

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 58/2017 OF 27<sup>th</sup> JUNE, 2017**

**BETWEEN**

**GETRIO INSURANCE BROKERS LTD.....APPLICANT**

**AND**

**KENYA LITERATURE BUREAU.....PROCURING ENTITY**

Review against the decision of the Kenya Literature Bureau in the matter of Tender No. KLB/T/9/17-18 for the provision of medical cover.

**BOARD MEMBERS PRESENT**

1. Mr. Paul Gicheru - Chairman
2. Mrs. Josephine W. Mongare - Member
3. Eng. Weche Okubo, OGW - Member
4. Mrs. Gilda Odera - Member
5. Mr. Paul Ngotho - Member

**IN ATTENDANCE**

1. Stanley Miheso - Holding Brief for Secretary
2. Maryanne Karanja - Secretariat

**PRESENT BY INVITATION**

**Applicant: Getrio Insurance Brokers Ltd**

1. Anthony E. Kiprono - Advocate, A.E. Kiprono & Associates

2. Patrick Kirimi - General Manager

**Procuring Entity: Kenya Literature Bureau**

1. George Kashindi - Advocate, Munyao Muthama & Kashindi Adv.
2. Bernard Milewa - Legal Services Manager
3. Audrey Cheruto - Senior Legal Officer

**Interested Parties**

1. Lucy Waweru - Advocate, Losagi Insurance Brokers
2. Sally Muchori - Director, Losagi Insurance Brokers
3. Steve Njenga - Operations, Losagi Insurance Brokers
4. Gideon Kuria - Organisation, Losagi Insurance Brokers
5. Gideon Githaiga - General Manager, Saham Assurance

**BOARD'S DECISION**

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

**BACKGROUND OF AWARD**

**INTRODUCTION**

A request for staff medical insurance was raised by Human Resources Department. An open national tender was advertised on 18<sup>th</sup> April 2017 and it closed on 10<sup>th</sup> May 2017. The tenders were opened on 10<sup>th</sup> May 2017 at 10.35 am. Eight brokers and six underwriters submitted their bid document as shown below;

- (i) Chancery Wright.
- (ii) Assured Insurance Brokers Ltd.
- (iii) Options Insurance.
- (iv) Trust Mark Insurance.
- (v) Getrio Insurance Brokers.
- (vi) Losagi Insurance Brokers.
- (vii) Disney Insurance Brokers.
- (viii) Pelican Insurance Brokers.
- (ix) Jubilee Insurance.
- (x) Madison Insurance.
- (xi) CIC Group General Insurance.
- (xii) Kenindia Insurance.
- (xiii) Trident Insurance.
- (xiv) Saham Assurance

## **EVALUATION**

Evaluation committee meeting for medical insurance was held on 19<sup>th</sup> and 25<sup>th</sup> May 2017.

The committee was informed that pursuant to section 106. Subsection [1] of the Public Procurement and Asset Disposal Act, 2015, an open tender was floated and eight brokers responded and six underwriters submitted their supporting documents.

## **MANDATORY TENDER REQUIREMENTS**

The respondents and their proposed underwriters were subjected to a mandatory requirements evaluation as per the bid document. The

respondents' were required to submit the below listed documents in line with the preliminary evaluation criteria;

- a) Compliance with the bid validity period specified,
- b) Bid document,
- c) Compliance with 2% tender price specified,
- d) Copy of certificate of incorporation,
- e) Current certificate of registration as a broker,
- f) Copy of Bank guarantee of Kshs. 1 Million deposited with the Commissioner of Insurance.
- g) Professional indemnity policy schedule for the current period (min.50 million),
- h) Current membership certificate of AIKB,
- i) Original and copy of the tender document,
- j) Submission of copy of form KLB2 in respect of each proposed underwriter.

Members discussed and recommended that the firms which did not meet the mandatory requirements would not proceed to technical evaluation. The firms that did not proceed include:-

1. M/s. Chancery Insurance.
2. M/s. Disney Insurance.
3. M/s. Getrio Insurance.
4. M/s. Trustmark Insurance.
5. M/s. Assured Insurance.

