

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 20/ 2013 OF 17TH JUNE, 2013

BETWEEN

CIC GENERAL INSURANCE LTD..... APPLICANT

AND

NAIROBI CITY COUNTYPROCURING ENTITY

Review against the decision of the Tender Committee of Nairobi City County dated 3rd June, 2013 in the matter of Tender No. NCC/CT/T/002/2013-2014 for Provision of General Insurance Services for the year 2013-2014.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	- Chairman
Mr. Akich Okola	- Member
Mrs. Loise Ruhiu	- Member
Mr. Sospeter Kioko	- Member
Ms. Natasha Mutai	- Member

IN ATTENDANCE

Ms. Pauline O. Opiyo	- Secretary
Ms. Judy Maina	- Secretariat

PRESENT BY INVITATION

Applicant – CIC General Insurance Ltd

Mr. Mogaka J. - Advocate
Mr. Ngugi S. - Advocate
Mr. Omwenga Kwamboka - Advocate
Mr. Edwin Njoroge - Advocate
Ms. Caroline Chemutai - Advocate
Ms. Njeru Marambii - Sales Manager

Procuring Entity – Nairobi City County

Mr. Thomas M. Kwanga - Advocate
Mr. John Okuku - D/Director SCM
Mr. Mathias Ouko - Procurement Officer
Ms. Nancy Adhiambo - Pupil

Interested Parties –

Mr. Caleb Jaoko - Advocate, AMACO
Ms. Elizabeth Koskei - General Manager, AMACO
Mr. James Onsongo - Officer, ICEA Lion

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

Tender No. NCC/CT/T/002/2013-2014 for Provision of General Insurance Services for the year 2013/2014 was advertised in the Daily Nation and The Standard Newspapers of 29th April 2013, among other tenders.

Closing/Opening:

Tender closing / opening was duly conducted on 21st May 2013 at noon. Twelve (12) firms submitted their bids which were opened, announced and recorded as follows:

Record of bids opened

S/No	Firm	Attached Bid Bond	Technical		Financial	
			Original	Copy	Original	Copy
1	Kenya Alliance Insurance	Barclays Bank of Kenya	YES	YES	YES	YES
2	Kenindia Assurance	Prime Bank Ltd	YES	YES	YES	NO
3	CIC General Insurance	Co-operative Bank	YES	YES	YES	YES
4	Jubilee Insurance	Diamond Trust Bank	YES	YES	YES	YES
5	ICEA Lion General Insurance	NIC Bank	YES	YES	YES	YES
6	Cannon Assurance LTD	CBA Bank	YES	YES	YES	YES
7	Eagle Africa Insurance Ltd	Development Bank	YES	YES	YES	YES
8	Kenya Orient Kenya Ltd	Family Bank	YES	YES	NO	NO
9	Britam	Not attached	YES	YES	YES	YES
10	Madison Insurance	Barclays Bank of Kenya	YES	YES	NO	NO
11	Real Insurance Ltd	Chase Bank	YES	YES	YES	YES
12	AMACO Africa	Fidelity Bank	YES	YES	YES	YES

The following were noted while opening the bid documents and brought to the attention of members of the opening committee as well as members of the public / bidders' representatives present:

- Ms. Kenindia assurance submitted only original bids without copies of the same
- Ms. Kenya Orient Kenya Ltd and Madison Insurance did combine financial with the technical bid.
- Ms. Eagle Africa Insurance Brokers Ltd is not an underwriter.
- Ms. Britam did not attach bid bond.

EVALUATION OF BIDS

The bids were evaluated in 3 stages namely preliminary evaluation, technical evaluation and financial evaluation respectively

Preliminary Evaluation

Members of the evaluation committee evaluated the twelve number bidders based on the set criteria as set out in the clauses of the tender document as indicated below:

1. Bid security of Kshs 1million, validity period of 150 days from the closing date 21st May, 2013 as per **clause 23.1, 23.3,(22.1 and bid security guarantee form) i.e. 17th October, 2013**
2. Proof of purchase of tender document (receipt) clause 26.2)
3. Instruction to tenders clause Technical bid separate from financial bid if not disqualify.

Preliminary Evaluation Table

Bidder No.	Name of Bidder	Bid Bond	Receipt of Purchase of Tender	Two Envelope Submission (Separate)	Remarks
1	Kenya Alliance Insurance	Yes	Yes	Yes	Validity period for the bid bond is up to 21 st OCTOBER, 2013(Not registered with IRA which is a mandatory requirement)
2	Kenindia Assurance	Yes	Yes	No	Validity period for the bid bond is up to 17 th SEPTEMBER, 2013(Bid Security not adequate)
3	CIC General Insurance	Yes	Yes	Yes	Validity period for the bid bond is up to 20 th November 2013(bid bond adequate)
4	Jubilee Insurance Company Ltd	Yes	Yes	Yes	Validity period for the bid bond is up to 18 st October, 2013(Bid Security adequate) but presented a mutilated bid against the instruction to tenderers clause 13.3
5	Icea Lion General Insurance	Yes	Yes	Yes	Validity period for the bid bond is up to 21 st September, 2013(Bid Security not adequate)
6	Cannon Assurance Ltd	Yes	Yes	Yes	Validity period for the bid bond is up to 18 st October, 2013(Bid Security adequate) but presented a mutilated bid against the instruction to tenderers clause 13.3
7	Eagle Africa Insurance Brokers Ltd	Yes	Yes	Yes	Not an un Underwriter therefore not eligible for further evaluation
8	Kenya Orient Kenya Ltd	Yes	Yes	No	Bid Security valid up to 15 th October 2013(Bid Security not adequate)&Combined technical with financial
9	British American Insurance Co.(K) Ltd (Britam)	Yes	Yes	No	No bid bond. Submitted both the technical and financial bid as one document.

