

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 47/2012 OF 28TH SEPTEMBER, 2012

BETWEEN

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

AND

NZOIA SUGAR COMPANY LIMITED.....PROCURING ENTITY

Review against the decision of the Tender Committee of Nzoia Sugar Company Ltd in the matter of Tender No. NSC/T-7/2012-14 for Provision of Insurance Brokerage Services.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Amb. Charles Amira	-	Member
Ms. Natasha Mutai	-	Member
Mrs. Loise Ruhiu	-	Member.

IN ATTENDANCE

Ms. Pauline Opiyo	-	Ag. Secretary
Ms. Shelmith Miano	-	Secretariat.

PRESENT BY INVITATION

Applicant – M/s Pelican Insurance Brokers (K) Limited

Mr. Anthony Kiprono - Advocate

Mr. Kagwe Githui - C.E.O

Procuring Entity – Nzoia Sugar Company Ltd

Mr. Ashitiva B. Mundale - Advocate

Mr. David Sitati - Advocate

Ms. Sarah Nyoike - Advocate

Ms. Rita Mukhongo - Legal Officer

Ms. Nurwin Fozia - Purchasing Manager

Mr. Henry B. Wamenya - Purchasing Supervisor

Mr. Kennedy Wanjala - Legal Assistant

Interested Parties

Mr. Augustus Onyango - Advocate, Four M Insurance Brokers

Mr. Chris Murai - Alpine Insurance Brokers

Mr. Paul Amuga - Advocate, Miran Insurance Brokers

Mr. Denis Nyongesa - General Manager, Four M Insurance

Ms. Lilian Kibunja - Finance & Admin Manager, Four M Ins.

Ms. Veronica Wangari - Underwriter, Eden Rock Insurance

BOARD'S DECISION

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

BACKGROUND OF AWARD

Advertisement

The tender for Provision of Insurance Brokerage Services was advertised in The Standard and Daily Nation of 13th July, 2012.

Closing/Opening

The tenders closed on 7th August, 2012 at 10.30 a.m. Bidders representatives witnessed the closing/ opening of the tenders. The following twenty (20) out of twenty-one (21) firms that bought tender documents submitted their tenders by the tender closing/ opening time:

1. Yess Insurance Brokers Ltd
2. Miran Insurance Brokers Ltd
3. Four M Insurance Brokers Ltd
4. Pelican Insurance Brokers (K) Ltd
5. Skylark Africa Insurance Brokers
6. Aon Kenya Insurance Brokers
7. Plan & Place Insurance Brokers Ltd
8. Eden Rock Insurance Brokers Ltd
9. Leon Insurance Brokers Ltd
10. Getrio Insurance Brokers Ltd
11. Interboke Insurance Brokers
12. Vike Insurance Brokers Ltd
13. Prosperity Insurance Brokers Ltd
14. Disney Insurance Brokers Ltd
15. Prime Mover Insurance Brokers Ltd
16. Alexander Forbes
17. Channel Insurance Brokers Ltd

18. Cherith Brooks Insurance Brokers Ltd

19. Alpine Insurance Brokers Ltd

20. First Class Insurance Agency

Bidders quoted the following prices before any evaluation

Table 1: Prices as

S/no	Description	First Class	Getrio	Prosperity	cherith
1.	Provision of insurance Brokerage services	52,126,200.00	44,633,322.00	31,116,128.00	47,948,231.00

S/no	Description	Vike	Four M	Alpine	Alexander
1.	Provision of insurance Brokerage services	67,106,847.00	87,342,545.00	107,018,258.00	50,840,908

S/no	Description	Plan & place	Leon	Disney	Prime movers
1.	Provision of insurance Brokerage services	71,181,281.00	61,153,290.00	41,011,274.00	40,722,740.00

S/no	Description	Eden rock	AON	Interbroke	Miran
1.	Provision of insurance Brokerage services	40,411,232.00	49,972,880.00	53,397,232.00	49,422,222.00

S/no	Description	Yess	Skylark	Channel	Pelican
1.	Provision of insurance Brokerage services	42,774,372.00	40,209,358.00	34,185,041.00	41,011,274.00

EVALUATION

Evaluation was done in three stages namely;

- Preliminary examination for provision of mandatory documents / information
- Technical Evaluation
- Commercial Evaluation

Preliminary Examination

Bids were examined for compliance with the following preliminary requirements:

1. Tender security 2%
2. Certificate of incorporation/Registration
3. Memorandum and Articles of Association
4. Trade license
5. PIN Certificate
6. Indicate names of Directors
7. Submit copy of the tax compliance certificate
8. Company profile

Bidders failing to provide any of the above preliminary requirements were to be disqualified. The results are as illustrated in table 2.