The five firms listed above were disqualified on the following basis:-

- **Failure to submit pin certificate and Tax Compliance Certificate**  
Getrio Insurance
- **Inadequate Bid Bond/ bid bond less than the required 2% of quoted price**  
Chancery Insurance  
Disney Insurance  
Trustmark Insurance
- **Minimum turnover below Kshs. 30 Million**  
Assured Insurance (Turnover of Kshs. 12 million recorded in year 2016)
- **Failure to submit a copy of bank guarantee deposited with Commissioner of Insurance**  
Getrio Insurance

The proposed underwriter were required to submit the below listed documents in line form KLB 2;

- a) Copy of certificate of incorporation
- b) Copy of current certificate of registration as an Insurer
- c) Audited financial statements for the last two years
- d) Original quotations submitted to the insurance brokers
- e) Copy of professional indemnity
- f) Copy of current membership of the Association of Kenya Insurers (AKI)
- g) Copy of the current tax compliance certificate
- h) Experience in provision of medical insurance services to corporate clients with a minimum of 80 employees.

Members discussed and disqualified the below listed underwriting firms as follows;

- **Failure to submit quotation**

Jubilee Insurance Company and CIC General Insurance Company

- **Failure to submit professional indemnity**

Trident Insurance

- **Loss recorded in the audited statement**

Trident Insurance (Loss of 20 million recorded in 2016)

Members noted that the tax compliance certificate for Trident Insurance was due to expire on 14/6/17 before the process was finalised.

### **TECHNICAL EVALUATION**

Three out of eight bidders qualified for the technical evaluation and the firms were:-

1. M/s. Options Insurance.
2. M/s. Losagi Insurance.
3. M/s. Pelican Insurance

Members were taken through the evaluation criteria and the score for each as outlined in the tender document which were as follows;

- a) Firm's experience as shown by the number of years in insurance brokerage business (10 Marks)
- b) Professional qualification and experience of the principal officer (25 Marks)

- c) Professional qualifications and experience of three other technical personnel (25 Marks)
- d) Gross premium turnover of broker (average of Kshs. 10 million per year) (20 Marks)
- e) Claims administration based on client reference (form KLB 3) (15 Marks)
- f) Financial performance of recommended underwriter (gross premium minimum 500 million per annum) (10 Marks)
- g) Responsiveness to KLB's requirement as per scope of cover (25 Marks)

Members were further informed that an addendum for both in-patient and out-patient medical services had been forwarded to Brokers and Underwriters. The addendum underpinned KLB's insurance requirements, scope of cover, member category, family size distribution and general conditions.

The three bidders were subjected to a technical evaluation process and scored as shown in the table below;-

	NAME OF BROKER		
	OPTIONS	LOSAGI	PELICAN
<b>TOTAL SCORE (MAX. SCORE 130)</b>	109	126	109
<b>OUT OF 100%</b>	<b>84%</b>	<b>97%</b>	<b>84%</b>

Members evaluated the firms on their responsiveness to KLB's requirement as per the requirements stated in the inpatient and outpatient medical addendum as follows;-

Parameters (Responsiveness to KLB requirements)	Weights
Upper limit-2M,1.5M	2.00
HIV/chronic/pre existinting of limit of 1m and 750k	2.00
Congenital sub limit-250k	2.00
Maternity-200k	2.00
All Ceaserian section-Limit 200k	2.00
Dental inpatient-Max 100k	2.00
Dental outpatient-Max 20k	2.00
Optical inpatient-100k	2.00
Optical outpatient-20k	2.00
Post hospitilization visit-30k	2.00
Last expence-100k	2.00
Separate fund- 3M	2.00
Overseas treatment-Full limit	2.00
Caretaker fees-age 10yrs and below	2.00
Quarterly reports	2.00
Network of hospitals per town	2.00
Age limit-Children 0-25	2.00
Age limit-Adults up to 65	2.00
Waiting Period for New Members = 0days	2.00
STDs = 200k	2.00
Notification of Claims = within 30days	2.00
Outpatient limit 150K, 100K	2.00
Member plus 6 dependants	2.00
Mode of identification	2.00
Evacuation+Help line	2.00
Clear list of exlussions	2.00
Reimbursement at 100% basis of utilization	2.00