10	Madison Insurance	Yes	Yes	No	Validity period for the bid bond is up to 21 st September, 2013 (Bid Security not adequate)& Submitted both the technical and financial bid as one document.
11	Real Insurance Ltd	Yes	Yes	Yes	Validity period for the bid bond is up to 21 st October, 2013 (Bid Security adequate)
12	Africa Merchant Assurance Co. Ltd	Yes	Yes	Yes	Validity period for the bid bond is up to 30 th October, 2013 (Bid Security adequate)

Observations by Evaluation Committee

Arising from the observations on the table above the following remarks were made from the five bidders.

Bidder No. 1 - M/s Kenya Alliance Insurance:

The tenderer did not attach current license from the Insurance regulatory Authority which is a condition to be met.

This disqualified the tenderer from further evaluation since only eligible registered insurance firms (underwriters) were required to bid.

Bidder No. 2 - M/s Kenindia Assurance:

The tenderer did not provided the adequate bid bond which was mandatory requirement hence disqualified for further evaluation.

Bidder No. 3 - M/s CIC General Insurance

The tenderer provided adequate bid bond which was mandatory hence qualified for further evaluation

Bidder No 4 - M/s Jubilee Insurance Company Ltd

The tenderer provided adequate bond which was mandatory but presented a mutilated bid hence qualified for further evaluation

The tenderer did not provide adequate security bond for the required period and also submitted both technical and financial as one document instead of separating as per the instruction in the tender document, hence disqualified for further evaluation.

Bidder No. 5 - M/s ICEA Lion General Insurance

The tenderer did not provide the adequate security bond which was mandatory requirement hence disqualified for further evaluation

Bidder No. 6 - M/s Cannon Assurance Ltd

The tenderer provided the security bond which was mandatory hence qualified for further evaluation

Bidder No. 7 - M/s Eagle Africa Insurance Brokers Ltd

This disqualified the tenderer from further evaluation since only eligible insurance firms (underwriters) were required to bid and not brokers

Bidder No. 8 - M/s Kenya Orient Kenya Ltd

The tenderer did not provide adequate security bond for the required period

Bidder No. 9 - M/s British American Insurance Co. (K) Ltd (BRITAM)

The tenderer did not submit bid bond hence disqualified for further evaluation

Bidder No. 10 - M/s Madison Insurance

The tenderer did not provide adequate security bond for the required period hence disqualified

Bidder No. 11 - M/s Real Insurance Ltd

The tenderer provided the security bond which was mandatory but did not attach the current license from the Insurance regulatory Authority which is a mandatory condition to be met hence disqualified for further evaluation.

Bidder No. 12 - M/s Africa Merchant Assurance Co. Ltd (AMACO)

The tenderer provided the security bond which was adequate hence qualified for further evaluation

TECHNICAL EVALUATION

Technical evaluation Comparison Table

Awarding of Marks for Underwriters		Maximum Score	M/s CIC General Insurance Bidder No.3	M/s Africa Merchant Assurance Co. Ltd Bidder No.12
S/No	Area of Examination			
1	Registration with the Commissioner of Insurance from IRA (Current)	5	YES	YES
2	Annual gross premiums 300m/600M 1.2billionfor GIB for 2011 & 2012	10	YES	YES
3	Paid up capital (300m and above)	10	YES	YES
4	Performance recommendation from at least 5 No reputable clients covered for at least 2 years- Minimum premium portfolio of 10M	10	YES	YES
5	Copy of the audited accounts for 2010,2011 & 201 (3 years)	10	YES	YES
6	Senior Management staff, at least Four (4No.)	5	YES	YES
7A	PIN certificate	3	YES	YES
B	Tax Compliance Certificate	3	YES	YES
C	Certificate of Registration/Incorporation	3	YES	YES
D	Valid Single Business permit or other regions.	3	YES	YES
E	Company profile.	3	YES	YES
8	Member of the Association of Kenya Insurance (AKI)	5	YES	YES
9	Proof of handling of an equivalent mega risk of fire and perils	10	YES	YES
10	Bid security (Kshs 1 million)	10	YES	YES

11	Document Handling (duly signed, or whether modified, or replaced)	5	YES	YES
12	Copy of receipt (purchased document)	5	YES	YES
	TOTAL	100	100	100

Observations by the Evaluation Committee

The following observations were made from the table above:

That the following bidders qualified for Financial evaluation after scoring above the required Technical score of **70%** as set out in the bid document and were recommended for invitation for financial opening on Wednesday 29th May 2013 at 11.00am City Hall- Procurement Boardroom;

- Bidder No. 3 M/s CIC General Insurance - 100%
- Bidder No. 12 M/s Africa Merchant Assurance Co. Ltd - 100%

FINANCIAL EVALUATION

The Financial bids were opened on 29th May, 2013 at 11.00 am by the members of evaluation panel.

The opening committee comprised of the following members:

Kibet Daniel	Human Resources	Chairman
Ronald Omondi	Valuation	Member
Jackson Chepkok	Technical Section	Member
Mathias Ouko	Procurement	Secretary

Bidders' representatives present were:

Name	Bidder / Telephone Number	
Njeru Marambi	CIC General Insurance Ltd	0722227130
Kipkoech Salim	AMACO Co. Ltd	0711882668
Elizabeth Koskei	AMACO Co. Ltd	0721530875

FINANCIAL BID OPENING TABLE

S/No	Firm	Amount Tendered
1	M/s CIC General Insurance	KSHS.88,446,280/=
2	M/s Africa Merchant Assurance Co. Ltd	KSHS.87,821,880/=

FINANCIAL EVALUATION

These bids were then subjected to financial evaluation process using the formula provided in the Tender Document Clause 2.2.2, Appendix 'C' as shown hereafter:

$$S_f = 100 \times PL/P$$

Where S_f is the financial Score

F_m is the lowest financial proposal and f is the price of the Proposal under Consideration.

