

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 32/2011 OF 14TH JULY, 2011

BETWEEN

SEDGWICK KENYA INSURANCE BROKERS LIMITED.....APPLICANT

AND

KENYA AIRPORTS AUTHORITY.....PROCURING ENTITY

Review against the decision of Kenya Airports Authority in the matter of Tender No. KAA/76/2011-2012 for Provision of Insurance Brokerage Services.

BOARD MEMBERS PRESENT

Ms. Judith Guserwa	-	Holding brief for Chairman
Mr. Joshua Wambua	-	Member
Mr. Sospeter Kioko	-	Member
Ms. Natasha Mutai	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

Mr. N. Soita - Holding brief for Secretary
Ms. S. Miano - Secretariat

PRESENT BY INVITATION

Applicant, Sedgwick Kenya Insurance Brokers Limited.

Mr. Arimi Kimathi - Advocate
Mr. Abdallah Bekah - Managing Director
Mr. Sammy Kiragu - General Manager

Procuring Entity, Kenya Airports Authority.

Mr. Victor Arika - Legal Counsel
Mr. Allan Muturi - General manager, Procurement
Mr. Sammy Kemboi - PA

Interested Candidates

Mr. Steve Mwaniki - General Manager (Alexander Forbes Risk & Insurance Brokers Ltd)
Mr. Abel Musunza - Assistant Divisional Director (Eagle Africa Insurance Brokers)
Mr. Paul Waweru - Managing Director (Alpha Risk Management Services 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 OF AWARD

Advertisement

The tender for Provision of Insurance Brokerage Services under Airport Operations Liability Policy was advertised in the daily press on 11th and 13th May, 2011.

Closing/Opening:

The tender closing was on 7th June, 2011. At the tender closing/opening four (4) bids were submitted as follows:

No.	Broker	Amount (US\$)	
		Option A	Option B
1	Sedgwick Kenya Insurance Brokers	US\$ 558,225	USD 558,225
2	Alexander Forbes Risk and Insurance Brokers	US\$ 486,170	US\$ 535,146
3	Eagle Africa Insurance Brokers	US\$ 473,750	US\$ 473,750
4	Liaison Group (Insurance Brokers) Ltd	US\$ 499,482	US\$ 499,482

EVALUATION

Evaluation was carried out in three stages namely; Preliminary examination, Technical and Financial Evaluations.

Preliminary Evaluation:

The tenders were evaluated for responsiveness based on the following mandatory requirements:

- i) Completed Form of Tender
- ii) Tender Security of Ksh.500,000
- iii) Completed Confidential Business Questionnaire
- iv) Registration with the Insurance Regulatory Authority for current year and a copy of the license be submitted
- v) Certificate of Registration/Incorporation
- vi) Current KRA Tax Compliance Certificate
- vii) Current membership of the Association of Insurance Brokers of Kenya (AIBK)
- viii) Provide the following particulars of the nominated local fronting insurer:
 - Certificate of Incorporation
 - Current Tax Compliance Certificate
 - Current Insurance Regulatory License
 - Current Membership to Association of Kenya Insurers
 - Submit certified copies of Audited accounts for the previous three (3) years (2008, 2009 & 2010)
- ix) Provide detailed Company Profile

- x) Professional Indemnity Insurance Cover of at least Ksh.100 million and copy of certificate to be submitted.
- xi) Certified copies of audited accounts for the previous three (3) years (2008, 2009 & 2010).
- xii) Bank guarantee of Ksh.3 million deposited with the Insurance Regulatory Authority and evidence thereof submitted.
- xiii) A list of the participating International Underwriters supported by a confirmation signed by each of the underwriters for their proportion of retention.
- xiv) In addition to the foregoing requirements, the bid shall also be evaluated on the basis of requirements stipulated under section 2.3 of the tender document.