<b>Parameters (Responsiveness to KLB requirements)</b>	<b>Weights</b>
All inpatient services – diagnostics	2.00
Counselling - within outpatient	2.00
<b>Total Scores</b>	<b>58.00</b>

The firms scored as follows;

	<b>BROKERS</b>	<b>LOSAGI</b>		<b>PELICAN</b>		<b>OPTIONS</b>	
		<b>Scores</b>	<b>Weights</b>	<b>Scores</b>	<b>Weights</b>	<b>Scores</b>	<b>Weights</b>
	<b>Total Scores</b>	50.00	58.00	44.00	58.00	48.00	58.00
	<b>Out of 25%</b>	21%		19%		19%	

The firms evaluated met all the requirements except as follows:-

**1. M/s. Options Insurance.**

- No list of network of hospitals per town was attached.
- Sexual Transmitted Diseases (STDs) were included in the list of exclusions.
- Notification of claim within 30 days period not stated.
- No reimbursement at 100% basis of utilization.
- No counselling services provided within outpatient cover limit.

**2. M/s. Losagi Insurance.**

- STDs were included in the list of exclusions.
- No notification of claim within 30 days period.
- No quarterly reports.

- No counselling services provided within outpatient cover limit.

### 3. M/s. Pelican Insurance.

- STDs were included in the list of exclusions.
- No notification of claim within 30 days period.
- No counselling services provided within outpatient cover limit.
- Does not meet the threshold of 1,000,000 and 750,000 of HIV and chronic diseases.
- Delivery through caesarean was covered as first ever caesarean.
- No quarterly reports.
- No overseas treatment available within the cover limit.

The pass mark for proceeding to the financials was set at 80 marks and the three brokerage firms scored as follows;

- M/s. Pelican Insurance - 84%
- M/s. Losagi Insurance - 97%
- M/s. Options Insurance - 84%

Members recommended that the three firms listed above proceed to the next level i.e. financial evaluation.

### FINANCIAL EVALUATION

The three firms; Ms. Pelican Insurance, Ms. Losagi Insurance and Ms. Options Insurance qualified for the financials.

The firms quoted for outpatient and inpatient as shown below;-

	Name Of Company	Outpatient	Inpatient	Gxol	Discount	Total Costs
1	Losagi Insurance Brokers	11,563,340.00	9,306,519.00	1,022,667.00	-207,975.00	21,684,551
2	Options Insurance Brokers	10,817,514.00	17,039,899.00	-	-	27,857,413
3	Pelican Insurance Brokers	14,086,572.00	12,875,986.00	1,022,667.00	-	27,985,225

### RECOMMENDATION

The committee recommended that the contract for provision of medical insurance cover be awarded to **M/s Losagi Insurance Brokers** for two years renewable annually at **Kshs. 21,684,551** since they had quoted the lowest supply price.

### PROFESSIONAL OPINION

In the statement of professional opinion for award of staff medical insurance cover from the Supply Chain Manager to the Managing Director, dated 13<sup>th</sup> June, 2017, the Supply Chain Manager in his professional opinion, considered that the subject procurement has satisfied the statutory requirements of the Public Procurement and Asset Disposal Act, 2015 and Public Procurement Regulations, 2006. The evaluation committee has recommended a firm which was the lowest evaluated as stipulated in the Act, Section 86 (1) (a) where award should be made to the tender with the lowest evaluated price. Supply Chain Manager therefore submitted the above procurement for approval if in order.

## THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s Getrio Insurance Brokers Ltd on 27<sup>th</sup> June, 2017 in the matter of the Tender No. KLB/T/09/17-18 for the provision of medical cover.

