

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD

REVIEW NO. 31/2015 OF 30TH JUNE, 2015

BETWEEN

PELICAN INSURANCE BROKERS (K) LTDAPPLICANT

AND

KENYA FERRY SERVICES LTDPROCURING ENTITY

Review against the decision of the Kenya Ferry Services in the matter of Tender No. KFS/MI/17/03/2015 for the Provision of Marine Hull & Machinery Protection and Indemnity Insurance Cover for MV Kwale&Likoni Ferries

BOARD MEMBERS PRESENT

- | | |
|--------------------------|------------|
| 1. Paul Gicheru | - Chairman |
| 2. Josephine W. Monga're | - Member |
| 3. Rosemary Gituma | - Member |
| 4. Peter Ondieki, MBS | - Member |
| 5. Paul Ngotho | - Member |

IN ATTENDANCE

1. Henock Kirungu - Board Secretary
 2. Philemon Kiprop - Secretariat
 3. Shelmith Miano - Secretariat
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Present By Invitation

Applicant – Pelican Insurance Brokers Ltd

1. Antony E. Kiprono - Advocate
2. Kagwe Githui - CEO
3. Cynthia Mungai - Ass. General Manager

Procuring Entity – Kenya Ferry Services Ltd

1. Elija Kitur - Advocate
2. Jenifer Cirindi - P & SM

Interested Parties

1. Churchill Midwa - Advocate Trident Insurance Co. Ltd
2. Kennedy Abincha - CEO, Trident Insurance Company Ltd.
3. Rose Nduthu - Sales Manger, Clerksons Insurance Brokers
4. Paul Kamau - Director, Eagle Africa Brokers

BOARD'S DECISION

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

BACKGROUND OF AWARD

The Procuring Entity advertised the above tender in the *Standard Newspaper* of 4th March 2015 and the *Daily Nation* of 18th March 2015. The tender closed on 31st March, 2015 at 10.00 hours and submissions opened immediately thereafter by the Tender Opening Committee in the presence of bidders' representatives who chose to attend.

Closing/Opening:

The Tender closed/Opened on 31st March 2015. 19 (Nineteen) tenderers submitted their bids for opening.

TENDER EVALUATION

The Tender Processing Committee carried out a Preliminary evaluation of the documents as per the criteria set out in the tender documents to establish the responsiveness in two(2) categories for the 19 bidders who submitted their bids.

i) PRELIMINARY EVALUATION OF UNDERWRITERS

The following underwriters did not meet the set criteria and were therefore disqualified.

1) African Merchant Assurance Limited

- The bidder did not provide a professional indemnity limit

2) CIC Insurance Limited

- The bidder did not provide the professional indemnity limit.
- The bidder did not provide evidence of having been in marine hull and machinery insurance business for the last 5 years.

- The bidder did not give a detailed company profile showing qualification and years of experience in marine hull insurance.
 - There was no evidence that the bidder had underwritten three policies each with a premium of Kshs. 10 Million and above.
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3) First Assurance Limited

- The bidder did not provide a professional indemnity limit.
- The bidder did not provide evidence of having been in marine hull and machinery insurance business for the last 5 years.
- The bidder did not give a detailed company profile showing qualification and years of experience in marine hull insurance.

4) APA Insurance

- The bidder did not provide a professional indemnity limit

5) BRITAM

- The bidder did not provide a professional indemnity limit.
- The bidder did not provide evidence of having been in marine hull and machinery insurance business for the last 5 years.

6) Jubilee Insurance

- The bidder did not provide a professional indemnity limit

7) UAP Insurance

- The bidder did not provide a professional indemnity limit.
- The bidder did not provide the evidence of having been in marine hull and machinery insurance business for the last 5 years.

8) Fidelity Shield Insurance

- The bidder did not provide evidence of having been in the marine hull and machinery insurance business for the last 5 years.