Proposals were ranked according to the combined technical (st) and financial (sf) scores using the weights (T =the weight given to the Technical Proposal; P = the weight given to the Financial Proposal; (T + P)=1)

The Combined Technical and Financial Score is calculated as follows:-

$$S = (S_t \times T\%) + (S_f \times P\%)$$

Score Sheet for Technical evaluation

- Calculation of the weighted Technical Score (St x T%) out of 80% =0.8

S/No	Name of bidder	Technical Score % (points)	Weighted Technical (St) Score
12	M/s Africa Merchant Assurance Co. Ltd	100%	100 x 0.8 = 80
3	M/s CIC General Insurance	100%	100x 0.8 = 80

- Calculation of the weighted Financial Score (Sf x p%) Out of 0.2

The evaluation Committee proceeded to calculate the Financial Scores of **M/s Africa Merchant Assurance Co. Ltd** and **CIC General Insurance** as follows:-

S/No	Name of bidder	Financial Proposal (inclusive of taxes)	Weighted Financial (St) Score
12	M/s Africa Merchant Assurance Co. Ltd	Kshs 87,821,880/=	$100 \times \frac{87,821,880}{87,821,880} \times 0.2 = 20$
3	M/s CIC General Insurance	Kshs 88,446,280/=	$100 \times \frac{87,821,880}{88,446,280} \times 0.2 = 19.85$

Combined weighted score (St + Sf) for each bidder.

S/No	Name of bidder	Technical % (St) Score	Weighted Financial (Sf) Score
12	M/s Africa Merchant Assurance Co. Ltd	80	20
3	M/s CIC General Insurance	80	19.85

Recommendation

The Evaluation Committee recommended **M/s Africa Merchant Assurance Co. Ltd** for consideration of award for Tender No. NCC/CT/T/002/2013-2014 Provision of General Insurance Services for the Year 2013-2014 after scoring the highest combined scores in both Technical and Financial evaluations and quoted sum of **Kshs 87,821,880 /=-** being the lowest evaluated.

TENDER COMMITTEE'S DECISION

The Tender Committee under Minute No. 25/22/2012-2013 of its Meeting No 22/2012-2013 held on 28th and 31st May 2013 deliberated on Tender No. NCC/CT/T/002/2013-2014 for Provision of General Insurance Services for the year 2013-2014 and awarded the tender to **M/s Africa Merchant Assurance Co. Ltd** at their bid sum of **Kshs 87,821,880 (Eighty Seven Million, Eight Twenty One Thousand, Eight Hundred and Eighty only)** being the lowest evaluated bidder for a period of one year.

The Letter of Notification of Award to the Successful Bidder is dated 30th May, 2013 while the Letters of Regret to the unsuccessful bidders, Including the Applicant are dated 3rd June, 2013.

THE REVIEW

The Request for Review was lodged by M/s CIC General Insurance Ltd on 17th June, 2013 against the decision of the Tender Committee of Nairobi City County dated 3rd June, 2013 in the matter of Tender No. NCC/CT/T/002/2013-2014 for Provision of General Insurance Services for the year 2013-2014.

The Applicant was represented by Mr. Edwin Njoroge and Mr. Ngusi S, Advocates while the Procuring Entity was represented by Mr. Thomas M. Kwanga, Advocate. Interested parties present were M/s AMACO Ltd represented by Mr. Caleb Jaoko, Advocate and ICEA Lion represented by Mr. James Onsongo, Officer.

The Applicant requests the Board for the following orders:-

- 1. The winning bid/candidate had not earned or transacted annual gross premiums of Kshs. 600 Million shillings under the General Insurance Business exclusive of Motor Insurance for each of the 2011 and 2012 years as stipulated in Sub Clause 4.2.2 of the tender document.**
- 2. The winning bid/candidate's bid was non-responsive and ineligible.**
- 3. The Procuring Entity was in breach of the Public Procurement and Disposal Act, the Public Procurement and Disposal Regulation 2006 and the criteria as stipulated in the tender documents particularly Sub-Clause 1.2.1, 1.2.2 and 4.2.2 therein conducting the bid evaluation.**
- 4. Annul the decision of the Procuring Entity to awarding tender number NCC/T/CT/002/2013-2014 for Provision of General Insurance for the Year 2012/2013 to the winning bidder / candidate.**

5. Direct and compel the Procuring Entity to apply the evaluation criteria set in the tender document, comply with the Public Procurement and Disposal Act, Cap. 412, the Regulations thereunder and thereafter annul the ... Of the evaluation and award the tender determined irregularly and unlawfully.
6. Decline the Applicant's bid as the winning bid and substitute the Applicant's bid for that of my bid.
7. Require and compel the Procuring Entity to apply the evaluation criteria as stipulated in the Tender Document and thereafter annul the part of the evaluation and award of the tender determined irregularly and unlawfully in breach of the provision of Cap. 412C and the regulations thereunder and thereby award the tender to the applicant or as found appropriate.
8. Review the Procuring Entity's decision and nullify the unlawful decision made irregularly and unlawfully in breach of the tender criteria conditions and instructions and the applicable law and Regulations cited herein above and thereby award the tender to the applicant.
9. Make any other incidental order, direction or finding as may be found fair and just.
10. Award costs of this review to the Applicant.

PRELIMINARY OBJECTION

The Successful Bidder, M/s Africa Merchant Assurance Company Ltd, has raised a Preliminary Objection to the Request for Review on the following three grounds:

1. **THAT** contrary to and in breach of Regulation 73(2) (b) of the Public Procurement Regulations, 2006, (hereafter referred to as “the Regulations”) the Request for Review was not accompanied by such statements as the Applicant considers necessary in support of the Request for Review
2. **THAT** pursuant to Section 93(2)(c) of the Public Procurement and Disposal Act, 2005 (hereafter referred to as “the Act”), where a contract is signed in accordance with Section 68 of the Act, this Honourable Board lacks the requisite jurisdiction to entertain, hear and determine a Request for Review.
3. **THAT** in view of the foregoing grounds 1 and 2 herein above, the Request for Review is unlawful, invalid, null and void in so far as it is an abuse of due process of this Honourable Board, frivolous and vexatious and should be dismissed.