The Applicant seeks for the following orders:

- 1. An order quashing the award of the tender herein to the 'successful tenderer'.*
- 2. A declaration that a tax compliance certificate is not a mandatory document in the tender.*
- 3. An order directing the Respondent to evaluate the Applicant's bid and other bids that had been declared non responsive on account of lack of tax compliance certificate.*
- 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 submission by parties

Counsel for the Applicant Mr. Kiprono started his submissions by addressing the preliminary issue of Jurisdiction. The first limb of the preliminary objection being whether the Applicant filed its Request for Review within the 14 days allowed by the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act, 2015. Counsel for the Applicant submitted that the Applicant received the first letter of notification on 13<sup>th</sup> June 2017 and subsequently in accordance with the law, the first day started running for the purposes of filling a Request for Review from 14<sup>th</sup> June 2017 by the dint of

Section 57 of the Statute of General Interpretations Act which provides that time starts running a day after the making of a decision or the happening of an event. It was the applicant's submission that its application which was filed on 27<sup>th</sup> of June 2017 was filed 13 days from 14<sup>th</sup> June 2017 and therefore the same was filed within time as provided for under section 167 of the Act.

Counsel for the Applicant further submitted that the second issue touching on jurisdiction was the contention that under the provisions of Section 167(3) of the Act the Board lacked jurisdiction to entertain the Request for Review on the ground that the respondent and the successful bidder had already signed a contract. Counsel for the Applicant submitted that judging from the documents filed before the Board, it appeared that the respondent and the interested party signed the contract on 28<sup>th</sup> June 2017 one day after the filing of the request for review. Counsel further submitted that the purported signing of the contract was null and void to the extent that Section 168 of the Act requires a Procuring Entity upon being informed or notified that a Request for Review has been filed to suspend the procurement proceedings and the execution of a contract until Review Board makes a decision or issues directions on the Request for Review. Counsel for the Applicant further submitted that upon filing the Request for Review, the applicant endeavoured to serve the Procuring Entity with the notification of appeal. The Applicant annexed the email correspondence to the Request for Review as evidence. According to the Applicant, the contract signed by the Procuring Entity and the Successful bidder was done in contravention the provisions of Section 168 of the Public Procurement and Asset, Disposal Act 2015 which provides that no contract shall be signed between the Procuring Entity and the tenderer awarded the contract unless the appeal has been finalized. Counsel for the

applicant therefore submitted that at the time of signing the contract, the Procuring Entity was aware that an appeal was pending before the Board and therefore the contract entered into on 28<sup>th</sup> June 2017 was null and void. The applicant therefore urged the Board to declare the said contract null and void *ab initio*. Counsel for the Applicant further submitted that although the responsibility to serve the Notice of Appeal was vested upon the Board, the applicant took upon itself to send an advance copy of the same via email on 27<sup>th</sup> June 2017 and that accordingly there was sufficient notice to the Procuring Entity which ought to have complied with the provisions of Section 168 of the Act and cease from undertaking any further proceedings of the Procurement process including entering into any contract. The Applicant urged the Board to dismiss the Preliminary Objection and allow the Request for Review to be determined on merit.

On the substantive application before the Board, Counsel for the Applicant stated that the reason why the Applicant's bid was rejected was not part of the criteria set out in the tender document for evaluation. The applicant submitted that the procuring entity vide its letter dated 22<sup>nd</sup> June 2017 informed the applicant that it had been disqualified for failure to include a tax compliance certificate as part of its tender. The Applicant submitted that this was not a mandatory requirement in the tender document and was not part of the preliminary evaluation criteria and further that the attempt by the Procuring Entity to introduce this as a criteria on the basis of which its disqualification was premised was therefore an afterthought as the criteria was extrinsic. He urged the Board to find as such and hold that the Procuring Entity could not apply a criteria not contained in the tender document to disqualify the

applicant's bid. The Applicant submitted that the action by the Procuring Entity to introduce a criteria which was not in the tender document was a breach of section 82 of the Act and also violated clause 2.2 0.4 of the tender document. The applicant therefore urged the Board to allow the Request for Review.