9) Kenya Orient Insurance Limited

- The bidder did not provide a professional indemnity limit.
- The bidder did not provide evidence of having been in marine hull and machinery insurance business for the last 5 years.
- The bidder did not give a detailed company profile showing qualification and years of experience in marine hull insurance.
- The bidder provided a copy of a tax compliance certificate that expired on 8th May, 2014

10) Madison Insurance Company

- The bidder did not provide evidence of having been in marine hull and machinery insurance business for the last 5 years.
- The bidder did not give a detailed company profile showing qualification and years of experience in marine hull insurance.

The following firm qualified to proceed to the technical evaluation stage after satisfactorily fulfilling the mandatory requirements:

a) Trident Insurance Company Limited

ii) **PRELIMINARY EVALUATION OF BROKERS**

The committee observed that some of the brokers did not meet the mandatory requirements as stipulated in the tender document and they were disqualified as follows:-

1) Clarkson Insurance Brokers

- The quotation presented had no authorization letter from the underwriter.

2) Southern Sahara Insurance Brokers

- The bidder did not provide evidence of experience in marine hull and machinery cover.
 - They did not provide evidence of an operational branch/office in Mombasa
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- The Bidder provided one authorized quotation from the underwriter whereas it was required to give two quotations.

3) Porim Insurance Brokers Limited

- The bidder did not provide evidence of experience in marine hull and machinery cover.
- They did not provide evidence of an operational branch/office in Mombasa

4) Eagle Africa Insurance

- The Bidder provided evidence of registration with Insurance Regulatory Authority that expired in December 2014.
- The Bidder did not provide evidence of experience in marine hull and machinery cover.

5) Stegrap Insurance Brokers Limited

- Did not provide evidence of experience in marine hull and machinery cover.
- They did not provide a letter of authorization from the underwriter to quote.

6) Pelican Insurance Brokers

- They did not provide a letter of authorization from the underwriter to quote.

The following firms qualified to proceed to the technical evaluation stage after satisfactorily fulfilling the mandatory requirements:

a) Liaison Insurance Brokers Limited

b) AON Kenya Insurance Brokers

TECHNICAL EVALUATION

COMBINED EVALUATION SCORES

Below is an analysis of the combined scores matrix for the evaluators;

	Evaluator 1	Evaluator 2	Evaluator 3	Evaluator 4	Total Averaged Score
Liaison Insurance Brokers	63.75%	68.75%	67%	65%	66%
AON Kenya Insurance Brokers	88.75%	85%	85%	83%	85%
Trident Insurance Company Limited	90%	82.5%	82.5%	88%	86%

The Pass mark for qualification to Financial bid evaluation was set at 70% in the tender document.

FINANCIAL EVALUATION

The following bidders qualified for financial evaluation.

- 1) AON Kenya Insurance Brokers
- 2) Trident Insurance Company Limited

The financial bids were evaluated for the firms that qualified at the technical stage as indicated below;

Firm	Amount Quoted (Kshs)
AON Kenya Insurance Brokers	1,982,380,600.00
Trident Insurance Company Limited	32,313,197.00

a) **AON Kenya Insurance Brokers** sought quotations from **APA Insurance Company Limited**

The deductible is as follows:

-
- ~~Marine Hull & Machinery- 10% on each and every claim: Min USD 35,000.~~
 - **Protection & Indemnity - USD 5,000.00**

The Procuring Entity noted that there was a discrepancy between the quoted amount on the form of tender of Kshs 1,982,380,600.00, the recommended underwriters quote of Kshs 45,388,751.00 and the price schedule of the broker of Kshs 44,393,141.00

b) Trident Insurance Company Limited

- **Marine Hull & Machinery- Kshs. 800,000.00 for each and every claim**
- **Protection & Indemnity;**
 - a. **All passenger claim - Kshs 40,000.00 for each and every claim**
 - b. **Loss of or damage - Kshs 150,000.00 each accident to fixed and floating objects**
 - c. **All vehicle claims - Kshs 40,000.00 each accident**

RECOMMENDATIONS

The Tender Evaluation Committee recommended that tender No. **KFS/MI/17/03/2015-Provision of Marine Hull & machinery, protection and Indemnity Insurance Cover for MV. Kwale and MV. Likoni** be awarded to **M/S Trident Insurance Company Limited** at a total cost of **Kshs. 32,313,197.00 (Thirty Two Million Three Hundred and Thirteen Thousand One Hundred and Ninety Seven only) Vat inclusive.**