The Successful Bidder submitted that the Applicant has breached Regulation 73(2) (b) in that the Request for Review was not accompanied with a statement.

Accordingly, the Request for Review was fatally defective and on that ground alone and it ought to be dismissed.

The Successful Bidder submitted that the Board did not have jurisdiction to hear and determine this Request For Review in view of section 93(2) (c) of the Act, since there is already a contract signed between the parties relating to

this tender. It stated that the said contract was signed in accordance to Section 68 of the Act and therefore the Board has no jurisdiction in this matter. In conclusion, it argued that the Request for Review was unlawful, valid, null and void and therefore an abuse of the process of the Board. It urged the Board to dismiss the Request for Review.

The Procuring Entity supported the submissions of the Successful candidate. It stated that the Successful Bidder was notified on 30th May, 2013 and the contract was signed on the 18th June, 2013 which was in accordance with Section 68 of the Act which requires the contract to be signed after the expiry of 14 days from the date of notification. It stated that by the time it was served with the Request for Review by the Board it had already signed the contract. It stated that it has already been issued with the insurance cover and had made payment and therefore this Request for Review has been overtaken by events.

In response, the Applicant stated that it was notified by a letter dated 3rd Jun, 2013 that its bid was unsuccessful. It argued that the appeal window started running on 4th June, 2013 and was to close on 18th Jun, 2013. It stated that it filed the Request For Review on the 18th June, 2013 which was within the appeal window. It further argued that Sec 67 of the Act requires the Procuring Entity to notify both the successful and unsuccessful bidders simultaneously.

Therefore since the Procuring Entity had admitted that it had served the successful bidder and itself on different dates, the Procuring Entity was in breach of Section 67 of the Act and thus the contract that was signed was not done in accordance with Section 68 of the Act. In view, of this it stated that

the Board has jurisdiction to hear and determine the matter as the contract was not signed in accordance with 68 as envisaged by Section 93(2) (c).

Regarding the allegations that it had not filed a statement as required by Regulation 73 (2), it referred the Board to the grounds of review which clearly set out the statements of facts and law that it was relying on. Further it referred the Board to its Request for Review and stated that it had filed all the supporting documents that were required. Accordingly, it argued that this limb of the preliminary objection had no merit.

The Board has considered the submissions of the parties and the documents that were presented before it.

The Board has noted as follows;-

1. The original minutes of the Evaluation and Tender committee submitted to the Board by the procuring entity show that:
 - i. The evaluation committee met on 29th May, 2013 when it made a recommendation for the award to the successful tenderer.
 - ii. The minutes of the tender committee show that it met on 28th May, 2013 and the tender committee meeting was adjourned to 31st May, 2013. The minutes for the two dates are combined. According to the minutes, the tender committee considered items No. 1-6 on 28th May, 2013 and this tender for Insurance was not one of the issues which were deliberated on that day. According to the minutes the tender for insurance was considered and the award made on 31st May, 2013. The Board notes that in a Replying Affidavit sworn by John O. Okuku on 11th July, 2013 it is alleged that the meeting was

on 30th May, 2013 and there is a typographical error in the minutes and the date should read 30th May, 2013.

2. The letter to the Successful Bidder is dated 30th May, 2013 but it is stamped as received by the Successful Bidder on 3rd June, 2013. At the hearing, the Board noted that a copy of the delivery book that had been supplied by the Procuring Entity had alterations and it appeared that the Successful Bidder's letter was delivered on 30th June, 2013. It was apparent from the said copy that the zero had been inserted. In view of this, the Board requested the Procuring Entity to produce the original delivery book. The Procuring Entity produced two original delivery books and what was shocking to the Board was that one of the books was for the year 2012 and some entries had been made regarding this tender in that delivery book and these were the only entries regarding the year 2013. The Procuring Entity's advocate and other representatives present could not explain how this entry was made in the delivery book for the year 2012 and why there were no other entries for the year 2013.

Regarding the second original delivery, book that was produced by the Procuring Entity, the Board notes that the entries related to this tender as entered were different from the ones that were in the delivery book for the year 2012. What was surprising was that the entries were running sequentially for the months of May and June, 2013 but as regards to the entry relating to the Successful Bidder, it appeared that it was served on 30th June, 2013. Again just like in the delivery book for 2012 the record appears to have been altered.

Having perused the two delivery books the Board is convinced that these are not typographical errors as alleged by the Procuring Entity, but deliberate alterations.

Even if the Board was to give the Procuring Entity the benefit of doubt that it served the Successful Bidder on the 30th of May, 2013, it was required by Section 67 of the Act to notify the unsuccessful bidders on the same date as the Successful Bidder. Having admitted that it served the Applicant on 3rd June, 2013 it is clear that the Procuring Entity breached Section 67 and the Board has to consider the significance of this issue in determining whether it has jurisdiction to hear and determine this Request for Review.

3. The letter to the Applicant is dated 3rd June, 2013 and it is common ground between the parties that it was delivered on 3rd June, 2013. Therefore, time for purposes of the appeals window started running on 4th June, 2013 and the last day for filing the Request for Review was on 17th June, 2013. This Request for Review was filed on 17th June, 2013 and was therefore filed within time.
4. Regarding the signing of the contract, the Board notes that having served the Applicant on 3rd June, 2013 time for purposes of signing the contract as envisaged by Section 68 could only begin running on 4th June, 2013. This means that the earliest date that the Procuring Entity could have signed the contract was on 18th June, 2013. By purporting to count time from 30th May, 2013 and signing the contract on 14th June, 2013, the Procuring Entity was trying to lock out the Applicant and its actions are a clear breach of Sections 67 and 68 of the Act.