Table 2: Preliminary Evaluation.

S/no	Requirement	First	Getrio	Prosperity	Cherith	Vike	FourM	Alpine
1.	Provide 2% of the tender security	Not attached	2%	Not attached	2%	Not attached	2%	2%
2.	Provide Company profile	Provided	Provided	Provided	Provided	Provided	Provided	Provided
3.	Certificate of	Provided	Provided	Provided	Provided	Provided	Provided	Provided

	incorporation/Registration							
4.	Memorandum and Articles of Association	Provided	Provided	Provided	Provided	Provided	Provided	Provided
5.	Trade license	Provided	Provided	Provided	Provided	Provided	Provided	Provided
6.	PIN Certificate	Provided	Provided	Provided	Provided	Provided	Provided	Provided
7.	Submit copy of the tax compliance certificate	Provided	Provided	Provided	Provided	Provided	Provided	Provided
8.	Indicate names of directors	Provided	Provided	Provided	Provided	Provided	Provided	Provided

S/no	Requirement	Alexander	Plan	Leon	Disney	Prime	Eden	EON
1.	Provide 2% of the tender security value	2%	Less 2%	Less 2%	2%	2%	2%	2%
2.	Provide Company profile	Provided	Provided	Provided	Provided	Provided	Provided	Provided
3.	Certificate of incorporation/Registration	Provided	Provided	Provided	Provided	Provided	Provided	Provided
4.	Memorandum and Articles of Association	Provided	Provided	Provided	Provided	Provided	Provided	Provided
5.	Trade license	Provided	Provided	Provided	Provided	Provided	Provided	Provided
6.	PIN Certificate	Provided	Provided	Provided	Provided	Provided	Provided	Provided
7.	Submit copy of the tax compliance certificate	Provided	Provided	Provided	Provided	Not provided	Provided	Provided
8.	Indicate names of directors	Provided	Provided	Provided	Provided	Provided	Provided	Provided

S/no	Requirement	Robert	Miran	Yess	Skylark	Channel	Pelican
1.	Provide 2% of	Less 2%	2%	2%	2%	2%	2%

	the tender security Value						
2.	Provide Company profile	Provided	Provided	Provided	Provided	Provided	Provided
3.	Certificate of incorporation/R registration	Provide	Provided	Provided	Provided	Provided	Provided
4.	Memorandum and Articles of Association	Provided	Provided	Provided	Provided	Provided	Provided
5.	Trade license	Provided	Provided	Provided	Provided	Provided	Provided
6.	PIN certificate	Provided	Provided	Provided	Provided	Provided	Provided
7.	Submit copy of the tax compliance certificate	Provided	Provided	Provided	Provided	Provided	Provided
8.	Indicate names of directors	Provided	Provided	Provided	Provided	Provided	Provided

Summary

1. First class Insurance, Prosperity Insurance and Vike insurance were disqualified for not attaching tender security.
2. Plan place, Leon, and Robert Interbroke were disqualified for attaching tender security that was less than 2%
3. Prime Movers was disqualified for not submitting the tax compliance certificate
4. Getrio, Cherith, Four M, Alpine, Alexander Forbes, Eden Rock, AON, Miran , Yess, Skylark, Channel, Disney and Pelican qualified for technical evaluation.

TECHNICAL EVALUATION

Any bidder who fails to meet any of the following minimum set criteria shall be disqualified

Evaluation Criteria

1. Must be registered with the commission of insurance (IRA) for current year and current license be submitted.
2. Must have a bank guarantee of Kshs. 3Million
3. Must have professional indemnity insurance cover of at least Kshs. 20Million and a copy be submitted.
4. Must give a list of (5) reputable clients and the total clients premium in the previous year.
5. Must submit a copy of audited accounts for the previous three years.
6. Must be a current member of the Association of insurance Brokers (AIB)
7. NSC shall subject bids to reserve premium amounts.
8. Split quotations are **NOT** allowed.
9. Staff competency profile for 5 key personnel who will be handling this portfolio if awarded.