THE TENDER COMMITTEE DECISION

In its meeting held on 19th June 2015 the Tender Committee concurred with the recommendation of the Tender Processing Committee and awarded the Tender to M/s Trident Insurance Company Ltd at the cost of Kshs. 32,313,197 (Thirty Two Million Three Hundred and Thirteen Thousand One Hundred and Ninety Seven only) V.A.T inclusive.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s Pelican Insurance Brokers (K) Ltd, of P. O. Box 52801 - 00200 Nairobi on 30th June 2015 against the decision of the Kenya Ferry Services in Tender No. KFS/MI/17/03/2015 for the Provision of Marine Hull & Machinery Protection and Indemnity Insurance Cover for MV *Kwale&Likoni* Ferries

The Applicant was represented by Mr. Antony E, Kiprono Advocate, from the firm of M/S. A. E. Kiprono & Associates while the Procuring Entity was represented by Mr. Elijah Kitur. The successful bidder M/s Trident Insurance Company Ltd was represented by Mr. Churchill Midwa Advocate.

The Applicant requested the Board for the following orders:-

1. An order quashing the Respondent's decision declaring the Applicant's bid unsuccessful.
2. A declaration that the Applicant provided authorization to quote from the underwriters.
3. An order directing the Respondent to re-evaluate the Applicant's bid and consider it for an award of the Tender.
4. Costs of the request for review to the Applicant.

5. Any other relief that the Review Board deems fit to grant under the circumstances.

The Applicant raised a total of twelve grounds in support of the Request for Review. The Board has considered the grounds of review put forward by the Applicant and finds that the said grounds can be reduced into two grounds of review namely:-

- i) Ground 1,2,3,4,5,6,7,8,9,10 & 11-These grounds have all been consolidated as they are interrelated and challenge the Procuring Entity's decision to declare the applicant's bid unsuccessful on the ground that Mandatory documents, namely the authorised quotations from at least two underwriters was missing as per the criteria set out in the Tender Document and particularly at Clause B.5 at page 18.*
- ii) Ground 12 -This ground relates to the alleged failure by Procurement Entity to evaluate the Tender within fifteen (15) days of tender opening and the failure to award the Tender within the tender award period of thirty (30) days of tender opening.*

Mr Antony E. Kiprono who appeared on behalf of the Applicant submitted that the reason given to it by the Procuring Entity for having adjudged the Applicant's tender as unsuccessful for lack of mandatory documentations in the tender, namely the authorised quotations from at least two underwriters was baseless. The applicant stated that it had submitted a complete tender which included the documents set out in the tender document and one of which was the authorised quotations from at least two underwriters in compliance with the terms and conditions set out in the tender document. Counsel for the Applicant, further submitted that the Procuring Entity vide its letter of Notification

dated 19th June 2015, informed the Applicant that its tender was unsuccessful since it submitted a bid which did not include authorised quotations from at least two underwriters.

The applicant further stated that the two documents formed part of the tender document which it submitted to the Procuring Entity and stated that the only way its two authorization letters could have gone missing was if a member of the procuring entity's tender opening or evaluation committee or any other employee wilfully and deliberately removed them. The Applicant further submitted that the Procuring Entity, in its instructions to tenderers had required that the tender be submitted as per the criteria set out in the Tender Document, particularly at Clause B.5 at page 18 of the Tender Document. These instructions, the applicant submitted, were to be found in the Evaluation Criteria -Brokers appearing at section II of the tender documents titled- Instructions to tenderers. The applicant therefore reiterated that it complied with all the instructions in the tender document.

On the issue of the period for tender evaluation, Counsel for the Applicant submitted that the tender evaluation committee failed to evaluate the subject tender within a period of Fifteen (15) days from the date of tender opening contrary to the Provisions of Section 66(6) of the Act as read together with the Provisions of Regulations 46(1) and 16(4) (b) of the Public Procurement and Disposal Regulations. Counsel for the Applicant further submitted that the tender committee had on its part failed to award the tender within the tender award period of Thirty (30) days of the tender opening contrary to the Provisions of Regulation 65 (2) of the Public Procurement and Disposal Regulations.

