

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 63/2015 OF 07th DECEMBER, 2015

BETWEEN

GETRIO INSURANCE BROKERS LTD.....APPLICANT

AND

**KENYA BROADCASTING CORPORATION.....PROCURING
ENTITY**

Review against the decision of the Kenya Broadcasting Corporation (KBC) dated 19th November, 2015 in the Tender No.10/KBC/2015-2016 for Provision of Group Medical Insurance Cover, Cum Group Personal Accident and funeral expenses Insurance for KBC Board of Directors, Managing Directors and Staff.

BOARD MEMBERS PRESENT

- | | |
|------------------|----------|
| 1. Paul Gicheru | - Chair |
| 2. Nelson Orgut | - Member |
| 3. Peter Ondieki | - Member |
| 4. Gilda Odera | - Member |

5. Hussein Were - Member

IN ATTENDANCE

1. Philemon Kiprop - Secretariat
2. Shelmith Miano - Secretariat

PRESENT BY INVITATION

Applicant – Getrio Insurance Brokers Co. Ltd

1. A. E. Kiprono - Advocate
2. Patrick Kirimi - GM
3. Nancy Kariuki - Marketing

Procuring Entity – KENYA BROADCASTING CORPORATION

1. Ms Kabochi - Advocate
2. Kennedy Adede - Clerk
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BACKGROUND

The Kenya Broadcasting Corporation is seeking to secure a group Medical Cum Personal Accident and Funeral Expenses cover for KBC's Board of Directors, Managing Director and Staff for a period of

one year with effect from 1st November 2015. The tender was advertised on 16th October 2015 and closed on 30th October 2015.

The following Brokerage firms responded;

1. M/s. Pelican Insurance Brokers (K) Ltd
2. M/s. Risk Solution Insurance Brokers Ltd
3. M/s. Arc Choice Insurance Brokers Ltd
4. M/s. Waumini Insurance Brokers Ltd
5. M/s. Aspen Insurance Brokers Ltd
6. M/s. Justine Insurance Brokers Ltd
7. M/s. Southern Sahara Insurance Brokers Ltd
8. M/s. Getrio Insurance Brokers Ltd
9. M/s. Canopy Insurance Brokers Ltd

The following Underwriters presented their supportive documents:-

1. M/s. Britam General Insurance Co. (K) Ltd.
2. M/s. UAP Insurance Co. Ltd
3. M/s. Saham Assurance Co. (K) Ltd.
4. M/s. CIC Life Assurance Ltd.
5. M/s. APA Insurance Ltd.
6. M/s. Madison Insurance Company.
7. M/s. Kenindia Assurance Co. Ltd.

EVALUATION PROCESS

All bids were subjected to evaluation which included preliminary mandatory requirements for both the Underwriters and Brokers.

SCOPE

The Scope included but was not limited to Group Medical Cum Personal Accident and Funeral Expenses cover for Board Members and Staff as follows:-

- Medical cum personal Accident cover for Board Members

(Out & Inpatient, Fatal Accident Death, Total & Permanent Disability, Weekly Earnings on Temporary Disability and Funeral Expenses)

- Staff Group Personal Accident Insurance Cover

(Medical Expenses out of accidents-In-Patient and Out-Patient, Total & Permanent disability, Weekly earnings on temporary disability, Fatal accident death)

- Staff Group Life Insurance Scheme in the event of death.

(In the event of a staff member)

- Medical Insurance for the Managing Director plus his family (Spouse and four (4) Children)

(Out-Patient and In-Patient for Managing Director, his spouse and up to four (4) Children)

STAGE 1. MANDATORY REQUIREMENTS FOR UNDERWRITERS

Seven (7) Insurance Companies that presented their supportive documents were evaluated as shown below:-

