

SCHEDULE 1
FORM 4
REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND
APPEALS BOARD

APPLICATION NOS. 31,32,33,35 AND 36 /2005 OF 19TH AND
20TH SEPTEMBER 2005
BETWEEN

WEB ENGINEERING LIMITED
CONSOLIDATED WITH
SYSTECH LIMITED
CONSOLIDATED WITH
LANTECH AFRICA LIMITED (THE APPLICANTS)

AND

MINISTRY OF FINANCE (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of Ministry of Finance dated 31st August 2005 in the matter of Tender Nos. TH/GITS/01,02,03,07 and 09/2005-2006 for Supply, Installation and Commissioning of Local Area Networks (LAN) in Harambee House, Bima House, Ardhi House, Law Courts and Treasury Building respectively.

BOARD MEMBERS PRESENT

| | | |
|-----------------------|---|-----------|
| Mr. Richard Mwongo | - | Chairman |
| Mr. Adam S. Marjan | - | Member |
| Eng. D.W.Njora | - | Member |
| Mr. John W. Wamaguru | - | Member |
| Mr. Paul M. Gachoka | - | Member |
| Ms. Phyllis N. Nganga | - | Member |
| Mr. J.W.Wambua | - | Member |
| Mr. Kenneth N.Mwangi | - | Secretary |

BOARD'S DECISION

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

BACKGROUND

These tenders were advertised by the Ministry of Finance amongst five (5) others on 13th May 2005. The closing/opening date was 14th June 2005. The tender closed/opened on the due date. The bidders for each of the tenders were as shown below:

TENDER NO.TH/GITS/01/2005-2006: HARAMBEE HOUSE

- (i) Copy Cat Limited
- (ii) Adnet Communications Limited
- (iii) Lantech Africa Limited
- (iv) MFI Office Solutions Limited
- (v) Dial Africa Limited
- (vi) Computech Limited
- (vii) Seven Seas Technologies
- (viii) Integralle Services Limited
- (ix) Telematics Limited
- (x) Pegrume Limited

TENDER NO.TH/GITS/02/2005-2006: BIMA HOUSE

- (i) Computech Limited
- (ii) Microflex Business Solutions
- (iii) Adnet Communications Limited
- (iv) Copy Cat Limited
- (v) MFI Office Solutions Limited
- (vi) Dial Africa Limited
- (vii) Web Engineering Limited
- (viii) Pegrume Limited

- (ix) Trans Business Communications
- (x) Bozz Cybernetics Systems
- (xi) Seven Seas Technologies
- (xii) Wilken Telecommunications (K) Ltd

TENDER NO.TH/GITS/03/2005-2006: ARDHI HOUSE

- (i) Systech Limited
- (ii) Devcon Group Limited
- (iii) Copy Cat Limited
- (iv) Computech Limited
- (v) Modern Business Communications Limited
- (vi) MFI Office Solutions Limited
- (vii) Bozz Cybernetics Limited
- (viii) Open View Business Systems Limited
- (ix) Pegrume Limited
- (x) Trans Business Machines Limited
- (xi) Dial Africa Limited

TENDER NO.TH/GITS/07/2005-2006: LAW COURTS

- (i) Computech Limited
- (ii) Copy Cat Limited
- (iii) Dial Africa Limited
- (iv) Pegrume Limited
- (v) Direct Communications
- (vi) Web Engineering Limited
- (vii) MFI Office Solutions Limited

**TENDER NO.TH/GITS/09/2005-2006:
TREASURY BUILDING**

1. Systech Limited
2. MFI Office Solutions Limited
3. Copy Cat Limited

The tender documents provided for potential tenderers to submit a bid comprising a technical and financial proposal enclosed in one envelope. In order to determine the tender responsiveness, bidders were evaluated on the following mandatory technical requirements:

1. The primary media back bone cabling must be fiber optic
2. All active components used in the network must be able to facilitate network management
3. The fiber optic cable must have a minimum of six (6) strands
4. All active devices used at the LAN edge must support IP routing
5. All active devices must support Virtual Local Area Networks (VLANs)
6. All active devices used at the aggregation layer must have at least 6 slots and a switching capacity of 64 Gbps.
7. All UPSs must be rack mounted
8. The main cabinet must be at least 42U
9. The structured cabling infrastructure MUST have a 15-year warranty.