Table 3: Technical Evaluation

S/No	Description	Getrio	Cherith	Four M	Alpine
1.	Must be registered with the commission of insurance for current year and current license be submitted	Registered with commission of insurance	Registered with commission of insurance	Registered with commission of insurance	Registered with commission of insurance
2.	Must have a bank guarantee of Ksh. 3M				Bank guarantee Deposited 3M

					Equity Bank
3.	Must have professional indemnity insurance cover of at least Ksh. 20M and a copy be submitted.	Kshs.50M	Kshs.30M	Kshs.100M	Ksh.30M
4.	Must give a list of (5) reputable clients and the total clients premium in the previous year.	-KARI -83,000,000.00 -KMTC 52,000,000.00 -EPZ 10,000,000.00 -KPA 18,324,080.00 KMC 17,978,030.00	-LAP Trust 1,297,150.00 -Kenya Utalii College 441,236.00 -NHIF 570,000.00 -EABL -KNH 10,885,000.00 -University of NRB 10,750,077.00	-Kenya Seed 4,260,670.00 -KenGen 76,810,964.00 -KENGEN 6,301,301. -NEMA 3,311,215 -NSC 11,007,218.	-MMC 3,510,235. -C.C. of Kwale 4,418,197 -Town C. of Kilifi 2,887,233. -County C.of Narok -Skymine Ltd
5.	Must submit a copy of audited accounts for the previous three years	Audited Acc. 2009-2011	Audited Acc. 2009-2011	Audited Acc. 2009-2011	Audited Acc. 2009-2011
6.	Must be a current member of the Association of insurance Brokers (AIB)	Member AIBK	Member AIBK	Member AIBK	Member AIBK
7.	NSC shall subject bids to reserve premium amount.	Bids does not meet reserve	Bids does not meet reserve	Bids meets reserve	Bids meets reserve
8.	Split quotations are NOT allowed.	Split quotation -Jubilee Ins. -British American	Split Quotation - Mercantile - Real - Jubilee Ins. - ICea	Not Split	Not Split
9.	Staff competency profile				

	for 5 key personnel who will be handling this portfolio if awarded.	Provided	Provided	Provided	Provided
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S/No	Description	Alexander	Eden	Aon	Disyney
1.	Must be registered with the commission of insurance for current year and current license be submitted	Registered with commission of insurance	Registered with commission of insurance	Registered with commission of insurance	Registered with commission of insurance
2.	Must have a bank guarantee of Ksh. 3M deposited with the commission of insurance and a copy submitted	3M	3M	3M	3M
3.	Must have professional indemnity insurance cover of at least Ksh. 20M and a copy be submitted.	50M	50M	50M	50M
4.	Must give a list of (5) reputable clients and the total clients premium in the previous year.	-Child Fund 29,000,000. -AMREF 59,352,991. -Kenya Pipeline USD 185,000 -LAPTRUST 111,000,000 -KRA 40,000,000.	-Kenya seed Co. 3,832,004. -Central Farmer 5,864,304. -Nzoia C.C. 6,420,280 -M.C. Kiambu 1,530,625.	-Safaricom 150,000,000. -EBL 150,000,000 -NRB Bottlers 60,000,000 -SDV 22,000,000 -Bamburi Cement 100,000,000	KenGen -75,805,013.00 Kenya Power -1,594,073.00 KNEC -14,583,074.00 -Laptrust Adm. 4,354,000.00 -Mavoko Municipal council -12,970,991.00
5.	Must submit a copy of	Audited Acc.	Audited Acc.	Audited Acc.	Audited Acc.

	audited accounts for the previous three years	2009-2011	2009-2011	2009-2011	2009-2011
6.	Must be a current member of the Association of insurance Brokers (AIB)	Member AIBK	Member AIBK	Member AIBK	Member AIBK
7.	NSC shall subject bids to reserve premium amount.	Bid does not meet reserve	Bid does not meet reserve	Bid does not meet reserve	Bid does not meet reserve
8.	Split quotations are NOT allowed.	Not split	Not split	Not split	Not split
9.	Staff competency profile for 5 key personnel who will be handling this portfolio if awarded.	Provided	Provided	Provided	Provided

S/No	Description	Miran	Yess	Skylark	Channel	Pelican
1.	Must be registered with the commission of insurance for current year and current license be submitted	Registered with commission of insurance	Registered with commission of insurance	Registered with commission of insurance	Registered with commission of insurance	Registered with commission of insurance
2.	Must have a bank guarantee of Ksh. 3M deposited with the commission of insurance and a copy submitted	3M	3M	3M	3M	3M
3.	Must have professional indemnity insurance cover of at least Ksh. 20M and a copy be submitted.	50M	30M	50M	50M	50M