Counsel for the Procuring Entity started his submissions by addressing the issues raised in its preliminary objection on jurisdiction. He submitted that the Board had to satisfy itself that it had the jurisdiction to hear the Request for Review before addressing any of the grounds of review. On the issue of the existence of a contract between the Procuring Entity and the successful bidder Counsel for the Applicant submitted that the two parties had properly entered into contract after the expiry of the fourteen days period allowed by law. He further submitted that the contract which was signed by the parties was signed in accordance with Section 135 of the Act and the Board could therefore not interfere with it as it lacked jurisdiction to do so under the provisions of Section in accordance with section 167(4) of the Act.

Mr. Kashindi additionally submitted that the letter of Notification had been served on the Applicant on 13<sup>th</sup> of June 2017 and subsequently the fourteen days period provided by law lapsed on 27<sup>th</sup> June 2017 while the contract in question was signed on 28<sup>th</sup> June 2017 which in the Procuring Entity's view was the fifteenth day after the date of service of the notification. Counsel opposed the allegation that by the time the contract was signed the Request for Review had been filed with the Board. He submitted an affidavit to support the assertion that it could not have been served by email since its

email was down at the time that it only became aware of the Request of review on the afternoon of 28<sup>th</sup> June 2017 having already signed the contract in the morning. The procuring entity went further to submit that upon executing the contract it started the implementation process and that the Procuring Entity had already received services whose value was in excess of Kshs.1,000,000. Counsel for the Procuring Entity therefore urged the Board to uphold the Preliminary objection and find that it lacked jurisdiction to entertain the Request for Review as filed on account of a valid contract.

Turning to the merits of the Request for Review Counsel for the Procuring Entity submitted that the reason why the applicant's bid was disqualified was as a result of the failure by the Applicant to include a Tax compliance to its bid. This was the reason that was stated by the Procuring Entity to the Applicant in its letter dated 22<sup>nd</sup> June 2017. The procuring Entity further stated that the applicant failed to provide a PIN, a Tax compliance certificate, a bank guarantee and that the Applicant's underwriter that is the insurance company did not provide a professional indemnity all of which were mandatory requirements in this tender. Counsel for the Procuring Entity further submitted that the Applicant also provided an expired Tax compliance certificate for the underwriter. It was the Procuring Entity's submission that although these were not included as mandatory requirements in the tender document, the law required that they be provided by virtue of the provisions of Section 55 of the Act, which provides that a bidder who purports to bid without these documents is supposed to be declared as being non-responsive. It was the position of the Procuring Entity that this was an implied requirement of the law and that the failure to provide them rendered the



Applicant's bid as non-responsive. The procuring Entity however conceded that a Tax compliance Certificate was not part of the documents listed under the Mandatory conditions in the tender document but was necessary as part of the general conditions of contract. Counsel for the Procuring Entity therefore urged the Board to dismiss the Applicant's Request for Review.

The interested party who was also the successful bidder herein associated itself with the Procuring Entity's submissions and went further to state that since the signing of the contract, the successful bidder had already started performing their part of the contract and that the medical cover provided was already being utilised by the procuring entity. The interested party submitted that to interfere with the contract would greatly prejudice it. The interested party therefore urged the Board to dismiss the Applicant's Request for Review and allow the procurement process to proceed.

## **BOARD'S FINDINGS**

### **The preliminary objection**

It is the practice of the Board to determine preliminary issues first before dealing with the merits of the Request for Review. The Board having heard all the Parties and having perused all the documents placed before it by the parties notes that the preliminary objection touching on its jurisdiction was premised on one issue namely *"whether the Board lacks the jurisdiction to determine the Request for Review since the Procuring Entity and the interested party had executed a contract in accordance with the provisions of Section 135 of the Act"*. The relevant facts as presented to the board were as follows:-

- i. On 13<sup>th</sup> June 2017 the Procuring Entity having concluded the procurement process simultaneously and in compliance with section 87 of the Act notified both the Applicant and the successful bidder of the outcome of the tendering process.
- ii. On 22<sup>nd</sup> June, 2017, the Applicant sought to know the reasons for its disqualification and was promptly advised by the Procuring Entity of the reason through a letter dated 22<sup>nd</sup> June 2017.
- iii. That on 27<sup>th</sup> June 2017, the Applicant filed its Request for Review before the Board
- iv. That on 28<sup>th</sup> June 2017, the Procuring Entity and the Successful bidder signed a contract pursuant to the Award.
- v. That on 28<sup>th</sup> June 2017 the Procuring entity was served with the Hard copy of the request for review.