The Applicant therefore urged the Board to allow the Request for Review and grant the orders sought in the application.

In his response to the Applicant's submissions, Mr. Elijah Kitur who appeared on behalf of the Procuring Entity submitted that the Procuring Entity had dealt with the Applicant's tender in the normal way and that it was immaterial to the Procuring Entity that the successful bidder was the current provider of the services sought since the subject Procurement was for the next financial year and as such the Procuring Entity evaluated the Applicant's tender document in the same manner as it did to all the other bidders. The Procuring Entity reiterated that, during the tender evaluation process the evaluation team conducted a thorough examination of the bid documents and established that the Applicant did not include authorisations to quote from two underwriters and that the Applicant was therefore rightly found to be non-responsive.

Counsel for the Procuring Entity therefore submitted that the applicant was declared non-responsive at the preliminary evaluation stage because the authorisations were not attached to the applicant's bid which led to its disqualification. He was of the view that by attaching the two documents to the Request for Review, the Applicant was seeking to introduce them through the back door.

On the issue of evaluation and the award being made out of time, Counsel for the Procuring Entity stated that evaluation was concluded on 13th April, 2015 which was within Fifteen (15) days. He however conceded that the final award was not made because the Procuring Entity was not able to find a quorum to enable the tender committee sit

and conclude the exercise until 19th June, 2015 which was outside the period of Thirty (30) days but he qualified this submission by stating that the tender award was made within the tender validity period and that the Applicant had not suffered any prejudice as a result of the default.

Counsel for the Procuring Entity therefore urged the Board to dismiss the Applicant's Request for Review.

Representatives from all the other Interested Parties and whose names have already been set out at the beginning of this decision except Counsel for the Successful bidder supported the Applicant's Request for Review and fully associated themselves with the submissions made by Mr. Kiprono on behalf of the Applicant.

Counsel for the successful bidder however opposed the Applicant's application and associated himself with the submissions made by Counsel for the Procuring Entity. He submitted that the successful bidder complied and adhered to the requirements in the tender document and believed that it had won the tender fairly. Counsel for the successful bidder further stated that it was not privy to the internal processes of the Procuring Entity and therefore that if there was any omission admitted or not admitted and that if there is procedure that was followed or not followed, that omission cannot be visited on the successful bidder. He agreed with Mr. Kitur that the Applicant had not in any event suffered any prejudice even if the tender evaluation and award had been made out of time. He therefore urged the Board to dismiss the Applicant's Request for Review.

In a brief response to the submissions made by Counsel for the Procuring Entity and Counsel for the successful bidder, Counsel for the Applicant stated that the reasons given by the Applicant for the delay in the evaluation and the award of the subject tender were not contained in the Procuring Entity's response and were being given from the bar. He further submitted that under the Provisions of Regulation 65(2) of the Regulations, the Procuring Entity ought to have completed the entire process including the making of an award within Thirty (30) days from the date of tender opening. He finally stated that where it had been demonstrated that the Procuring Entity had breached the Provisions of the law, there was no need to show that the Applicant had suffered prejudice.

The Board has carefully considered the Request for Review filed by the Applicant and the Responses by the parties by the Procuring Entity and has also looked at the original tender documents and the evaluation reports which were supplied to it by the Procuring Entity pursuant to the Provisions of Regulation 74(3) of the Public Procurement and Disposal Regulations. The Board has also considered the submissions made before it by all the parties.

Having set out the grounds of review and captured the arguments by the parties, the Board will now proceed and make its determination on the grounds raised by the Applicant in this review.

ISSUE NO. 1

Grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11: Whether the Applicant submitted in its tender document the documents titled "Authorized

quotations” from at least two underwriters as required in the tender document.

The Board finds that by its letter dated 19th June, 2015, the Procuring Entity informed the Applicant that its bid was not successful because, in the Procuring Entity’s own words, the Applicant “**did not provide authorization from the underwriter to quote**”.