In view of this, the contract that was signed was in breach of the law and specifically Section 68 of the Act and therefore the jurisdiction of the Board has not been ousted as envisaged by Section 93(2) (c) of the Act. For the jurisdiction of the Board to be ousted, a Procuring Entity must comply with Sections 67 and 68 of the Act which provides as follows;

Section 67(1)

"Before the expiry of the period during which tenderers must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted."

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."

As already held, the Procuring Entity admitted that the letter to the Successful Bidder is dated 30th May, 2013 and the one to the Applicant is dated 3rd June, 2013. The Board holds that time for purposes of the appeals window and signing of the contract started running on the 4th of June, 2013 and the signing of the contract on 14th June, 2013 was irregular and contrary to the clear provisions of the Act. The Board holds that its jurisdiction cannot be ousted by an unlawful act of a procuring entity and therefore the Procuring Entity in this matter cannot hide behind the provisions of section 93(2) (c) of the Act.

In view of the foregoing the Board holds that the contract signed between the Procuring Entity and the Successful Bidder is null and void and the Board has jurisdiction to hear and determine this matter on merit.

5. Regarding the other limb of the preliminary objection that the Request For Review was not accompanied by the statement of 73(2) (c) the Board finds as follows:-

- i. The Regulations do not provide the format in which the statement should be provided by an Applicant. The Board notes that the grounds of Review contain both statements of facts and law which clearly set out the case the Procuring Entity is facing.
- ii. The Request for Review contains all the supporting documents that support the allegations contained in the grounds for review and therefore the procuring entity has been provided with all the information that it requires in order for it to defend itself.

The upshot of the foregoing is that the preliminary objection has no merit and the Board holds that it has jurisdiction to hear and determine this matter on merit. Accordingly, the preliminary objection is dismissed and the Request for Review shall be heard on merit.

The Applicant raised eight (8) grounds of review which the Board deals with as follows:

Grounds 1, 2, 3, 4, 5, 6, 7 and 8– Breach of Sections 2, 31, 34, 64(1) and 66 of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as “the Act”) and Regulations 25, 47, 48 49 and 50 of the Regulations thereof herein referred to as “the Regulations” and Sub-clauses 1.2.1, 1.2.2 and 4.2.2 of the Tender Document

These grounds have been consolidated because they raise related issues on the alleged irregularities in the tender evaluation process and the subsequent award of contract by the Procuring Entity.

The Applicant alleged that the Procuring Entity in carrying out its preliminary evaluation process acted irregularly and in breach of the criteria and procedures stipulated in the Act and the Regulations thereunder by entertaining and admitting the winning bid which was not responsive contrary to Section 64(1) of the Act and the provisions of Regulation 48(1).

It further alleged that the Procuring Entity in carrying out the technical evaluation of the winning bid acted irregularly and in breach of the criteria and instructions provided in Section A of the Tender Document entitled **“General Information”** Sub-clause 1.2.1-Appendix 1, Row 1 by entertaining, admitting to tender and awarding the tender to the Successful Bidder whose bid did not conform to all the mandatory requirements in the Tender Document contrary to Provisions of Section 64(1) of the Act.

The Applicant averred that the Procuring Entity breached the provisions of Section 66(2) and (3)(a) and (b) of the Act and Regulation 49 by awarding the tender to the Successful Bidder whose bid did not meet the technical requirements and special condition stipulated under Section B, Clause 4.2 entitled **“Conditions to be met by the Insurance Company (Underwriters)”**

sub-clause 4.2.2 thereunder because the Successful Bidder had only transacted business totaling Kshs. 428,447,000/= under the general insurance business (excluding the motor portfolios) for the years 2011 and 2012 combined instead of Kshs. 1.2 billion as required in the Tender Document.

It further averred that the Procuring Entity in carrying out the preliminary evaluation, technical evaluation and awarding the tender to the Successful Bidder, acted irregularly and in breach of the criteria and procedures on awarding or allocation of scores for technical evaluation provided in the tender documents by awarding the Successful Bidder a maximum score of 10 marks under **Sub-Clause 1.2.2 -Appendix II -"Instructions to Tenderers on Scores for Evaluation"** Table A, Column 3 Row 2 thereof when the winning bidder had not met the technical evaluation requirement, under the criteria/instructions to tenderers in sub-clause 1.2.1 Appendix I, Column 2 and the Special Conditions in sub-clause 4.2.2 of the tender document, of having transacted an annual total of Kshs. 600 million under the general business (excluding motor portfolios) in the preceding two years i.e. 2011 and 2012 to qualify to be awarded the 10 marks; and consequently, the Successful Bidder scored the maximum technical score of 80 marks. It argued that this was contrary to the provisions of **Sections 2, 31(1), 34 (1) (2) &(3), 64(1) and Section 66(1) (2) & (3) of the Act and Regulations 48 and 49.**The Applicant submitted that it on the other hand had met the technical requirement thereunder.

The Applicant alleged that the Procuring Entity irregularly and in breach of the criteria and procedures set in the tender document admitted the winning bid to financial evaluation and proceeded to evaluate the same despite the fact that the winning bid had not satisfied the technical requirements

contrary to the provisions of **Section 66(1) (2) and (3) of the Act and Regulations 49 and 50.**

In conclusion, the Applicant alleged that the Procuring Entity irregularly, unfairly and without any basis failed to evaluate its bid which was substantially and fully compliant and responsive in its entirety which was in breach of the provisions of **Sections 2, 31(1), 66(1) (2) &(3) of the Act and Regulations 25, 47, 48 and 49.** It prayed for the Board to nullify the award to the Successful Bidder and substitute the award to it.