A summary of the Preliminary evaluation results were as follows:

	Sedgwick Kenya	Liaison Group	Eagle Africa	Alexander Forbes
Form of Tender	Yes	Yes	Yes	Yes
Bid Bond - Ksh.500,000	Yes	Yes	No	Yes
Business Questionnaire	Yes	Yes	Yes	Yes
IRA Registration	Yes	Yes	Yes	Yes
Certificate of Incorporation	Yes	Yes	Yes	Yes
Tax Compliance	Yes	Yes	Yes	Yes
AIBK membership	Yes	Yes	Yes	Yes
Detailed Company profile	Yes	Yes	Yes	Yes
Professional Indemnity Cover Ksh.100m	Yes	Yes	Yes	Yes
Certified copies of audited accounts (2008, 2009 \$ 2010)	No	Yes	Yes	Yes
Bank guarantee of Ksh. 3m	Yes	Yes	Yes	Yes
A list of participating underwriters supported by a confirmation signed by each	Yes	Yes	Yes	Yes
Requirements as per section 2.3 of the tender document.	Yes	Yes	Yes	yes
Remarks	NR	R	NR	R

Key: R – Responsive, NR – Non Responsive

Following the Preliminary Evaluation of the bids, two tenderers namely; Sedgwick Kenya Insurance Brokers and Eagle Africa Insurance Brokers were disqualified for being non-responsive. Sedgwick Kenya Insurance Brokers did not provide certified copy of audited accounts for 2010 while Eagle Africa Insurance Brokers provided a bid security with validity period of 91 days instead of the required 120 days.

Liaison (IB) Group Ltd and Alexander Forbes Risk & Insurance Brokers Ltd were both responsive and therefore subjected to further evaluation.

Mandatory Requirements for the nominated Local fronting insurer, nominated International Insurance Brokers and the Lead Nominated International Underwriter/Re-Insurer.

The two tenderers were subjected to the above requirements where Liaison (IB) Group Ltd was disqualified. The tenderer had nominated AON UK Ltd as their International Broker and Mit Llyods Syndicate as their International Underwriter both of which did not provide copies of audited accounts for three (3) years (2008, 2009 & 2010) and detailed company profiles.

Only one tenderer, M/s Alexander Forbes Risk and Insurance Brokers met all the mandatory requirements and proceeded to Technical Evaluation.

Technical Evaluation

Technical evaluation was based on the criteria indicated below. Tenderers attaining the minimum score of **80%** were to proceed to Financial evaluation.

Local Insurance Broker:

1. Must have continuously operated as insurance brokers for the last 5 years evidenced by annual insurance certificates from Insurance Regulatory Authority (IRA). **Points-5%**
2. Must have an average gross underwritten premium of ksh.300 million in the last three (3) years i.e 2008, 2009 & 2010. Each tenderer must submit proof in terms of certified certificates from auditors and endorsed by a commissioner of oaths. **Points-10%**
3. Recommendation letters from five clients (for 2008 to 2010) with premiums of Ksh. 10 million and above. Each client **MUST** indicate the types of insurance policies, premium for each policy and aggregate premium. **Points-10%**
4. Proof of business partnership of not less than 3 years with an overseas broker able to place insurance business in international insurance market (Agreements, letters of recommendation and contracts). **Points-15%**
5. Demonstrate your firm's experience in direct placing of insurance business overseas markets and provide proof of the volume of business so placed for the last 5 years (**not reinsurance**) – Attach copies of IRA authorization letters. **Points-10%**

6. Must have written proof from three clients that they have handled business of similar size and complexity in the last five years (Attach agreements, LSO's, letter of awards or Contracts). **Points-10%**
7. Staff qualification of at least a degree plus a diploma in insurance with 3 years experience in aviation or marine and related insurance lines. Details of at least two (2) key staff members must be submitted in the format of the attached **form T3** below. Attach all the relevant certificates and detailed CVs for two above. **Points -10%**

Nominated International Broker

1. Must have continuously operated as insurance Brokers for the last 5 years (attach proof). **Points-5%**
2. Must have written proof from five clients that they have handled business of similar size and complexity in the last five years (Attach agreements, LSOs, letter of awards or Contracts). **Points-10%**

Nominated International Underwriter

1. Must have continuously operated as underwriter for the last 5 years (attach proof). **Points-5%**
2. Must have written proof from three clients that they have handled business of similar size and complexity in the last five years (Attach agreements, LSOs, letter of awards or Contracts). **Points-10%**

Results of the Technical evaluation were that the only bidder evaluated at this stage, M/s Alexander Forbes Risk and Insurance Brokers scored a total of 83.5% which was above the required minimum score of 80% and proceeded to Financial evaluation.