Clause B.5 at page 18 of the Tender Document however required bidders to, as a mandatory requirement, submit “**authorised quotations from at least two underwriters**”. The Board therefore observes from the onset that the reason given by the Procuring Entity to the Applicant for its bid not being successful and which has been stated above is not the same reason set out in the tender document.

The Applicant alleges that its Tender Document contained authorization letters to quote from Ms First Assurance Co. Ltd and M/s African Merchant Assurance Co. Ltd and that it submitted all the documents as per the tender document, including the authorization letters dated 30/03/2015 and 27/03/2015 from the two insurance Companies respectively.

The Board has considered the submissions made by the parties on this issue and whereas it was the Applicant’s case that it had complied with the Provisions of Clause B5 of the evaluation criteria by providing two authorization letters to quote from two underwriters, it was however the Procuring Entity’s position that the Applicant did not do so and that is

why the Applicant's bid was declared as non-responsive at the Preliminary Evaluation stage.

The Board has examined the Applicant's original tender document and finds that the tender document was preceded by a table of contents which set out all the documents that were included in the tender document. The table of contents shows that the Applicant incorporated a total of 26 items in its tender document. Item No. 23 was listed as authorization letters from proposed underwriters. This same table of contents appears at page 52 of the Procuring Entity response. An examination of the Applicant's tender document shows that the Applicant's tender document was on the face of it complete and contained 25 out of the 26 documents listed but the items listed as items No. 23 were missing from the tender document. The Applicant in the statement in support of the Request for Review annexed a letter dated 27/3/2015 from the Africa Merchant Assurance Co. Ltd (AMACO) and one dated 30th March, 2015 from the First Assurance Company Limited at pages 41 and 42 of the Request for Review. Both these two letters were authorization letters addressed to the Managing Director, Kenya Ferry Services Ltd which the Applicant states it annexed to its bid.

The Board finds on a balance of probabilities that the Applicant did in fact provide the two letters of authorization firstly for the reason that though these letters were produced and annexed to the Applicant's statement in support of the Request for Review, the Procuring Entity did not obtain any affidavit or other rebuttal from any member of the tender evaluation committee to challenge the Applicant's position.

The Board further finds that instead of obtaining an affidavit or any other rebuttal from any member of the tender processing/evaluation committee, the Procuring Entity sought to rely on the statement marked as annex "KFSM 3" signed by the members of the tender Processing Committee appearing at page 450 of the Request for Review. The Board however notes that the statement is dated 6th July, 2015 and was prepared one week after this Request for Review was filed and must have therefore been prepared as part of the Procuring Entity's defence to the already filed Request for Review.

Secondly Counsel for the Procuring Entity did not suggest that the two letters were forgeries and no evidence was led to show that they were not issued by the two underwriters who were indicated to have issued them. The Board finds no plausible reason why an established Insurance broker such as the Applicant would obtain two authorization letters, list them in it's table of contents and then omit them from it's tender document. It is additionally clear from the Applicant's tender document that all the other documents were arranged sequentially and in the order that they appeared in the table of contents save for the two letters and that there was an apparent gap between the documents appearing as items 22 and 24 in the table of contents meaning that the documents marked as item "23" were missing.

The Board therefore finds on the basis of the documents placed before it and the submissions made by the parties that the Applicant's complaint is well founded and further that the reason on the basis of which the Applicant's tender was declared unsuccessful was not valid.

Before moving to the next ground of review, the Board wishes to observe that this is the second case that the Board is handling in the recent past where a bidder is complaining that some documents were missing from its tender document. The Board takes such complaints very seriously in view of the frequency of such complaints and wishes to state that such practice goes against the spirit and the objectives set out in Article 227 of the Constitution of Kenya 2010 and Section 2 of the Public Procurement and Disposal Act.

The consolidated grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the Applicant's Request for Review therefore succeed and are hereby allowed.

ISSUE NO. II

Ground 12 - Whether the Procuring Entity failed to evaluate the Tenders within fifteen (15) days of tender opening and award the Tender within a period of Thirty (30) days of tender opening.