Going by the above chronology of events, the Board notes that technically the 28<sup>th</sup> June 2017 was the fifteenth day after the Notification. Section 135 of the Act however requires that a contract can only be entered into upon the expiry of a period of fourteen days. The Board was however informed that immediately upon the filing of this Request for Review Counsel for the Applicant send a copy of the notification to the Procuring Entity via email. The Applicant had previously communicated successfully with the applicant through the same email and that the address through which the email was send was the one normally used by the Procuring Entity to communicate with the procuring Entity. The email address used to communicate with the Procuring entity was [info@klb.co.ke](mailto:info@klb.co.ke). In its defence to the Applicant's assertion, the Procuring Entity while admitting that the email address used

was correct denied having seen any email from Counsel for the Applicant and went further to state that it's email was down and hence the reason why it's staff never saw the notice until the next day. On being put to task on the same, the Procuring entity confirmed that the information that its email was down was only communicated internally and that no notices were put out or send to the public informing them of the same. The Board having heard both parties notes that in accordance with section 168 of the Act, a notification of the filing of a Request for Review is deemed to be a stay of further procurement proceedings and once the parties are served with a letter of notification of the filling of a Request for Review, all the processes must come to a stop until the review so filed is determined. The letter of notification read as follows:-

*"you are hereby notified that on 27<sup>th</sup> June 2017 a Request for Review was filed with the Public Procurement Administrative Review Board in respect of the above matter and under Section 168 of the Public Procurement and Assets, Disposal Act, 2015, no contract shall be signed between the Procuring Entity and the tenderer awarded the contract unless the Appeal has been finalized".*

Section 168 of the Act on the other hand provides as follows;

*"168. Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed."*

The Board has noted that the Applicant though not seized with the obligation to serve the Request for Review went out of its way to notify the Procuring

Entity through an email that a Request for Review had been filed and also forwarded to it the letter of notification stating that no contract ought to have been entered into. The Board is therefore persuaded that the Procuring Entity received the said communication. Digital communication is nowadays the norm and the law has allowed it as a means of communication under the provisions of Section 64 of the Act. The board being so persuaded therefore holds that the contract signed between the Procuring Entity and the successful bidder was entered into while there was already a stay order in place in accordance with the provisions of Section 168 of the Act. The Board therefore finds and holds that the purported contract is a nullity and illegal. This therefore means that the Board has jurisdiction to hear and determine the Request for Review filed before it. The Preliminary objection by the Procuring Entity therefore lacks merit and the same is disallowed.

#### **THE REQUEST FOR REVIEW**

The Request for review filed on 27<sup>th</sup> June, 2017 by the Applicant rests on one issue, to wit;

*“Whether the Procuring Entity was justified in disqualifying the applicant for failure to attach a Tax Compliance certificate”*

The Board notes that the Applicant was notified by the Procuring Entity that its tender was unsuccessful vide the letter Ref. No. KLB/4/05:1.XXV(17) dated 13<sup>th</sup> June, 2017. This letter however did not disclose the reasons for disqualification nor did it disclose the successful bidder as required by the provisions section 87(3) of the Act which provides as follows;

