial bids were opened on 28th July, 2010. At the opening, the chairman of the Evaluation Committee reported that M/s Co-operatives Insurance Co. and M/s Kenindia Assurance Company did not submit their financial bids as required. Representatives of the two bidders raised concern and insisted that they had presented their financial bids together with the technical bids. The committee went ahead and opened the financial bids that were available as scheduled.

The prices quoted after the opening of the available financial bids were as tabulated:

Bid No.	Name Of The Bidder	Amount Tendered	Remarks
1	First Assurance Co Ltd	Kshs 107,181,380	Submitted both original and copy of financial bid
2	Cooperative Insurance Co. Ltd (CIC)	-	Financial bid not availed
5	Madison Insurance Company (K) Ltd	Kshs 105,446,802	Technical and financial bids bound together as one document.
6	Insurance Company Of East Africa Ltd(ICEA)	Kshs 108,090,448	Submitted both original and copy of financial bid
7	Kenindia Assurance.	-	Financial bid not availed

RECOMMENDATION

Due to the concern raised by M/s Cooperative Insurance Co. (CIC) and M/S Kenindia Assurance, the Evaluation Committee noted that their concerns were weighty and could adversely affect the relative ranking of the bidders. Arising from the anomaly, the Evaluation Committee recommended that tender NO CCN/T/068/2009-2010 - PROVISION OF GENERAL INSURANCE SERVICES FOR THE YEAR 2010/2011 be nullified as per provisions in Clause 36.1, pages 19 of the bid document.

TENDER COMMITTEE DECISION

The Tender Committee had not held its meeting to deliberate on the Evaluation Committee recommendations when the Request for Review was Lodged.

THE REVIEW

The Applicant lodged the Request for Review on 30th July, 2010 against the decision of the City Council of Nairobi in the matter of tender No. CCN/T/CT/068/09-10 for the provision of General Insurance Services for the year 2010 - 2011.

At the hearing the Applicant was represented by Mr. Anthony Kiprono, Advocate while the Procuring Entity was represented by Mr. J. K. Ndichu, Advocate. The Interested Candidates present included Kenindia Assurance Company Ltd represented by Mr. Dennis Abincha, Advocate; Insurance Company of East Africa (ICEA) represented by Mr. George Ndungu; and First Assurance Company Ltd represented by Mr. Nelson Chege.

The Applicant requested the Board for the following orders:

- i) "The Decision by the Respondent to open and read the Financial Bids submitted by other Bidders in respect of the Tender No. CCN/I/068/2009-2010, for Provision of General Insurance for the period 2010/2011 without the Applicant's Financial Bid be and is hereby declared null and void and quashed.*
- ii) The Respondent be compelled to open and read the Applicant's Financial Bid so that the same can be evaluated, compared and ranked with the Financial Bids opened and read on 28th July, 2010.*
- iii) The cost of this review be awarded to the Applicant.*
- iv) Any other relief that the Review Board deems fit to grant under the circumstances.*

The Applicant in its Request for Review raised twenty two grounds which the Board deals with as follows:

Grounds 1 - 21 – Breach of Sections 2, 27, 39, 64 and Regulations 45(2), 47 (1) (2), 48 (1), 49(1) and 50 (1)

We combine these grounds as they raise similar issues on the absence of the Applicant's financial bid.

The Applicant submitted that the Procuring Entity failed to open its financial bid in breach of Sections 2, 27, 39 and 64 of the Act. It added that it had submitted its financial bid together with its technical bid at the tender closing/opening date. It further submitted that the Procuring Entity invited it for the financial opening that was to take place on 28th July, 2010 but was informed during the financial bid opening that its financial bid was missing. The Applicant submitted that Clause 27 of the tender Documents provided how bidders were to submit their tenders. It added that it could not have been evaluated on the technical bid if it had not submitted its financial proposal. The Applicant further added that the Procuring Entity was in breach of Regulation 45 (2) for not returning its financial bid unopened if its technical bid had not passed the technical evaluation stage. It contended that its bid was evaluated up to the technical evaluation stage and passed, and that is why it was invited to attend the financial bid opening.

The Applicant submitted that if the allegation by the Procuring Entity that the Applicant had not submitted its financial bid at the closing/opening of the bids was true, then the Procuring Entity should have declared the Applicant's bid non responsive at the preliminary evaluation stage as stipulated in Regulation 47 (2). It further submitted that its tender should have been rejected pursuant to Regulation 48 (1) if it was not responsive in accordance with Section 64 (1) of the Act which provides that a tender is responsive if it conforms to all the mandatory requirements of the tender documents. The Applicant averred that

having been invited for the opening of the financial proposals, the Procuring Entity implied that its technical bid was responsive and admitting that the financial proposal was submitted.