4.	Must give a list of (5) reputable clients and the total clients premium in the previous year.	-Sony Sugar 42,900,000 . -Postal Co. 21,000,000 . -KAA 21,049,065 . -Maseno University 9,542,568. -Muhoroni Sugar 7,024,387.	-Masinde Muliro 2,079,064. -Lake Basin Devp.Autority . -N.C.C.K 16,298,67 5. -KISUMU WATER 225,013. -NHCK	-KenGen 46,426,523. -NHIF 5,987,739. -CMA 4,824,465. -Kenya pipeline co. 983,338. -JKUAT 4,226,047.	-KENYA FERRY. 3,179,845. 80,742,615. -KenGen 628,113. -National oil Co. 10,750,077. -NAIROBI BOTTLERS 10,773,221.	-KenGen 57,473,142. -Kenya Power 32,359,255. -Jacaranda 7,192,272. -Mayfair 2,463,808. -Nzoia Sugar 37,654,508
5.	Must submit a copy of audited accounts for the previous three years	Audited Acc. 2009-2011	Audited Acc. 2009-2011	Audited Acc. 2009-2011	Audited Acc. 2009-2011	Audited Acc. 2009-2011
6.	Must be a current member of the Association of insurance Brokers (AIB)	Member AIBK	Member AIBK	Member AIBK	Member AIBK	Member AIBK
7.	NSC shall subject bids to reserve premium amount.	Bid does not meet reserve	Bid does not meet reserve	Bid does not meet reserve	Bid does not meet reserve	Bid does not meet reserve
8.	Split quotations are NOT allowed.	Not split	Not split	Not split	Split Quote -British ins. -Mercantile	Not split
9.	Staff competency profile for 5 key personnel who will be handling this portfolio if awarded.	Provided	Provided	Provided	Provided	Provided

Conclusion

1. M/s Eden Rock was disqualified for not meeting the reserve premium amount
2. M/s EON Minet was disqualified for not meeting the reserve premium amount
3. M/s Miran was disqualified for not meeting the reserve premium amount
4. M/s Yess was disqualified for not meeting the reserve premium amount
5. M/s Skylark was disqualified for not meeting the reserve premium amount
6. M/s Channel was disqualified for not meeting the reserve premium amount & Submitting a split quotation
7. M/s Pelican was disqualified for not meeting the reserve premium amount
8. M/s Disney was disqualified for not meeting the reserve premium amount.
9. M/s Getrio was disqualified for not meeting the reserve premium amount and submitting a split quotation
10. M/s Cherith was disqualified for not meeting the reserve premium amount and submitting split quotation.
11. M/s Alpine and Four M qualify for further evaluation.

COMMERCIAL EVALUATION

S/No	Description	Four M	Alpine	Lowest	Total Value
1.	Provision of insurance Brokerage services	87,342,545.00	107,018,258.00	Four M	87,342,545.00

TENDER COMMITTEE DECISION

The Company Tender Committee at its 226th Meeting held on 17th September, 2012 awarded the contract for provision of Insurance Brokerage Services to M/s Four M Insurance Brokers Ltd at Kshs. 87, 342, 545.00 for a period of 21 months.

The successful and unsuccessful bidders were notified of the Tender Committee decision via letters dated 18th September, 2012.

THE REVIEW

The Applicant, M/s Pelican Insurance Brokers (K) Ltd lodged this Request for Review on 28th September, 2012 against the decision of the Tender Committee of Nzoia Sugar Company Ltd in the matter of Tender No. NSC/T-7/2012-14 for Provision of Insurance Brokerage Services.

The Applicant was represented by Mr. Anthony Kiprono, Advocate while the Procuring Entity was represented by Mr. Ashitiva B. Mundale, Advocate. The interested parties present were M/s Four M Insurance Broker represented by Mr. Augustus Onyango, Advocate, M/s Alpine Insurance Broker represented by Mr. Chris Murai, Executive Director and M/s Miran Insurance Brokers represented by Mr. Paul Amuga.

The Applicant requested the Review Board for the following orders:-

- 1. The decision of Nzoia Sugar Company Limited to award Tender No. NSC/T-7/2012 - 14 for the provision of Insurance Brokerage Services to the highest evaluated bidder be and is hereby quashed.*
- 2. The Respondent, be compelled to award Tender No. NSC/T-7/2012 - 14 for the provision of Insurance Brokerage Services to the lowest evaluated bidder.*
- 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.*

PRELIMINARY ISSUE

At the beginning of the hearing, it was disclosed that the Procuring Entity had already signed a contract with the Successful Bidder Four M Insurance. Therefore the Board has to determine whether it has jurisdiction to hear the Request for Review under Section 93(2) (c) of the Act.

The Procuring Entity submitted that the notification letters were sent by e-mail and courier on 18th September 2012.

The Procuring Entity in its affidavit submitted to the Board argued that it would not have been prudent for it to stay without an Insurance cover consequent to the lodging of Request for Review by the Applicant. It stated that it decided to pay some money to the underwriter in order to obtain an insurance cover pending the hearing and determination of the Request for Review Application.