The second issue raised by the Applicant in this Request for Review was that the Procuring Entity breached the Provisions of Section 66 (6) of the Act as read together with Regulations 46 (1) and 16 (4) (b) by failing to evaluate the tenders the subject matter of this Request for review within Fifteen (15) days of tender opening and further in failing to award the tender to the successful bidder within Thirty (30) days from the tender opening date contrary to the Provisions of Regulation 65(2) of the Regulations.

The Board was considered the documents placed before it and the arguments made by the parties regarding this ground of review and

finds that this tender was advertised on 4th March, 2015 in the Standard Newspaper and on 18th March, 2015 in the Daily Nation Newspaper. The tenders were opened on 31st March, 2015 and the evaluation of the tenders was completed on 13th April, 2015 as evidenced by the evaluation report which was signed on the same date. The Board therefore finds that the Procuring Entity's tender evaluation committee evaluated the tenders within 13 days from the date of tender opening and was therefore within the stipulated period.

The Board however finds that the Procuring Entity's tender committee met considered and adopted the recommendations of the tender evaluation committee on 19th June, 2015 and made the award of the tender and notification letters dated 19th June, 2015 to both the successful and the unsuccessful bidders were thereafter written. Calculating the number of days from the date of tender opening to the date of tender award, the Board finds that it took a total of Eighty (80) days for the Procuring Entity to award the tender.

Section 66(6) of the Act, provides as follows:-

"66(6) The evaluation shall be carried out within such period as may be prescribed.

While Regulations 16(4)(b), 46 and 65 of the Regulations states as follows:

"16(4) The committee shall-

(a)

(b) evaluate the tenders within a period of fifteen days after the opening of the tenders;

.....

While Regulation 46 states as follows:-

46. A procuring entity shall, for purposes of section 66 (6) of the Act, evaluate the tenders within a period of thirty days after the opening of the tender.

Regulation 46 of the Regulations was however amended by Legal Notice No. 106 of 2013 to reduce the period of tender evaluation. The amendment reads as follows:-

"14. Regulation 46 of the principal Regulations is amended by -

(a) renumbering the existing provision as paragraph (1);

(b) deleting the word "thirty" appearing in the new paragraph (1) and substituting therefore the word "fifteen";"

Regulation 65 of the Regulations on the other hand stipulates as follows:-

"65. All contract award decisions shall be taken by the appropriate award authority, in accordance with the levels of Authority specified in the First Schedule.

This Regulation was amended as follows by Legal Notice No. 106 of 2013

"18. Regulation 65 of the principal Regulations is amended by -

(a) renumbering the existing provision as paragraph (1); and

(b) adding the following new paragraph immediately after paragraph (1) -

(2) The period of tender award shall not exceed thirty days from the date of tender opening."

The Board holds on the basis of the above findings that although the Procuring Entity's tender evaluation committee evaluated the subject tender within time, the Procuring Entity's tender committee did not however award the tender within the stipulated period of Thirty (30) days from the date of tender opening.

Counsel for the Applicant sought to explain the delay by stating that the Procuring Entity could not raise the necessary quorum to enable it convene a tender committee meeting until 19th June, 2015.

The Board however respectfully wishes to state that under the Provisions of Regulation 46(2) of the amended Regulations, the accounting Officer or the head of the Procuring Entity can extend the period for tender evaluation (as opposed to tender award) for a further period not exceeding Thirty (30) days if the tender is complex or has attracted a high number of tenderers

Regulations 46(2) of the amended Regulations provides as follows:-

"Where a tender is complex or has attracted a high number of tenderers, the accounting officer or the head of the Procuring Entity may extend the period for tender evaluation under paragraph (1) for a further period within the tender validity period not exceeding Thirty (30) days from the date of expiry of the initial period".

The reason for delay in the making of the tender award alluded to by Counsel for the Procuring Entity, namely that the Procuring Entity could not raise a quorum of the tender committee to award the tender was not only not contained in the Procuring Entity's written response but it is also not one of the grounds on the basis of which the Procuring Entity's accounting officer or the Chief Executive Officer can extend the legal period for evaluation of tenders. Counsel for the Applicant conceded that no such extension was granted by the Procuring Entity's accounting/executive officer.