*“87(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also*

*notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.*

The Board further notes that the Applicant wrote to the Procuring Entity seeking for the reasons for it's disqualification and was notified through a letter dated 22<sup>nd</sup> June 2017 of the reason for it's disqualification. The letter dated 22<sup>nd</sup> June 2017 disclosed that the Applicant was disqualified from this procurement process for failure to attach a **Tax Compliance Certificate** to its bid. The Board was informed that a Tax Compliance Certificate was not among the mandatory documents bidders were expected to provide when submitting their bids. The Applicant therefore stated that the reason for it's disqualification was erroneous. In its defence on this issue, the Procuring entity referred the Board to the provisions of section 55 of the Act. Section 55(1)(f) provides as follows;

*"55. (1) A person is eligible to bid for a contract in procurement or an asset being disposed, only if the person satisfies the following criteria:-*

*(a) ... ..*

*(b) ... ..*

*(c) ... ..;*

*(d) ... ..*

*(e) ... ..*

*(f) the person has fulfilled tax obligations; (g) the person has not been convicted of corrupt or fraudulent practices; and*

*(h) ... ..*

*(4) A State organ or public entity shall require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied.*

*(5) A State organ or public entity shall consider as ineligible a person for submitting false, inaccurate or incomplete information about his or her qualifications."*

Having had the opportunity to peruse the tender document, the Board notes that there was no mandatory requirement for bidders to include a Tax compliance certificate in their tender documents submitted to the Procuring Entity. The Board further notes that the tender document was the only means through which parties to the tender communicate and that the procuring entity should have set out all the information it required from bidders through the tender document. Where the procuring entity omits to call for certain information from bidders, a bidder cannot be faulted for failing to provide the same. This is necessary because the information set out to the public to bid should be adequate to allow for proper submission of bids by the bidders. Where a Procuring Entity omits to require bidders to supply certain documents, the provisions of Section 55 of the Act cannot be called into play to disqualify such a bidder.

In other words the obligation to require bidders to comply with the provisions of Section 55 of the Act is placed on the procuring entity and not on the bidder. It would therefore be visiting an injustice to a bidder to disqualify it for failure to provide a document which was not required or called for by the Procuring Entity in the tender document. The tender document is prepared by the Procuring Entity and it is the responsibility of the Procuring entity to

include the information it requires from the bidders. The absence of a Tax compliance Certificate in the bid by the Applicant does not automatically mean that the Applicant was not compliant. In any event the Applicant in this Review produced a Tax compliance certificate for the relevant period to demonstrate that it was compliant. The Board therefore finds and holds that the criteria used to disqualify the Applicant was extrinsic and was not one required by the tender document. Based on the above facts, the Board therefore finds that the Request for review is merited and will allow it.

### COSTS

Costs follow the event. The applicant has been successful in its request for review. The Board notes that Procuring Entity was reluctant to supply information necessary to allow the applicant file its request for review with ease as required by the provisions of section 87(3) of the Act and by failing to provide it with the reasons for disqualification or even disclosing the successful bidder in the first instance. This section of the law if complied with makes it easy for a party to decide whether to come before the board or not. In this case the applicant was forced to write and request the Procuring Entity to provide it with reasons. The board therefore finds that the Procuring Entity deliberately denied to provide necessary information to the Applicant and was in violation of the law and will award costs to the applicant in this matter.

### FINAL ORDERS

In view of all the foregoing findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Disposal Act, 2015 the Board makes the following orders on this Request for Review:-

1. The Request for Review filed by the Applicant by M/s Getrio Insurance Brokers Ltd on 27<sup>th</sup> June, 2017 in the matter of the Tender No. KLB/T/09/17-18 for the provision of medical cover is hereby allowed.
2. The contract signed between the successful bidder and the procuring entity on 28<sup>th</sup> June 2017 in respect of Tender No. KLB/T/09/17-18 for the provision of medical cover is vacated and set aside.
3. The Board directs and orders the procuring entity to return the Applicant M/S Getrio Insurance Brokers Bid back and evaluate the same at the technical and financial stages.
4. The procuring Entity will pay to the applicant costs assessed at Kshs. 150,000 and the disbursements paid towards the filing of the Request for Review.

Dated at Nairobi on this 18<sup>th</sup> day of July, 2017.



**CHAIRMAN**  
**PPARB**



**SECRETARY**  
**PPARB**