The Procuring Entity alleged that it received the Request for Review on the 2nd October, 2012 at about noon, long after the contract had already been signed at/or around 8.30 am on the same day. It further alleged that at the time of signing the contract, no service had been effected of either the Request for Review or Stay by the Applicant upon the Procuring Entity. However, it conceded that that the fourteen days appeals window was to lapse on 2nd October, 2012.

On its part, the Applicant submitted that since the appeals window was to close on 2nd October, 2012, the earliest day the Procuring Entity would have signed the contract was on 3rd October, 2012. It averred that the contract was signed after the Board had issued a stay on these

procurement proceedings hence the signing of the contract on 2nd October 2012 was a contravention of the stay orders that were issued on 28th September, 2012. It further submitted that the signing of the contract on 2nd October, 2012 was a breach of Section 68(2) of the Act and therefore the Board had jurisdiction to hear and determine the Request for Review.

The issue for the Board to determine on this Preliminary issue is whether the Procuring Entity signed the contract in accordance with the provisions of Section 68(2) of the Act which provides as follows:-

Section 68 (2);

“The written contract shall be entered into within the period specified in the notification under section 67 (1) but not until at least fourteen days have elapsed following the giving of that notification”.

The Board notes the following from the documents presented before it;

- The Procuring Entity sent to the Successful Bidder and the Unsuccessful Bidders Notification Letters dated 18th September 2012, by courier on 18th September, 2012.
- Therefore counting from the 19th September, 2012, the 14 days appeals window was expected to expire on 2nd October, 2012, hence a Contract would only have been signed after 2nd October, 2012.
- The signing of the Contract on the 2nd October, 2012 was therefore done before the expiry of the 14 days appeal window.

- Records of events on this Request for Review indicate that;
 - The letter from the PPARB Secretariat notifying the Procuring Entity of the lodged Request for Review was sent by e-mail to the MD Nzoia Sugar Company on the 28th September 2012 and confirmed received at 6.04 pm.
 - Receipt of the e-mail was also confirmed on phone by the Nzoia Sugar Company MD's Secretary on Monday 1st October, 2012 in the morning upon enquiry by the Board's Secretariat.
- The hard copy of the letter notifying the Procuring Entity of the lodged Request for Review was delivered by Courier on 2nd October at 10.45 a.m.

In view of the above, the Board finds that the signing of the contract by the Procuring Entity and the Successful Bidder was premature since it was done before the expiry of the 14 days appeals window. In view of the fact that the Contract was not signed in accordance with the provisions of Section 68(2) of the Act, the Board has jurisdiction to hear and determine this Application, as hereunder.

The Applicant raised thirteen (13) grounds of review which the Board deals with as follows:-

Grounds 1,2,3,4,5,6,7,8,9, 10, 11 and 12 - Breach of Sections 66, 2 and 27 of the Public Procurement and Disposal Act, 2005 and Regulations 50(1), 50(2) and 66(2) of the Public Procurement Regulations, 2006

These grounds have been consolidated as they raise similar issues of tender evaluation and award of the Contract.

The Applicant submitted that the Procuring Entity awarded Tender No. NSC/T-7/2012-14 for provision of Insurance Brokerage Services to the highest evaluated bidder instead of the lowest evaluated bidder contrary to Section 66(4) of the Public Procurement and Disposal Act, 2005, hereafter referred to as "the Act" Act as read together with Regulation 50(1) and (2) of the Public Procurement and Disposal Regulations, 2006, hereafter referred to as "the Regulations," and also contrary to the criteria stipulated under Clause 2.25.1 of the Tender Documents.

The Applicant also submitted that the Procuring Entity in evaluating the tender adopted a criterion which was not stipulated in the Tender document. It averred that by failing to award the tender to the lowest evaluated bidder, the Procuring Entity contravened the provision of Section 2 of the Act which seeks to;

- a. Maximize economy and efficiency;
- b. Promote competition and ensure that competitors are treated fairly;
- c. Promote the integrity and fairness of those procedures;
- d. Increase transparency and accountability in procurement procedures; and
- e. Increase public confidence in those procedures.

The Applicant alleged that it submitted to the Procuring Entity the lowest evaluated bid of an annual premium of Kshs. 41, 011,274 whereas the Successful Bidder submitted an annual premium of Kshs. 49,910,025. It further submitted that at the tender opening, its bid was read out as Kshs. 41,011,274 whereas that of the Successful Bidder was Kshs. 87,342,545. It averred that Regulation 50(2) enjoins the Procuring Entity to carry out financial evaluation by comparing the bid prices as read out at the tender/bid opening. It stated that by awarding the tender to a bidder that submitted the highest evaluated price, the Procuring Entity failed to comply with Regulation 50(2).