	REQUIREMENTS	F1	F2	F3	F4	F5	F6	F7
1	Be registered with Commissioner of Insurance (Certificate)	√	√	√	√	x	√	√
2	Paid up annual gross premiums in previous year of Kshs.750. Million excluding Motor Vehicles	√	√	x	√	√	√	√
3	Paid up capital of at least Kshs.150 Million	√	√	√	√	√	√	√
4	Must give a list of 5 (five) reputable clients and the total clients premiums for the previous year	√	√	√	√	x	√	√
5	Audited accounts for the previous 3 years	√	√	√	√	√	√	√
6	Number of Management staff of at least 5 No.		√	√	√	√		√
7	PIN Certificate	√	√	√	√	√	√	√
8	VAT Certificate	√	x	x	x	√	√	√
9	Valid Tax Compliance Certificate	√	√	√	√	x	√	√
10	Certificate of Registration/Incorporation	√	√	√	√	√	√	√
11	Must be a member of the Association of Kenya Insurance (AKI)	√	√	√	√	x	√	√
	Total Number of Scores	11	9	10	10	7	11	11
	Remarks	Pass	Fail	Fail	Fail	Fail	Pass	Pass

KEY

√ - Condition met

x- Condition not met

REMARKS

(a) The following Insurance Companies did not meet all conditions as required and were therefore deemed non responsive;

1. Firm No. 2 M/s. UAP Insurance Co. Ltd
2. Firm No. 3 M/s. Saham Assurance Co. (K) Ltd.
3. Firm No. 4 M/s. CIC Life Assurance Ltd.
4. Firm No. 5 M/s. APA Insurance Ltd.

(b) The following Insurance companies met all the Mandatory conditions and were therefore deemed responsive to support respective Brokerage firms

5. Firm No. 1 M/s. Britam General Insurance Co. (K) Ltd.
 6. Firm No. 6 M/s. Madison Insurance Company.
 7. Firm No. 7 M/s. Kenindia Assurance Co. Ltd.
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MANDATORY REQUIREMENTS FOR INSURANCE BROKERAGE FIRMS

During the Tender Opening the Procuring Entity noted that four firms mixed their Technical and Financial proposals together which was contrary to tender conditions clause 2.15.1. Therefore the following four firms were deemed non responsive:-

1. Firm No. 2 M/s. Risk Solution Insurance Brokers Ltd.
2. Firm No. 5 M/s. Aspen Insurance Brokers Ltd
3. Firm No. 6 M/s. Justine Insurance Brokers Ltd
4. Firm No. 9 M/s. Canopy Insurance Brokers Ltd

The Brokerage firms that were responsive are evaluated as shown below:-

	REQUIREMENTS	F1	F3	F4	F7	F8
1	Must be registered with the Commission of Insurance for current year and a copy of the current license be submitted(IRA)	√	√	√	√	√
2	Must have a Bank guarantee of Kshs. 3,000,000 deposited with the Commissioner of Insurance and a Copy be submitted	√	x	√	√	√
3	Must have a Professional Indemnity Insurance Cover of at least Kshs. 10,000,000 and a copy be submitted	√	√	√	√	√
4	Must give a list of 5 (five) reputable clients and the total clients premium in the previous year	√	√	√	√	√
5	Must submit a copy of the audited accounts for the	√	√	√	√	√

	REQUIREMENTS	F1	F3	F4	F7	F8
	previous 3years					
6	Must be a current member of the Association of Insurance Brokers (AIB) (to be completed as appropriate. Amendments may be made as necessary)	√	√	√	√	√
7	Registration Certificate	√	√	√	√	√
8	VAT Certificate	√	√	√	√	√
9	PIN Certificate	√	√	√	√	√
10	Valid Tax Compliance	√	√	√	√	√
11	Proof of Tender purchase	√	√	x	√	√
	Total Number of Scores	11	10	10	11	11
	Remarks	Pass	Fail	Fail	Pass	Pass

REMARKS AND RECOMMENDATIONS

1. The following Brokerage firms did not meet all mandatory requirements and were deemed non responsive to proceed to the next stage;

- i. Firm No.3. M/s. Arc Choice Insurance Brokers Ltd
- ii. Firm No.4. M/s. Waumini Insurance Brokers Ltd

2. The following Brokerage firms met all Mandatory requirements and were deemed responsive to proceed to the next stage of evaluation;

- i. Firm No. 1. M/s. Pelican Insurance Brokers (K) Ltd

- ii. Firm No.7. M/s. Southern Sahara Insurance Brokers Ltd
- iii. Firm No. 8. M/s. Getrio Insurance Brokers Ltd

STAGE 2. TECHNICAL EVALUATION

Only responsive Brokerage firms supported by their responsive Insurance Companies were to proceed to financial evaluation. Both Insurance Companies and Brokerage firms were to meet mandatory requirements as stipulated in the tender document. The table below shows responsive Brokerage firms and their respective Insurance Companies.