The Applicant further submitted that the Procuring Entity breached Regulation 51(1) by failing to ensure that the Evaluation Report contained a summary of all the tenders received and opened. It further submitted that the Procuring Entity should have recorded in the tender opening minutes the missing document in the Applicant's bid. The Applicant concluded by stating that the Procuring Entity was in breach of Section 27 of the Act by failing to comply with the provisions of the Act ; and Section 39 (1) of the Act by failing to facilitate the participation of the Applicant in the procurement proceedings without discrimination.

In response, the Procuring Entity denied the allegations of the Applicant and stated that the Applicant did not submit its financial bid document together with its technical bid. It added that the absence of the Applicant's financial bid was discovered by the Evaluation Committee during the Preliminary Evaluation of the bids. It averred that the Applicant's bid was never evaluated as per Regulation 45 (2) of the Public Procurement and Disposal Regulations, 2006

The Procuring Entity stated that the fact that all bidders including the Applicant were invited to attend the financial bid opening did not imply that their documents were in order as required. It submitted that all the bidders were invited to enhance transparency and accountability of the process. The Procuring Entity concluded that the Applicant's Request for Review was

premature as the tender had not yet been awarded. It added that the Evaluation Committee had recommended that the tender be nullified in accordance with Section 36 of the Act.

An Interested party, Kenindia Assurance Company Ltd, submitted that it had participated in the tender process and had submitted both its technical and financial bids at the tender closing/opening date. It added that it was informed that its financial bid was missing during the financial bid opening. It concluded by stating that the opening of the financial bid of other bidders and the misplacement of its bid rendered the entire tendering process fatally flawed and irregular

Another Interested party, Insurance Company of East Africa Limited (ICEA) in its written submissions to the Board stated that all the bids opened on 9th July, 2010 were complete with both technical and financial bid. It stated that the Procuring Entity did not inform the bidders that any financial bids were missing. The Interested Party stated that bidders had to wait for two hours during the financial bid opening while the Procuring Entity's officials were searching for the financial bids of the Applicant and that of M/s Kenindia Assurance Company Ltd.

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

The Board notes that the tender under review was closed/opened on 9th July, 2010 in the presence of the bidders' representatives. The Board also notes that seven bidders including the Applicant submitted their bids. The Board further

notes that the tender document in *Clause 1.2.1 Appendix 1 – Instructions to tenderers, item 27 page 16* stated as follows;

“Tenderers are advised that submission shall be a two envelope method (Technical envelope to be separated from financial envelope but all is put in one big envelope, - All envelopes should be carefully labelled. Then together with the labelled technical bid be put in one big outer envelope stated Town Clerk and Tender No.

- i. Technical shall be opened and evaluated thereafter*
- ii. Successful tenderers shall then be invited to witness the opening of the financial (those who choose to attend)*
- iii. Financial that contains information in 30 (a) and Form of Bid on page 26, Schedule of Requirements (Insurance Cover) and Price (Premium) offered on pages 27 – 59 to be submitted in a separate envelope marked ‘financial bid’.”*

The Board also notes that Clause 32.4 of the tender document states that prior to the detailed evaluation, the Procuring Entity shall determine the substantial responsiveness of each tender to the tender documents. The Clause further stipulates that a substantially responsive tender would be one which conformed to all the terms and conditions of the tender documents without material deviations. In addition, the Board notes that Clause 32.5 stipulates that if a tender is not substantially responsive, it shall be rejected by the Procuring Entity and shall not subsequently be made responsive by the tenderer by correction of the non-conformity.

The Board further notes that during the tender closing/opening, the Procuring Entity recorded in the Tender Opening Register the name of the bidder;

provision of the City Council Permit; VAT Certificate; PIN Certificate; Registration Certificate; and the bid Security. The Board also notes that the minutes of the Tender Opening Committee recorded whether a bidder had submitted an original or copy of the tender document. In addition, the Board notes that the Tender Opening Committee made only one observation in the Tender Opening Minutes to the effect that Madison Insurance Company (K) Ltd had provided both the financial and technical bids in the same document though it had been indicated clearly in the tender document that the technical and financial proposals be separate. The Board notes that despite this noted discrepancy, the bid by M/s Madison Insurance Company (K) Ltd was evaluated and declared responsive at the Preliminary Evaluation stage and passed to the technical evaluation stage. The same bidder's financial quotation was recorded during the financial opening together with the other bids. The Board also notes that the Evaluation Committee made no observation in respect of the alleged missing financial bid by the Applicant at the Preliminary Evaluation stage.