The Applicant reiterated that by awarding the tender to the highest evaluated bidder, the Procuring Entity failed to maximize economy and promote efficiency in the management of public resources as the difference between the annual premium of the lowest evaluated bid and the highest evaluated bid is a whopping Kshs. 8,898,751.

The Applicant averred that the foregoing defeats the letter and spirit of the Act and the Regulations which sought to ensure transparency and accountability in the utilization and management of public resources by ensuring that public entities acquire goods, services or works through competitive bidding and in so doing ensure that all bidders enjoy a level playing field.

The Applicant submitted that the Procuring Entity is in breach of Section 27 of the Act by failing to comply with the provisions of the Act, the Regulations and the Directions of the Authority and in particular to ensure transparency and accountability in the procurement process.

Lastly, the Applicant stated that it has spent money in its participation in the tender and therefore it will suffer an irreparable harm, financial loss and damage if this Request for Review is not allowed as prayed.

In response, the Procuring Entity categorically denied that it awarded the tender to the highest evaluated bidder contrary to Section 66(4) of the Act, and that it did not discriminate against any bidder in the entire procurement process. It averred that the Applicant was disqualified for failing to meet Technical Specification No. 6 (at page 64 of the Tender Document) regarding whether the Applicant's quotation conformed to the standard premium rates set by the Commissioner of Insurance and also whether the quotation met the criteria under the Technical Evaluation as stipulated under item No. 7 of the Evaluation Criteria which stipulated that *"NSC shall subject bids to reserve premium amount"*.

The Procuring Entity averred that Section I, Clause 1.5 required all bidders to quote a net figure inclusive of all taxes and that Section V (Schedule of Requirements) of the Tender Document required the said net figure to be for the period covering 1st October, 2012 to 30th June, 2014, that is, 21 months. It stated that the Applicant's figure of Kshs. 41,011,274 was for 12 months and not for 21 months as per tender requirement.

The Procuring Entity further averred that the Tender Document required as a prerequisite for eligibility, that all Tenderers furnish, a Tender Security of 2% of the total tender value in the form of a guarantee from a reputable bank or an insurance company approved by

PPOA (see Clauses 1.6, 2.12.1; 2.12.2, 2.12.3 and 2.12.4 of the Tender Document). Therefore, it agreed that if the Applicant quoted sum of Kshs. 41,011,274 for one year was prorated to 21 months, then its Tender Security would not be sufficient. Accordingly, even if one accepted the argument by the Applicant that its tender sum should have been prorated for 21 months, then it would have been disqualified for failing to provide sufficient Tender Security.

The Procuring Entity submitted that the Applicant quoted premiums that were substantially below the reserve premium amount hence to award the tender to the Applicant would be to condone massive undercutting by the Applicant as well as causing unfair competition in the insurance industry, which is contrary to the Act as well as the directives of the Insurance Regulatory Authority. It would also amount to under insuring major risks and exposing the Procuring Entity to potentially inadequate cover in the event it suffered loss. It stated that what the Applicant had quoted translates to the following rates:-

Fire and perils	1.01
Machinery break down	0.57;

While the rates obtained from the Insurance Regulatory Authority were as follows:-

Fire and Perils	1.083
Machinery break down	2.96

The Procuring Entity further submitted that it did not award the tender to the highest bidder. It averred that at the Commercial Evaluation stage

only two bidders were evaluated. The Successful Bidder, 4M Insurance herein quoted Kshs. 87,342,545/= and M/s. Alpine Insurance Brokers Limited quoted Kshs. 107,018,258/=. The Successful Bidder which emerged as the lowest evaluated bidder was 4M Insurance whose quotation translates to the following rates:-

Fire and Perils.....	1.085
Machinery break down	2.98

It argued that these rates were within the rates set by the Insurance Regulatory Authority.

The Procuring Entity denied that it acted in breach of any Section of the Act and stated that the Applicant's claim was brought in bad faith after the Procuring Entity declined to accede to its request to extend its contract. It referred to Application No. 38 of 28th June, 2010 which was brought before this Board by this same Applicant which the Board had found to lack merit.

In reply the allegation that it failed to provide a summary of the Evaluation Report, the Procuring Entity admitted that it received the Applicant's letter dated 21st September, 2012 requesting for summary of the evaluation together with written reasons as to why the Applicant was unsuccessful. The Procuring Entity stated that it responded to the Applicant's request vide its letter dated 27th September, 2012 and enclosed the said Summary of evaluation and criteria pursuant to the provisions of Section 44 (3) of the Act. It denied that it acted in breach of any provisions of the Act as alleged by the Applicant. It stated that it

had already awarded the contract to the successful tenderer in line with the tender documents. It further stated that the Applicant has not demonstrated that it has suffered loss at all.