BROKERAGE FIRMS	UNDERWRITERS	REMARKS
M/s. Pelican Insurance Brokers (K) Ltd	-M/s. UAP Insurance Co. Ltd - M/s. APA Insurance Ltd.	Both underwriters were none responsive and therefore could not proceed to financial.
M/s. Southern Sahara Insurance Brokers Ltd	- M/s. Britam General Insurance Co. (K) Ltd.	Are responsive and qualifies to financial evaluation
M/s. Getrio Insurance Brokers Ltd	Did not indicate the underwriter for comparison purposes. However, it was assumed the underwriter quotation will be from the above evaluated and qualified underwriters.	Responsive and qualifies to proceed to financial evaluation.

REMARKS AND RECOMMENDATIONS

The following firm did not qualify to proceed to financial evaluation due to the following:-

Firm No. 1. M/s. Pelican Insurance Brokers (K) Ltd – Both underwriters were none responsive hence disqualified to proceed to financial evaluation.

Only two firms qualified to proceed to financial evaluation namely,

- i. Firm No. 7. M/s. Southern Sahara Insurance Brokers Ltd
- ii. Firm No.8. M/s. Getrio Insurance Brokers Lt

STAGE 3. FINANCIAL EVALUATION

The financial quotations from the firms were as follows;

	BROKERAGE FIRM	
	M/s. Southern Sahara Insurance Brokers Ltd	M/s. Getrio Insurance Brokers Ltd
UNDERWRITERS	M/s. Britam General Insurance Co. (K) Ltd	M/s. Jubilee Insurance Co.Ltd
FIRMS QUOTATION	Kshs.9,787,550.50	Kshs.6,682,954.
UNDERWRITERS QUOTATION	Kshs.8,304,880.78	Kshs.5,816,010

REMARKS

It was noted that, M/s. Jubilee Insurance Company did not submit document for evaluation to support the Brokerage firm. This therefore rendered M/s Getrio Insurance Brokers Ltd none responsive and therefore was disqualified.

Only firm number seven M/s. Southern Sahara Insurance Brokers Ltd and its underwriter M/s. Britam General Insurance Co. (K) Ltd were responsive

	REQUIREMENTS		F 7
1	Medical cum Personal Accident Cover for Board members (4No)		
	Out-Patient Medical limit	Ksh. 100,000 per annum	1,383,704.78
	Inpatient Medical limit	Ksh. 500,000 per annum	
	Accident cover as follows:		
	Fatal Accidental Death	Ksh. 2,000,000	
	Total & Permanent Disability	Ksh. 2,000,000	
	Weekly Earnings on Temporary Disability	Ksh. 10,000	
	Last Expense	Ksh. 100,000	
2	Staff Personal Accident Insurance Cover Compensation for injuries, suffering and death following accident(s)		
	Fatal Accidental Death	Three (3) year's salary	1,482,669.72
	Total & Permanent Disability	Three (3) year's salary	
	Weekly Earnings on Temporary Disability	Weekly equivalent of actual earning	
	Total number of staff is 904 earning a total basic salary of approximately Ksh. 42,723,309.00 as at the end of August 2015		
	Group Personal Accident/WIBA		

3	Staff Group Life Insurance Scheme		
	Death benefit payable to dependent's following death of an officer equivalent to 36 months basic salary based on the last salary of the officer concerned		6,921,176
	Total number of staff is 904		
4	Medical Insurance for the Managing Director plus his family (Spouse and four (4) Children		
	Out-Patient cover	upto Ksh. 100,000 per annum	
	In-Patient Cover	upto Ksh. 2 million per annum for Managing Director, his Spouse and upto four (4) children	
5	Total Price Quoted		9,787,550.50
	Remarks		RECOMMENDED

RECOMMENDATION

The Committee recommended M/s. Southern Sahara Insurance Brokers Ltd to provide a Group Medical Cum Personal Accident and Funeral Expenses cover for KBCs Board of Directors, Managing Director and Staff for a period of one year with effect from 1st November 2015 to 30th October 2016 at a total cost of Kshs. 9,787,550.50 vat inclusive (Nine million, seven hundred and eighty seven thousand five hundred and fifty and fifty cents only) being the overall lowest evaluated bidder.