In its response, the Procuring Entity submitted that the Applicant's first ground for review did not disclose any breach by the Procuring Entity of any provisions of the Act or Regulations and as such the same should fail, in so far as Regulation 47(2) stipulates inter alia that:-

"The evaluation committee shall reject tenders, which do not satisfy the requirement set out in paragraph (1)."

It further submitted that the Tender Document stipulated that only bidders who had fully meet the minimum criteria set out therein would be shortlisted and invited to submit technical and commercial bids. The Procuring Entity averred that it had a statutory obligation to accept the lowest bid after technical evaluation stage and in the premises it could not be faulted for notifying bidders or candidates of the rejection and as such the ground lacked merit and should fail.

The Procuring Entity submitted that Clause 4.2 of the Tender Document had set out clear requirements for a bidder to set out its experience, qualifications and references. It further submitted that it was the obligation of the Applicant to set out in its bid and/or application all the requirement in the

Tender Document to enable its tender to emerge successful. It averred that in default of meeting the requirements of the Tender Document at the technical evaluation stage the Applicant could not purport to fault the Procuring Entity based on assumptions. It further averred that the Applicant had failed to set out facts to prove its allegations that the tender technical evaluation process was capricious, prejudicial and unfair.

The Procuring Entity submitted that it was trite law that any party that made an allegation against the other must prove it or set out clear facts to prove the same, but in this instant case, the Applicant had made bare allegations which were not supported by any evidence and as such the same should be rejected. It reiterated that it could not be faulted for rejecting the Applicant's bid at the technical evaluation stage in view of Regulation 47 (2).

The Procuring Entity invited the Board to consider the unique and sensitive nature of the services that caused these proceedings in determining the allegation thereof and further peruse the tender document and in particular the term under clause 4.2.2 thereof. It averred that Section 34(1) of the Act gave the Procuring Entity the mandate to prepare specific requirements relating to the goods, works or services being procured with a view to allowing fair and open competition. It further averred that having taken into consideration that provision, it opted not to apply the said term universally against all the bidders and the same did not form the basis of the technical evaluation solely to encourage fair competition, and as such, the Applicant could not therefore turn around and invoke the same clause.

It submitted that the spirit of Section 2 of the Act must be exercised fairly on all parties and the Applicant's failure to win the bid cannot be termed as

offending the said provision unless there was concrete evidence to support the allegation set out in the grounds herein and in the premises the aforesaid grounds lacked merit and should fail.

It further submitted that it had fairly evaluated all the bids and the entire process conformed to the entire mandatory requirements in the Tender Document and that there was no deviation whatsoever or material departure from the requirements of Tender Document; and that it had taken into account price, quality and service for the purpose of evaluation.

It alleged that the Applicant's claim that the Successful Bidder had not earned or transacted annual gross premiums of Kshs. 600 Million shilling under the General Insurance Business was unsubstantiated, without any sound legal backing, without any proof, nor availing the winning bidder's tender document or through an affidavit evidence. It averred that in any event, the said requirement was not universally considered for all the bidders and hence did not form a basis of the Procurement Entity's decision to award the winning bid and in the premises the allegation lacked merit and should fail.

In conclusion, the Procuring Entity submitted that the Applicant had failed to tender any evidence to prove that the Procuring Entity in carrying out preliminary evaluation and technical evaluation of the tenders acted irregularly and in breach of the criteria and procedures on awarding or allocation of scores for technical evaluation provided in the Tender Document; and further that it had conducted both evaluations fairly in accordance to the Tender Document requirements, that the Successful Bidder

had satisfied/met the technical evaluations requirements and was therefore awarded the tender in compliance with Section 66(4) of Act.

On its part, the Successful Bidder fully supported the Procuring Entity's submissions.

It averred that clause 32.3 of the tender document allowed the Procuring Entity to waive any minor information or non-conformity or irregularity in a material deviation provided that such waiver did not prejudice or affect the relative ranking of any tender. It further averred that clause 36.1 gave the Procuring Entity a right to accept or reject all tenders.

It submitted that it had met the technical requirements of transacting business of a minimum of Kes 1.2 billion under general insurance as stipulated by the marking scheme in the tender document.

On its part the Successful Bidder associated itself with the submissions of the Procuring Entity and stated that the Tender Document gave the Procuring Entity the discretion to waive any of the requirements of the tender and that the waiver of clause 4.2.2 was properly done.

Finally it submitted that the Contract has been performed and therefore the Request for Review has been overtaken by events.

The Board has carefully considered the documents before it and the parties' submissions.

With regard to the Act and Regulations thereof cited as allegedly breached, the Board notes the provisions of Sections 2, 31(1), 34, 64(1) and 66 of the Act and Regulations 25, 47, 48,49 and 50 which state as follows;

Section 2:-

"The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives –

- (a) to maximize economy and efficiency;*
- (b) to promote competition and ensure that competitors are treated fairly;*
- (c) to promote the integrity and fairness of those procedures;*
- (d) to increase transparency and accountability in those procedures;*
- and*
- (e) to increase public confidence in those procedures.*
- (f) to facilitate the promotion of local industry and economic development."*

Section 31(1):-

"(1) A person is qualified to be awarded a contract for a procurement only if the person satisfies the following criteria –

- (a) the person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured;*
- (b) the person has the legal capacity to enter into a contract for the procurement;*
- (c) the person is not insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing;*
- (d) the procuring entity is not precluded from entering into the contract with the person under section 33;*
- (e) the person is not debarred from participating in procurement proceedings under Part IX."*

Section 34:-

“(1) The procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.

(2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured.

(3) The technical requirements shall, where appropriate –

(a) relate to performance rather than to design or descriptive characteristics; and

(b) be based on national or international standards.