An interested party, M/s Four M Insurance Brokers Ltd, the Successful Bidder, stated that it fully concurred with the submissions of the Procuring Entity. It further stated that:

1. It quoted premiums for 21 months of Kshs. 87,342, 545.00 as required by the Procuring Entity.
2. It had already placed Insurance Covers on behalf of the Procuring Entity with Kenindia Assurance Co. Ltd consequent upon signing the contract with the Procuring Entity on 2nd October 2012.
3. It had also been paid part premiums of Kshs. 26, 202, 764.00 as per provision of the Contract as per "cash and carry" requirements in the Insurance Act.

Therefore, it requested the Board to dismiss the Application with costs.

A second Interested Party, M/s Alpine Insurance Brokers Ltd, submitted that it met all the requirements of the Tender and therefore ought to have been awarded the tender. It stated that the Procuring Entity did all the evaluation from Preliminary Evaluation to Technical evaluation but did not do Commercial evaluation to determine the bid that was most competitive especially after it (the Procuring Entity) received a letter from Insurance Regulatory Authority stating the applicable rates which were part of the conditions that were set.

It argued that the Bidder who was awarded the tender did not merit the award for the following reasons:

- 1) The Successful Bidder did not meet and conform to the standard premium rates as set by Insurance Regulatory Authority.
- 2) The Successful Bidder did not have proof of a quotation presented from the proposed Underwriter because it is the only one that was given a quotation by the Underwriter and if the Successful Bidder has a quotation then the Underwriter issued two different quotations for the same Procuring Entity which amounts to fraud.
- 3) The Interested Party prayed the Board to award it the contract since it fulfilled all the conditions set by the Procuring Entity including the Reserve Premium amounts.

A third Interested Party M/s Getrio Insurance Brokers supported the Request for Review on the ground that:-

1. The contract was awarded to the highest evaluated bidder;
2. The Procuring Entity evaluated the tender and adopted a criterion that was not stipulated in the Tender Document contrary to Section 66 of the Act, and;
3. On the issue of Reserve Premium Amounts, the Interested Party questioned what formulas the Procuring Entity used to set these reserves.

The fourth Interested Party M/S Eden Rock Insurance Brokers Limited stated as follows:-

1. The criteria used to award the said tender was wrong owing to award to the highest bidder instead of the lowest evaluated bidder

contrary to Section 66(4) of the Act, read together with Regulation 50 (1).

2. The Procuring Entity evaluated the tender and adopted criterion that was not stipulated in the tender document contrary to Section 66 of the Act and by introducing reserve premiums set by Insurance Regulatory Authority (IRA) which was not in the tender document.
3. By failing to award the tender to the lowest evaluated bidder the Procuring Entity contravened the provision of Section 2 of the Act.
4. That it submitted to the Procuring Entity the lowest evaluated bid of Kshs. 40, 411,232 annual premiums whereas the successful tenderer submitted Kshs. 49,910,025 which is a difference of Kshs. 9,588,793.
5. It further stated that the Procuring Entity was trying to hide under the guise of reserve premiums set by IRA but this was not correct for it was not stated in the tender document.
6. For the above stated reasons, the Interested Party prayed that the process be annulled and that the correct and right procedures be followed since the Procuring Entity had gone to tender with a set mind on a single Underwriter and the tendering was just a public relations exercise.

The Board has carefully examined the documents presented before it and considered the submissions by the Parties.

The issues that arise for determination are:-

1. Whether the Procuring Entity awarded the tender to highest evaluated bidder instead of the lowest evaluated Bidder contrary to Sections 66 (4) and 2 of the Act and Regulation 50 (1), 50 (2) as well as contrary to Clause 2.25.1 of the Tender Documents.
2. Whether the Procuring Entity evaluated the tender and adopted a criterion that was not stipulated in the Tender Documents contrary to Section 66 of the Act.
3. Whether the Reserve Premium Criteria was not set out in the Tender Document but was used as a criterion in the evaluation.