Financial Evaluation

The formula provided for financial evaluation was:

Tender Amount Score (TAS) = $100 \times \text{fm}/\text{f}$, where,

TAS = Tender Amount Score

FM = Is the lowest fees quoted by the brokers who have passed technical requirements

F = Is the fees of the proposal under consideration.

M/s Alexander Forbes Risk and Insurance Brokers' tender sum was as follows:

	US\$	RATE GIVEN	KSH.
OPTION A	486,170.00	1US\$ @ Ksh.87	42,296,790.00
Kenya Airports Authority			
OPTION B			
Kenya Airports Authority	486,170.00	1US\$ @ Ksh.87	42,296,790.00
Contractors/sub-contractors	48,976.00	1US\$ @ Ksh.87	4,260,912.00
TOTAL	535,146.00		46,557,702.00

The bidder met all the technical specifications of the tender document in terms of the Limits of Liability and what was to be included in the Cover.

RECOMMENDATION

The Committee recommends that the tender for provision of insurance services in respect of Airport operations liability, be awarded to M/s Alexander Forbes Risk & Insurance Brokers Ltd, who was responsive to all requirements under Option B at a premium of US\$ 535,146.00 which will cover Kenya Airports Authority, contractors and sub contractors undertaking contract works as stipulated in the tender document until integrated insurance programme cover is put in place.

For clarity purposes the committee further recommends that the Alexander Forbes Risk & Insurance Brokers Ltd should ensure that risk details from Marsh Limited under interest insured is rectified to read as per the scope of the cover in the tender documents.

THE TENDER COMMITTEE DECISION

The Tender Committee in its 155th meeting held on 23rd June, 2011 deliberated on the recommendations of the Evaluation Committee and approved award of the contract to M/s Alexander Forbes Risk & Insurance Brokers Ltd at their tender sum of US\$ 535,146.00. This would cover contractors and sub contractors undertaking contract works as recommended by the evaluation committee.

THE REVIEW

The Request for Review was lodged by M/s Sedgwick Kenya Insurance Brokers Limited on 14th July 2011 against the decision of the Tender Committee of Kenya Airports Authority in the matter of Tender No. KAA/76/2011-2012 for Provision of Insurance Brokerage Services under Airport Operations Liability Policy. The Applicant was represented by Mr. Arimi Kimathi, Advocate while the Procuring Entity was represented by Mr. Victor Arika, Advocate. The interested candidate Alexander Forbes Risk & Insurance Brokers Ltd was represented by Mr. Stephen Mwaniki.

The Applicant raised eight (8) grounds of review and urged the Board to make the following orders:-

- a) The Decision of the Procuring Entity be annulled and the Tender be awarded to the Applicant herein.*
- b) The Procuring Entity be ordered to enter into contract with the Applicant on terms of its tender price as required and/or anticipated by the Act and the Tender document.*
- c) The Applicant be awarded costs of and incidentals to this application AND*
- d) Such other or further order and/or directions as this Humble Board may deem fit and expedient to grant.*

The Board deals with the grounds of Review as follows:

Grounds 1 & 2: Breach of Section 66(3)(a)

The two grounds have been consolidated as they both relate to the requirements of Clause 4.1.9 of the Tender Document on unrealistic and unattainable evaluation criteria.

The Applicant stated that the Tender Document had an arbitrary, unrealistic and unattainable requirement under condition 4.1.9 which required the Insurance Brokers to submit certified Accounts for the previous three years (2008, 2009 and 2010). It submitted that this requirement could not be met as the Accounts for the year 2010 were not and would not have been ready within the required time in the month of May, 2011 before the closure of the tender on 6th June, 2011. It added that the Applicant's Auditors M/S. Ernst & Young had written to the Procuring Entity confirming that the said Accounts were not yet ready for submission although the same would be ready for submission before 30th June, 2011 in compliance with the provisions of the Income tax Act Cap 470. It submitted that for the last 20 years when it was providing Insurance Services to the Procuring Entity, it had never been required to supply the Audited Accounts for the current year and therefore imputed malice and bad motive on the part of the Procuring Entity in this regard.