THE REVIEW

The Applicant, M/s Getrio Insurance Brokers Ltd, whose address for purposes of this Request for Review is P. O. Box 53172-00200, Nairobi, lodged the Request for Review on 7th December, 2015 against the award of Tender No. 10/KBC/2015-2016 for Supply of Brokerage Insurance Services for Group Medical cum Personal Accident and Funeral Expenses Insurance Schemes for the Board Members and Staff of KBC.

The Applicant requests the Board for the following prayers:

- 1. An order quashing the Respondent's decision declaring the Applicant's bid unsuccessful.*
- 2. An order quashing award of the tender to Southern Sahara Insurance Brokers.*
- 3. A declaration that the Applicant's price was the lowest evaluated price.*
- 4. An order directing the Respondent to award the tender to the Applicant at the tender sum of Kshs.6,682,954/.*
- 5. Costs of the request for review to the Applicant.*
- 6. Any other relief that the Review Board deems fit to grant under the circumstances.*

The Applicant raised 17 grounds for review as contained in the Request for Review paragraphs 1-17, of which 6 are the main ones, being Grounds 1-3, 7, 11 and 12.

Ground 1:- The Respondent has declared the Applicant's bid unsuccessful on the ground that *"your underwriter, M/s Jubilee Insurance Company did not submit document for evaluation to support your firm"*.

Ground 2:- The tender document did not require the proposed underwriter to independently submit any document to support a bidder as alleged by the Respondent.

Ground 3:- The Applicant submitted all the documents that the Respondent had requested for at Section IV of the Respondent's tender document.

Ground 7:- The Applicant's bid was evaluated and found to be substantially responsive having succeeded at stages 1 & 2 of the evaluation criteria and subsequently passed for the opening and evaluation of the financial bid

Ground 11:- Breach of Section 66(2) of the Act

The Applicant alleges that the Respondent breached Section 66(2) of the Act by failing to evaluate the tender in accordance with the criteria set out in the tender document and thus arrived at an erroneous decision.

Ground 12:-The Applicant's and M/s Southern Sahara Insurance Broker's financial bids were opened on 04/11/2015. The Applicant's bid was Kshs.6,682,954/- whereas that of Southern Sahara was Kshs.9,787,550.50, a difference of Kshs.3,104,596.50.

During the hearing of the Request for Review, the Applicant was represented by Mr A.E Kiprono, Advocate from A.E. Kiprono Associates while the Procuring Entity was represented by Ms Kabochi from Nyandoro and Co Advocates.

The Applicant's Case

Mr Kiprono relied on his written submissions dated 30th December 2015, and the oral submissions made before the Board stated that his client had presented its bid as per clause 2.14.1, as read together with clause 2.15.1, of the Procuring Entity's Tender Document which

required separate envelopes for Technical and Financial evaluation. Both evaluations were carried out by the Procuring Entity only for it to subsequently declare the Applicant's bid unsuccessful on the grounds that *"your underwriter, M/s Jubilee Insurance Company did not submit documents for evaluation to support your firm"*. Mr Kiprono's contention was that the Tender Document did not require the proposed underwriter to independently submit documents in support of a bidder. Counsel for the Applicant reiterated that his client had submitted M/s Jubilee Insurance's documents as per Section IV of the Procuring Entity's Tender Document. Furthermore, the Applicant's technical bid was passed for financial evaluation without raising the issue relating to non existence of M/s Jubilee documents for evaluation. If indeed it was a requirement for a bidder to submit documents from the underwriter for evaluation, then the technical evaluation committee was not in order to assume that perhaps the Applicant was fronting one of the underwriters who had submitted documents for evaluation as alleged by the Procuring Entity in its response. The correct action would have been to declare the Applicant's bid non responsive at that stage but not to pass it for financial evaluation. The Counsel for the Applicant went on to assert that M/s Jubilee Insurance's documents were never an issue at any stage of the tender processing right from tender opening through to