The Board further notes that at the preliminary and technical evaluation stages, the bids of five bidders including the bid by the Applicant were declared responsive and the qualified bidders were invited for the financial bid opening. Indeed the Board notes that at the Technical Evaluation stage, the Applicant scored 100%; Madison Insurance Company Ltd scored 100%; Kenindia Assurance Company Ltd scored 87%; First Assurance Company scored 85%; and Insurance Company of East Africa scored 80%. The Board also notes that the financial opening was conducted by the Evaluation Committee on 28th July, 2010 and not by the Tender Opening Committee. It was at this stage the

Procuring Entity reported to the bidders present that financial bids of the Applicant and M/s Kenindia Assurance were missing.

On perusal of the original bid documents, the Board notes that Madison Insurance Company Ltd had submitted bid document which had combined both Technical and Financial proposal. The Board further notes that the Applicant's bid and that of Kenindia Assurance Company Ltd bids were each titled "Original Technical Bid" implying that each had a separate Financial Bid.

The Board is alive to Regulation 47 (1) which stipulates that the Evaluation Committee shall first conduct a Preliminary Evaluation to determine whether the tender has been submitted in the required format. The Board also notes that Regulation 47 (2) empowers the Evaluation Committee to reject tenders which do not satisfy the requirements set out in Regulation 47 (1). The Board observes that the Evaluation Committee in its Evaluation report only noted the anomaly of the combined technical and financial bid by M/s Madison Insurance Company Ltd, but does not, surprisingly, report or note the missing financial bids of the Applicant and Kenindia Insurance Company. The Procuring Entity did not explain the reason for this omission during the hearing.

The Board further notes that the Evaluation Committee recommended that the tender process be 'nullified' as a result of the missing financial bids. However, the Board notes that by the time this Request for Review was lodged the Tender Committee had not deliberated on this recommendation.

The Board has reviewed the Evaluation Committee's Preliminary; Technical and Financial Evaluation reports and makes the following observations:

i) The tender document clearly stipulated that the bidders were to submit the tenders in a two envelope system.

ii) The Procuring Entity evaluated the bids in two stages namely, Preliminary and Technical and then invited the qualified bidders including the Applicant for the financial bid opening.

Taking into account the above matters, the Board finds that the Applicant could not have been invited for the financial bid opening if it had not submitted its financial bid. The Board notes that Regulation 45 (2) provides that where a tenderer fails at technical evaluation, a Procuring Entity shall return the financial bid unopened. The Board finds that the Applicant's financial bid was not returned to it unopened as required by Regulation 45 (2).

The Board further finds that the Procuring Entity did not record in the tender register or in the Tender Opening Minutes that the Applicant had not submitted its financial bid. In view of this, the Procuring Entity cannot therefore claim that the Applicant had not submitted its financial bid at the tender closing/opening. The Board further finds that the claim by the Interested Party Kenindia Assurance Company Ltd that it had also submitted a financial bid together with its technical bid is justified.

In view of the foregoing, these grounds of Review succeed.

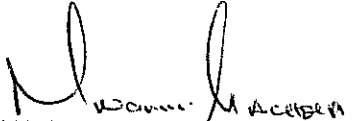
Ground 22- Statement of Loss

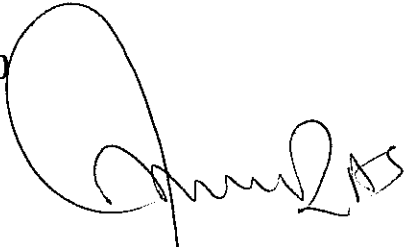
This is not a ground but the Applicant's statement of Loss.

The Board has, on several occasions, held that costs incurred by tenderers at the time of tendering are commercial risks borne by people in business and therefore each bidder carries its own costs.

Taking into account all the foregoing matters the Board finds that the procurement process was flawed. The Request for Review succeeds. The Board directs, pursuant to Section 98 of the Act, the tender process is hereby annulled. The Procuring Entity may re-tender.

Dated at Nairobi on this 23rd day of August, 2010


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CHAIRMAN
PPARB


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SECRETARY
PPARB