Section 64(1):-

“A tender is responsive if it conforms to all the mandatory requirements in the tender documents.”

Section 66:-

(1) The procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63(3).

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2) –

(a) the criteria must, to the extent possible, be objective and quantifiable; and

(b) each criterion must be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation.

(4) The successful tender shall be the tender with the lowest evaluated price.

Regulation 25:-

(1) The procuring entity shall, in writing, record the results of its evaluation of applications for pre-qualification using the evaluation criteria in the pre-qualification documents and shall state which candidates were found to be qualified and the reasons why any candidates were not qualified.

(2) The record of results prepared under paragraph (1) shall be submitted to the tender committee for approval.

(3) The procuring entity shall invite tenders from only the persons who have been pre-qualified under this regulation.

Regulations 47, 48, 49 and 50:-

"47 (1) Upon opening of the tenders under Section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether:-

(a) The tender has been submitted in the required format

(b)

...

.....

...

*(f)all required documents and information have been submitted;
and*

(g)any required samples have been submitted.

(2)The evaluation committee shall reject all tenders, which do not satisfy the requirements set out in paragraph (1).

48(1)A procuring entity shall reject all tenders, which are not responsive in accordance with Section 64 of the Act.

49(1) Upon completion of the preliminary evaluation under Regulation 47, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the description of goods, works or services in the tender document.

(2) The evaluation committee shall reject tenders which do not satisfy the technical requirements under paragraph (1).

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.

(2) The evaluated price for each bid shall be determined by-

(a) taking the bid price, as read out at the bid opening;

(b) taking into account any corrections made by a procuring entity relating to arithmetic errors in a tender;

(c) taking into account any minor deviation from the requirements accepted by a procuring entity under section 64(2) (a) of the Act;

(e) where applicable, converting all tenders to the same currency, using uniform exchange rate prevailing at the date indicated in the tender documents;

(f) applying any discounts offered in the tender;

(g) applying any margin of preference indicated in the tender documents

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be the tender with the lowest evaluated price in accordance with section 66(4) of the Act."

The Board observes that Regulation 25, cited herein, may not be relevant in the instant tender because it relates to the evaluation of Applications for Prequalification of Suppliers whereas the tender which is the subject of this review is an Open Tender. The Board further observes that Section 34 of the Act is on Specification of Requirements and none of the grounds of review raised by the Applicant touched on this aspect of the tender.

In order for the Board to be able to determine whether the other cited Sections and Regulations were breached, and the possibility of the Applicant's prayers being granted in the event that its application is successful, the following issues need to be considered and determined:-

- i) The value of general insurance business transacted by the Successful Bidder and the Applicant in the years 2011 and 2012;
- ii) The value of general insurance business (excluding the motor portfolios) transacted by the Successful Bidder and the Applicant in the years 2011 and 2012;
- iii) What the technical requirement was in the Tender Document in regard to the above two values of general business;
- iv) How the Procuring Entity applied /did not apply this criteria in its technical evaluation of the bids; and
- v) The effect of the application/non-application of this criteria on the ranking of the bids.

The Board has examined the Tender Document, the bid documents of the Successful Bidder and the Applicant as well as the Evaluation Report prepared by the Procuring Entity and notes the following:

With regard to the first and the second issues - **The value of general business transacted by the Successful Bidder and the Applicant in the years 2011 and 2012; and the value of general business excluding motor vehicle insurance**, the Board notes as follows;

1. That the Financial Statements submitted by the Successful Bidder as part of its bid documents have gross premiums for the years 2011 and 2012, inclusive of motor vehicle portfolio, as Kshs 1,661,830,148 and Kshs 1,799,424,910 respectively. With the motor vehicle portfolio accounting for Kshs 1,481,680,532 and Kshs 1,608,834,513 respectively the Successful Bidder's gross premiums for the two years, excluding motor vehicle portfolio are Kshs 190,690,387 and Kshs 180,149,616 respectively; a total of Kshs 370,840,013.
2. That the Financial Statements submitted by the Applicant as part of its bid documents have gross premiums for years 2011 and 2012, inclusive of motor vehicle portfolio, as Kshs 3,961,009,000 and Kshs 5,715,946,000 respectively. With the motor vehicle portfolio accounting for Kshs 2,389,455,000 and Kshs 2,949,339,000 respectively the Applicant's gross premiums for the two years, excluding motor vehicle portfolio are Kshs 2,766,607,000 and 1,571,554,000 respectively; a total of Kshs 4,338,171,000.

With regard to the third issue - **What was the technical requirement in the Tender Document in regard to the above two values of general business**, the Board notes as follows;

1. That in sub-clause 1.2.1 - Appendix 1 - Instructions to Bidders found at page 6 of the Tender Document, the particulars in row 1 of the table therein stated that "for Tenderers to be eligible for this Tender, he/she must meet all the requirements of special conditions set out in sections 4.2 and 4.3 and Clause 23 (Bid Security).
2. That in Clause 4.2 - Conditions to be met by the insurance company (underwriters), at **sub-clause 4.2.2** stated that the insurance company ***"Must have done an annual gross premium of Kenya Shillings Six Hundred Million (Kshs600M) under general insurance business (excluding motor vehicles portfolio) i.e. minimum Kenya Shillings One Billion Two Hundred Million (1.2 Billion) in the preceding two years i.e. 2011 and 2012. Attach proof."***
3. That Sub-clause 1.2.2 Appendix II -Instructions to Tenderers on Scores for Evaluation, Table A row No. 2 clearly indicated that a tenderer would score 10 marks for Annual Gross Premium \geq 600m / 1.2 billion for general insurance business for 2011 & 2012.