In view of the long and inordinate delay in the award of the tender and the lack of any valid explanation, the Board therefore finds that the Procuring Entity breached the Provisions of Regulation 65(2) of the Regulations.

This ground of the Applicant's Request for Review therefore succeeds and is allowed.

The Board has finally observed that almost all the bidders who participated in the initial tender were disqualified at the Preliminary Evaluation stage on the basis that they lacked the requisite experience of Five (5) years thereby leaving only three bidders to proceed for technical evaluation and two for financial evaluation.

The Board however wishes to observe that a criteria in a tender document that eliminates a substantial number of bidders does not in anyway promote competition and the other objectives set out in the Constitution and the Act. The Board further finds that the services sought to be procured are unique in nature and are not widely accessible to bidders and to require that a bidder demonstrates an experience of 5

years rather than the technical and financial capacity to pay compensation in the event of the occurrence of an insured risk not only fails to promote fair competition but it is also discriminatory.

The Board has severally dealt with the issue of such a requirement in it's various decisions as demonstrated by the case of Kenya Shield Security Ltd -vs- Kenya Pipeline Company Ltd (PPRB Application No. 26 of 2015) where the Board held as follows:-

"The Board has in the past had occasion to examine and declare tender documents whose contents contravene the Provisions of the Constitution, the Act and the Regulations as illegal and anullity where the requirements set out in the said documents are out rightly unfair, unreasonable and inhibit competition"

In the case of Unfree Duty Free & Others -vs- Kenya Airports Authority (PPRB Review No. 50 of 2013) and in the case of Transcend Media Group Limited -vs- Kenya Airports Authority (PPRB Review No. 6 of 2014).

The Board observed as follows on the requirement on experience.

"The Board however finds that the requirement that a party must be a member of 5years good standing in any of the associations or bodies in order to participate in a tender is oppressive and restrictive. Such a requirement locks out practitioners who may have not attained the 5 years threshold and yet are otherwise technically and financially capable".

It was held by the High Court in the case of JGH Marine A/s Western Marine Services Ltd CNPC NorthEast Refining & Chemical Engineering Co. Ltd/Pride Enterprises -vs- The Public Procurement

Administrative Board & 2 Others (Nai HC JR Misc Application No. 137 of 2015) that where the Review Board finds that there is a problem with the tender document, the proper order to make in the circumstances is to order for a re-tender.

The Board finally finds that the tender validity period of 90 days from 31st March, 2015 as set out under clause 2.13.1 has already lapsed and that in view of the Board's findings on the two issues above, the Board is left with no other option but to order for a re-tender in the circumstances of this case.

FINAL ORDERS

Pursuant to the powers conferred upon it by the Provisions of Section 98 of the Public Procurement and Disposal Act, 2005, the Board directs and makes the following orders;

1. The Request for Review dated 30th June 2015 and filed on 30th June 2015 by M/S Pelican Insurance Brokers (K) LTD against Kenya Ferry Services Ltd in respect of tender No. KFS/MI/17/03/2015 in respect of the provision of marine Hull & Machinery Protection and Indemnity Insurance Cover for MV Kwale & Likoni Ferries is hereby allowed.
2. The award of the said tender to the successful bidder M/s Trident Insurance Company Limited together with the entire procurement process in respect of the said tender is hereby annulled.

3. That the Procuring Entity M/S Kenya Ferry Services is directed to re-tender for the provision of marine Hull & Machinery Protection and Indemnity Insurance Cover for MV Kwale & Likoni Ferries within the next Fifteen (15) days from the date of this decision.
4. The re-tender shall be conducted on the basis of a fresh tender document that promotes fair competition between all bidders in terms of the Board's observation on experience.
5. That Board orders and directs that each party shall bear its own costs in view of the Board's order on a re-tender where the Applicant and other bidders are likely to participate.

Dated at Nairobi on this 23th July, 2015.



CHAIRMAN
PPARB



SECRETARY
PPARB