In response the Procuring Entity submitted that the Applicant's grounds contained mere Statements which could not substantively form part of the grounds as contemplated by the Request for a Review under Section 93(1) of the Act. It argued that it performed the duties and obligations imposed on it by the Act and Regulations by ensuring that there was conformity with the mandatory requirement in the tender documents. It stated that the Applicant's bid was found to be unsuccessful at the Preliminary Evaluation stage and was not evaluated further as per Section 64(1) of the Public Procurement and Disposal Act and Regulations 47(1) & (2) and 48(1) of the Public Procurement and Disposal Regulations 2006. It further argued that the condition contemplated in Clause 4.1.9 of the Tender Document in respect of the evaluation criteria could not be said to be arbitrary, unrealistic and unattainable as all the other bids complied with the requirement. It added that the Applicant did not raise any issues or queries touching on the evaluation criteria before the tender was closed and therefore could not be heard to complain after its bid was rejected. It finally submitted that the Procuring Entity had fully complied with the provisions of the Act.

The Board has carefully examined the documents presented before it and the parties' submissions. The Board has noted that Clause 4.1.9 of the tender documents provided as follows:-

“Must have certified copies of audited accounts for the previous three (3) years (2008, 2009 and 2010)”.

The Board has further noted that all the bidders who participated in the subject tender were required to comply with the foregoing Clause. It is also noted that neither the Applicant nor any of the other bidders prior to bid closure raised any issues or queries concerning the aforementioned Clause with regard to whether or not it was possible to submit the Audited Accounts for the year 2010.

The Board finds that the Applicant did not comply with the requirements of the said Clause by failing to submit with its bid documents the Accounts for year 2010 and hence the disqualification of its bid at the Preliminary Evaluation stage. The letter from the Auditors could not meet the evaluation criteria set by the Procuring Entity as the same could not suffice for the requirement of **Certified Audited Accounts**.

The Board therefore holds that the Applicant's bid was properly rejected by the Procuring Entity and these grounds of Appeal fail.

Ground No. 3

The Applicant stated that there was a conflict of interest on the part of the Risk Consultant engaged by the Procuring Entity in either design or evaluation of the Bids. It added that the Managing Director of M/S. Alpha Risk Management Services Ltd, the firm retained by the Procuring Entity was a former employee of the Successful Bidder and therefore must have evaluated the Applicant's bid with a bias towards the Successful Tenderer's bid in contravention of Section 2.1.3 of the Tender Document.

In response, the Procuring Entity stated that it did not breach Clause 2.1.3 of the Instructions to Tenderers (I.T.T.) in any way as it did not have any knowledge or evidence of Mr. Paul Waweru the Managing Director of the M/s Alpha Risk Management Services Ltd having been an employee of the Successful Bidder. At this juncture, Mr. Paul Waweru, who was in attendance during the proceedings informed the Board that he had never worked for the Successful Bidder at any time whatsoever as alleged by the Applicant. He further informed the Board that the Company he previously worked for was M/s Alexander Forbes Insurance Brokers (K) Ltd, now known as Eagle Africa Insurance Brokers, whereas the Successful Bidder was Alexander Forbes Risk and Insurance Brokers Ltd.

The Board has considered the documents placed before it and the submissions by all the parties and makes the following findings.

The Board notes that Clause 2.1.3 of the Tender Documents provided as follows:-

"Tenderers shall provide the qualification information statement that the tenderer (including all members of a joint venture and subcontractors) is not associated, or have been associated in the past, directly or indirectly, with a firm or any of its affiliates which have been engaged by the Kenya Airports Authority to provide consulting services for the preparation of the design, specifications, and other documents to be used for the procurement of the services under this invitation for tenders".

The Board further notes that a Mr. Paul Waweru the Managing Director of M/s Alpha Risk Management Services Ltd appeared before it and confirmed that he had never worked for the Successful Bidder as alleged.

The Board also notes that the resignation letter dated 1st June, 2005 which the Applicant relied on is not addressed to the Successful Bidder.

In the above premises, the Board finds that there is no justification and/or merit in the allegation of conflict of interest as the same cannot be established between the Successful Bidder and Mr. Paul Waweru.

This ground of Appeal therefore also fails.