financial evaluation and it can only be assumed that the Applicant's bid was fully responsive. Mr Kiprono referred the Board to Regulation 45(2) which requires the Procuring Entity to return the financial bid unopened if a bidder fails at the technical evaluation stage as it happened to Pelican Insurance Company who was discontinued after the technical evaluation and their financial bid envelope returned unopened. Regulations 48(1) and 49(2) enjoins the Procuring Entity to reject any bid that fails to meet all the technical requirements and Regulation 50(1) prohibits the Procuring Entity from financially evaluating a bid that does not meet technical criteria. Counsel for the Applicant wrapped up his submissions by asserting that his client's bid was lower than that of the successful bidder at Kshs 6,682,954 as compared with Kshs 9,797,550.50 – a difference of 3,104,596.50, which made it the lowest price and should be awarded the tender as stipulated under section 66(4) of the Act and Regulation 50(3), and as per clause 2.24.1 of the tender document. Additionally the Counsel for the Applicant stated that the signing of the contract with the successful bidder was irregular in that section 68(2) of the Act, which requires 14 days to elapse before signing a contract, was violated by dating the contract the same date as that of the award made on 19th November 2015. The Procuring Entity had also failed to

submit the requisite documents to the Board Secretariat in good time, which raises serious issues as to its intention.

He concluded by urging the board to allow the request for review with costs to the Applicant – informing the Board that the Applicant had expended Kshs 26,170 to file this request for review.

The Procuring Entity's response

The Counsel for the Procuring Entity, Ms Kabochi, countered the arguments by Mr Kiprono and relied on her written submissions dated 24th December 2015. She referred the Board to section IV of the tender document clauses 4.1.1 to 4.1.8, *Special Conditions of Contract* meant for Insurance Companies and which are separate from clause 4.2 meant for the Insurance Brokers. She maintained that in all the documents submitted by the Applicant it was not indicated which Insurance Company was the nominated underwriter. She asserted that the mere existence of documents from M/s Jubilee Insurance Company annexed to the Applicant's documents, including the price quotation, did not make the said Jubilee Insurance Co an underwriter of the Applicant. The Procuring Entity's contention was that there was no evidence by the Applicant indicating Jubilee as having agreed to be their underwriter. Neither did the documents submitted by Jubilee mention about tendering as underwriters for the Applicant.

This rendered the Applicant's tender documents non responsive as they did not have a successful bidder for the underwriter's portfolio. Ms Kabochi was, however, unable to explain how the financial bid of the Applicant was opened when it was deemed to have failed due to failure by M/s Jubilee Insurance Company to submit documents for evaluation – only citing this action by the evaluating committee as a mistake. She went on to admit, in response to a query by the Board, that there was no requirement for submission of joint documents of the bidder with those of its underwriter. She also admitted that Clause 4.2.7 of the tender document was not specific regarding such requirement for the underwriter to submit documents for evaluation.

BOARD'S DECISION

Counsel for the Procuring Entity's referred the Board to the Provisions of Clauses 4.1 and 4.2 of the tender document and alleged that the two provisions placed an obligation on any Insurance broker to incorporate in the tender documents documents from an insurance company in order to be eligible to evaluation and that is the reason why the Applicant was declared as having been non-responsive and therefore unsuccessful.

The Board has examined the Provisions of Part IV of the Tender document headed special conditions of contract which was divided into two clauses namely; clause 4.1 and clause 4.2. clause 4.1 is headed conditions to be met by the Insurance Company while clause 4.2 is headed conditions to be met by Insurance Brokers.

It is clear from a plain reading of the above Provisions that this tender was open to both Insurance Companies and Insurance Brokers and the conditions to be met by each category of bidders was clearly spelt out.

The Board has examined the entire tender document and has been unable to come across any clause that required a broker bidding alone to attach any document or submit a document from an underwriter for the purposes of evaluation in order to be eligible to the award of the subject tender.