With regard to the fourth issue -**How the Procuring Entity applied / did not apply this criteria in its technical evaluation of the bids**, the Board notes as follows;

1. That at the preliminary evaluation stage both the Applicant and the Successful Bidder were responsive to/met all the Mandatory Requirements of the Tender and were therefore considered for further evaluation. The remaining ten bidders were not considered for further evaluation for failing to meet one or more of the mandatory requirements. Regarding Regulations 47 and 48 and Section 64 of the Act, which relating to the preliminary evaluation, the Board finds that by declaring the Applicant and the Successful Bidder as responsive to the mandatory requirements that were considered in the Preliminary Evaluation and rejecting the other ten bidders for their non-responsiveness, the Procuring Entity had complied with Regulations 47 and 48 and Section 64(1) of the Act.

With regard to the allegations of Breach of Regulation 49, the Board finds that the Procuring Entity had duly complied with the requirement under Regulation 49(1) whereas the requirement under Regulation 49(2) was not applicable because the technical evaluation criteria provided for the award of full marks or zero marks and the cut off mark for proceeding to financial evaluation was 70% which was met by both bidders. Consequently, the Board finds that there was no breach of Regulation 49.

2. The Board finds that the Procuring Entity's Evaluation Report shows that in the technical evaluation both the Applicant and the Successful Bidder were awarded the maximum score of 10 marks each under the requirement that the Insurance Company/ Underwriter *must have done an annual gross premium of Kenya Shillings Six Hundred Million (Kshs 600M) under general insurance business (excluding motor vehicles portfolio) in the preceding two years i.e. 2011 and 2012.* As the Board noted under the first

and second issues, the Successful Bidder did not meet this particular requirement.

3. The Board further finds that in conducting the preliminary, technical and financial evaluation, the Procuring Entity evaluated the bids in accordance with the set criteria in the Tender Document. Further, the Procuring Entity subjected the Successful Bidder and the Applicant to the criteria in clause 4.2.2 (general insurance excluding motor vehicle business) and allocated marks for this criteria contrary to the sworn affidavit of Mr. John O. Okuku, the Procuring Entity's Deputy Director of Procurement, that this criteria was abandoned at technical evaluation stage. The Board did not find any evidence submitted by the Procuring Entity that this was indeed the case other than the sworn affidavit of Mr. John O. Okuku because the tender evaluation report /minutes did not state that any criteria was waived at any stage of evaluation.

With regard to the fifth issue -**The effect of the application / non-application of this criteria on the ranking of the bids** the Board makes the following findings;

1. That having been awarded full marks for the technical requirement in regard to clause 4.2.2, the Successful Bidder scored the maximum score of 80 in the technical evaluation. This was then combined with the financial score of the maximum of 20 since the Successful Bidder had submitted the lowest financial bid. The result of the combined score of 100% led to the Successful being ranked first.

2. That the Applicant having also scored the maximum score of 80 in the technical evaluation, which when combined with the financial score of 19.85 resulted in a combined score of 99.85 thus ranking it second.
3. The Board finds that had the Procuring Entity correctly allocated a score of zero to the Successful Bidder for this requirement as per the Evaluation Criteria under requirement No.2 in Table A - Appendix II, the scores of the Applicant and the Successful Bidder in the Technical Evaluation would have been different.
4. The Board observes that the Successful Bidder would have scored 90/100 marks for technical which is the equivalent of a score of 72 in technical; which when combined with the financial score of a maximum of 20, would have resulted in a combined score of 92 for the Successful Bidder; compared to the Applicant's combined score of 99.85.
5. Accordingly, the Board finds that the ranking in accordance to the procedure for financial evaluation provided in table C found at page 8 of the Tender Document and Regulation 50 would have changed with the Applicant ranking first and the Successful Bidder second.

The Board therefore finds that the Successful Bidder's argument that the Procuring Entity acted in accordance with clause 32.3 of the Tender Document by doing away with the requirement at the technical evaluation cannot be sustained because the ranking was prejudiced by doing so.

The Board further finds that in awarding the Successful Bidder the full 10 marks under requirement No.2 in Table A - Appendix II found at page 7 of the Tender Document, the Procuring Entity acted contrary to the provision of Clauses 4.2.2 and 1.2.2 of the Tender Document because the Successful

Bidder had not met the requirement in question; and consequently, the Procuring Entity breached Section 66(2) of the Act.

Further, the Board also finds that by allegedly doing away with the said requirement purportedly during technical evaluation; the Procuring Entity in essence breached Section 2 of the Act in that it was biased in the technical evaluation process in favour of the Successful Bidder to the detriment of the Applicant.

Further, the Board finds that the award of the contract to the Successful Bidder was also a breach of Section 31(1)(a) of the Act in that the Successful Bidder had not satisfied the financial capability requirement specified under sub-clause 4.2.2.

The Board therefore finds that outcome of the technical and financial evaluation as it is in the Evaluation Report resulted in the tender being awarded to a bidder that was not the lowest evaluated bidder contrary to Section 66(4) of the Act.

Taking into account the foregoing, the Board finds that the appeal succeeds.

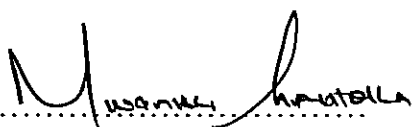
Accordingly, the Board orders, pursuant to Section 98 of the Act, that:-

1. The award to the Successful Bidder, Africa Merchant Assurance Company Limited, is hereby annulled;

2. The Procuring Entity should convene the requisite committee meetings within the next thirty days to award the tender to the highest ranked bidder in accordance with Section 66(4) of the Act.
3. The current insurance cover will remain in force for a maximum period of thirty days from the date thereof

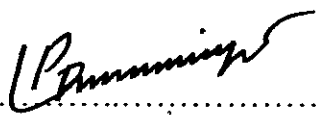
There are no orders as to costs.

Dated at Nairobi on this 16th day of July, 2013.



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CHAIRMAN
PPARB



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SECRETARY
PPARB