Grounds 4,5,6 and 8: Breach of Section 66(2)

These grounds have been consolidated as they all relate to the evaluation process. The Applicant averred that the Successful Bidder was established in the year 2008 October while the Procuring Entity's tender documents at Section 4.1.11 required eligible bidders to have been in operation as Insurance Brokers for the last 5 years. It alleged that the Successful Bidder did not comply with condition 4.1.18 of the Instructions to Tenderers (I.T.T.) which required the Local Insurance Brokers to provide a list of participating International Underwriters supported by a confirmation signed by each of the underwriters for their proportion of retention. It added that the Applicant's London correspondent brokers had expressed their concern over the alleged Successful Bidder who had approached them when in fact they had already quoted for the Applicant. It argued that the

attempt by the Successful Bidder, post award, to contact Chartis Insurance UK Ltd clearly showed it did not have an International Underwriter of its own in the London market as per the requirement of Section 7.1(a) and condition 4.1.15 of the Addendum dated 24th May, 2011 to the bidders. It submitted that the Successful Bidder was therefore in breach of the Instructions to Tenderers (I.T.T.) and ought not to have won the tender.

In response the Procuring Entity stated that the Successful Bidder's bid was evaluated in strict compliance with the criteria set out in the Instructions to Tenderers (I.T.T.) and the evaluation was transparent, fair, and open. It stated that the Successful Bidder had provided all the relevant certificates of registration and relevant Insurance Regulatory Authority's certificates to show that it had been in business since the year 2003 July 7th. It added that the Successful Bidder had complied with the requirement for the provisions of a list of International Underwriters as required by Clauses 7.1(a) and (2).

The Interested Party, M/S Alexander Forbes Risk & Insurance Brokers Ltd, stated that it had been in existence since 7th July, 2003 under different names but doing Insurance businesses. It further stated that it had complied with all the requirements of the subject tender as per the Instructions to Tenderers (I.T.T.) and even supplied a list of its International Underwriters. It also confirmed that it had contacted M/S. Chartis Insurance UK Ltd as one of its International Underwriters in the London Market.

The Board has considered all the documents placed before it together with the submissions of the parties and makes the following findings.

The Board notes that the Successful Bidder, M/s Alexander Forbes Risk & Insurance Brokers Ltd, had been in operation since its registration on 7th July, 2003 as **Forbes Insurance Brokers Ltd** under Registration Certificate No. C. 104447. The Board further notes that on 1st July, 2004 the Successful Bidder changed its identity to **Quantum Insurance Brokers Ltd** under the same certificate No. C. 104447 and on 28th August, 2008 a further change of name was effected to **Alexander Forbes Risk and Insurance Brokers Limited** under the same certificate No. C. 104447.

The Board further notes that the Successful Bidder's bid document contained all their certificates of registration as a broker in their respective names since 2005 together with licences from the Commissioner of Insurance and the Insurance Regulatory Authority for the period 2008 to 2011.

To this extent, the Board finds that the Successful Bidder satisfied the Procuring Entity's requirements under Clause 4.1.4 of the Tender Document which provided as follows:-

"Must have continuously operated as insurance brokers for the last 5 years evidenced by annual insurance certificates from Insurance Regulatory Authority (IRA)".

On the second limb relating to the compliance with Clauses 7.1.13, the Board notes that the said Clauses provided as follows:-

“A list of the participating International Underwriters supported by a confirmation signed by each of the underwriters for their proportion of retention.”

The Board notes that the Applicant in its bid listed Chartis Insurance UK Ltd as its sole International Underwriter.

The Board further notes that the documents supplied by the Applicant with respect to the International Underwriters were duly stamped and signed as per the Instructions contained in the aforesaid Clause. The Board also notes that the Successful Bidder had nominated Marsh Ltd as its International Broker and Chartis Insurance UK Ltd as its International Underwriter, amongst others. However, the Board finds that the list supplied by the Successful Bidder with respect to the underwriter was not signed by any one of the nominated underwriters. This fact was acknowledged by the Procuring Entity at the hearing.

In the premises, the Board holds that the Successful Tenderer bid did not comply with the requirements of the Tender Document.

Consequently, the Successful Tenderer's bid ought to have been disqualified on this account. To this extent the Board finds that this limb of the grounds for appeal succeeds.

Grounds 7

This ground is the Applicant's statement of anticipated 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 the foregoing, this Request for Review Succeeds. The Board orders, pursuant to Section 98 of the Act that the Procuring Entity may retender using the Restricted Tendering Method using the same bidders that participated in the tender.

Dated at Nairobi on this 8th day of August, 2011


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CHAIRMAN
PPARB


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for
SECRETARY
PPARB