It was not disputed during the hearing of this request for review that the Applicant went through the preliminary, technical and the financial evaluation stages. The Applicant was not disqualified at any of the two initial stages on the ground set out in the letter of notification namely that its underwriter M/s Jubilee Insurance Company did not submit documents to support the evaluation of the Applicant firm.

Under the Provisions of Regulation 50 of the Regulations, a procuring entity cannot revisit and seek to declare a bidder as unsuccessful at the financial evaluation stage based on technical grounds.

The Procuring Entity's action also flies on the face of Section 66(2) of the Public Procurement and Disposal Act which provides as follows:-

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.

A procuring entity cannot evaluate tenders on the basis of a criteria other than the criteria set out in the tender document. If the procuring entity required that insurance brokers submit documents for evaluation from insurance companies as part of the tender documents to be supplied by brokers bidding in this tender, then it ought to have set out the said requirement as part of the tender document which it did not do.

Turning to the issue of whether the Applicant was the lowest evaluated bidder, the Board finds that only two bidders namely M/s

Southern Sahara Insurance Brokers and the Applicant were the only two bidders who made it to the financial evaluation stage when the financial bids were opened.

M/s Southern Sahara Insurance Brokers submitted a bid of Kshs.9, 797, 550.00 while the Applicant submitted a bid of Kshs.6, 682, 954.00. The Applicant's bid was therefore the lowest evaluated bid and the difference between the two bidder's prices was the sum of Kshs.3, 104, 369.50.

Under the Provisions of Section 66(4) of the Act, the law requires that a tender conducted through open tendering be awarded to the lowest evaluated bidder which in this case was the Applicant.

The Board wishes to finally observe that inspite of the secretary of this Board writing to the procuring entity asking to be furnished with the original tender and other documents within a period of five (5) days upon notification as required by the Regulations, the procuring entity did not do so. The Board wishes to draw to the attention of the parties and particularly the procuring entity that under the Provisions of Section 136 of the Act, a person who contravenes an order of the Review Board under part VII of the Act or an order of the Director

General or the Review Board under part VIII is guilty of an offence and if convicted such a person shall be liable to:-

(a) If the person is an individual to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years or to both.

(b) If the person is a body corporate to a fine not exceeding ten million shillings.

(2) In addition to the penalty under sub-section 1, the public officer involved shall suffer disqualification from public office while the private individual shall be debarred.

The above sanctions indicate that the procuring entity was treading on very dangerous grounds in this matter, but the Board will for now leave the issue at that.

The Applicants request for view dated 7th December 2015 is therefore allowed on the terms set out below.

FINAL ORDERS:- In the exercise of the powers conferred upon it by the provisions of Section 98 of the Public Procurement and Disposal

Act 2005, the Board makes the following final orders on this Request for Review:-

(a)The Applicant's Request for Review dated 7th December 2015 be and is hereby allowed.

(b)The Respondents decision declaring the Applicant's bid as unsuccessful as contained in the Respondent's letter dated 19th November 2015 is hereby quashed and annulled.

(c)The award of the tender made to M/s Southern Sahara Insurance Brokers Ltd via the Respondent's letter dated 19th November 2015 is also hereby annulled.

(d)In the exercise of the powers conferred upon it by the Provisions of S.98 of the Public Procurement and Disposal Act, the Board hereby substitutes the decision of the procuring entity with a decision awarding to the Applicant the tender for the insurance scheme for group Medical cum personal Accident and funeral expenses for KBC Board of Directors, Managing Director and staff at the sum of Kshs.6, 682, 954.00.

(e) The Respondent is hereby directed to issue a letter of award in the above terms and execute a contract in respect of the tender with the Applicant within fourteen (14) days from the date hereof and forward the letter of award and the contract to the Board on or before 14th January 2015.

(f) In view of the law that costs follow the event, the Applicant will have the costs of this request for review assessed at the sum of Kshs.150, 000.00 and the Respondent will additionally re-imburse to the Applicant the filing fees of Kshs.26, 170.00 which the Applicant incurred in the filing of this request for review.

Dated at Nairobi on this 5th day of January, 2016.


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**CHAIRMAN
PPARB**


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**SECRETARY
PPARB**