On the issue as to whether the tender evaluation was done in accordance with the criteria in the Tender Documents and in line with Section 66 of the Act, and if so whether the tender was awarded to the lowest evaluated bidder, the Board has carefully perused the evaluation report, and notes that the Criteria that were used in the Preliminary Evaluation and indicated as Mandatory were as follows:-

1. Tender Security 2%
2. Certificate of incorporation/ Registration
3. Memorandum and Articles of Association
4. Trade License
5. Pin certificate
6. Indicate names of Directors
7. Submit copy of the tax compliance certificate
8. Company profile

The Board also notes that the following criteria were used in the Technical Evaluation as found in Section IV (page 28 paragraph 4.2) and section V pages 63 and 64 of the Tender document:

1. Must be registered with the Commission of Insurance (IRA) for current year and current license be submitted.
2. Must have a bank guarantee of Kshs. 3 million.
3. Must have professional indemnity insurance cover of at least Kshs. 30 million and a copy be submitted.
4. Must give a list of (5) reputable clients and the total clients premium in the previous year.
5. Must submit a copy of audited accounts for the previous three years.
6. Must be a current member of the Association of Insurance Brokers (AIB)
7. **Nzoia Sugar Company (NSC) shall subject bids to reserve premium amounts.**
8. Split quotations are NOT allowed.
9. Staff competency profile for 5 key personnel who will be handling this portfolio if awarded.

The Board further notes that in addition to the criteria stipulated above, the Tender Documents under Section V – Schedule of Requirements at page 30 to page 63, clearly stated that the period of Insurance cover was from 1.10.2012 to 30.6.2014 that is 21 months.

The Board notes that the Minutes of Tender Opening on 7th August, 2012 indicate that the Applicant, Pelican Insurance Brokers Ltd quoted Kshs. 41, 011, 274.00 for one (1) year or 12 months instead of for 21 months as required in the Tender Documents, while the Successful Bidder, 4 M Insurance Brokers Ltd quoted Kshs. 87,342,545.00 for 21 months as required in the Tender document.

The Board further notes that quoting for one year instead of 21 months by the Applicant, first of all contravened the clear provisions of the Tender Documents that required bidders to give a quotation for 21 months. The Board also notes that quite a number of other Bidders were disqualified because their quotations were based on one (1) year or 12 months instead of 21 months as required in the Tender Documents. The Board finds that the disqualification of these bidders, including the Applicant, was therefore proper in that they failed to comply with a specific requirement in the Tender Documents.

The Board further notes that condition No. 2 on page 63 of the Tender Documents required that bidders must comply with the Reserve Premium amounts as issued by the Commissioner of Insurance.

The Board notes that the Reserve Premium set by the Commissioner of Insurance was as follows:

Fire and Perils	1.083
Machinery break down	2.96

The Board observed that it was common ground between the Parties that these rates are issued by the Commissioner of Insurance and circulated to the various Underwriters. It was therefore incumbent on the bidders to confirm that information from the Underwriters or seek clarification from the Procuring Entity.

From the foregoing, the Board holds that the Evaluation Criteria were provided in the Tender Documents in compliance with Sections 66 (2)

and 66(4) of the Act and Regulation 50 (1) and (2) and Clause 2.25.1 of Tender Documents which provide as follows:-

Section 66 (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".

Section 66(4)

"The successful tender shall be the tender with the lowest evaluated price".

Regulation 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."

Regulation 50(2)(a)

"The evaluated price for each bid shall be determined by:

a) Taking the price, as read out at the bid opening"

Clause 2.25.1

"Subject to paragraph 2.29, Nzoia Sugar Company will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender provided further that the tenderer is determined to be qualified to perform the contract satisfactorily"

As the Board has already observed, the Reserve Premium criterion was clearly set out in the Tender Documents and it was properly applied in

the Tender Evaluation. Therefore, all the bidders, including the Applicant, who were disqualified for failing to meet the Criteria on the period of 21 months and Reserve Premiums, were properly disqualified.

Accordingly, these grounds of review fail.

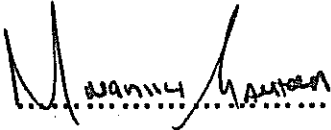
GROUND 13 - Statement of Loss

As regards the allegation by the Applicant that it will suffer irreparable harm, financial loss and damage if the Request for Review is not allowed, the Board has held severally, that tendering is a commercial business risk taken by the parties, and as such each party should bear its own costs.

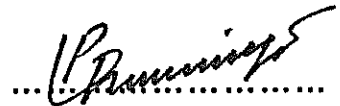
Accordingly, this ground of review also fails.

In view of the foregoing, all the grounds of review fail and the Request for Review is hereby dismissed. The Board orders pursuant to Section 98 of the Act, that the procurement process may proceed. Further, each party shall bear its own costs.

Dated at Nairobi on this 29th day of October, 2012.



CHAIRMAN
PPARB



AG. SECRETARY
PPARB