Bidders who did not comply with all the mandatory requirements were disqualified.

For each of the five tenders, firms that passed this stage were subjected to evaluation on responsiveness to the technical specifications and drawings based on the following criteria:

| | | SCORE |
|---|---|-------------|
| | ITEM | |
| 1 | Network design | 50% |
| 2 | Project plan and methodology | 20% |
| 3 | Contractors experience & past performance on similar projects | 15% |
| 4 | Qualifications & experience of key technical personnel | 15% |
| | Overall total points | 100% |

By applying the above evaluation criteria, the firms scored as follows:

TENDER NO.TH/GITS/01/2005-2006: HARAMBEE HOUSE

| | Bidder's Name | Overall Score |
|---|------------------------------|---------------|
| 1 | Lantech Africa Limited | 65.5 |
| 2 | MFI Office Solutions Limited | 57.5 |
| 3 | Computech Limited | 56.5 |
| 4 | Copy Cat Limited | 44.5 |

TENDER NO.TH/GITS/02/2005-2006: BIMA HOUSE

| | Bidder's Name | Overall Score |
|---|------------------------------|---------------|
| 1 | Web Engineering Limited | 66.0 |
| 2 | Computech Limited | 56.0 |
| 3 | MFI Office Solutions Limited | 47.0 |
| 4 | Copy Cat Limited | 45.0 |

TENDER NO.TH/GITS/03/2005-2006: ARDHI HOUSE

| | Bidder's Name | Overall Score |
|---|---------------------------------------|---------------|
| 1 | Systech Limited | 84 |
| 2 | Computech Limited | 56.5 |
| 3 | MFI Office Solutions Limited | 48.5 |
| 4 | Copy Cat Limited | 46.5 |
| 5 | Modern Business Communication Limited | 15.0 |

TENDER NO.TH/GITS/07/2005-2006: LAW COURTS

| | Bidder's Name | Overall Score |
|---|------------------------------|---------------|
| 1 | Web Engineering Limited | 67.5 |
| 2 | Computech Limited | 56.5 |
| 3 | Copy Cat Limited | 48.5 |
| 4 | MFI Office Solutions Limited | 48.0 |

TENDER NO.TH/GITS/09/2005-2006: TREASURY BUILDING

| | Bidder's Name | Overall Score |
|---|------------------------------|---------------|
| 1 | Systech Limited | 81.0 |
| 2 | MFI Office Solutions Limited | 48.0 |
| 3 | Copy Cat Limited | 44.5 |

These firms were then subjected to a binary system of selection, which was indicated in the tender document Section D: Special Conditions Clauses 3.1 and 3.2 and some firms were recommended to proceed for financial evaluation.

TENDER NO.TH/GITS/01/2005-2006: HARAMBEE HOUSE

- (i) Lantech Africa Limited
- (ii) MFI Office Solutions Limited

TENDER NO.TH/GITS/02/2005-2006: BIMA HOUSE

- (i) Web Engineering Limited
- (ii) Computech Limited

TENDER NO.TH/GITS/03/2005-2006: ARDHI HOUSE

- (i) Systech Limited
- (ii) Computech Limited
- (iii) MFI Office Solutions Limited

TENDER NO.TH/GITS/07/2005-2006: LAW COURTS

- (i) Web Engineering Limited
- (ii) Computech Limited

TENDER NO.TH/GITS/09/2005-2006: TREASURY BUILDING

- (i) Systech Limited
- (ii) MFI Office Solutions Limited

The Financial Proposals for the aforementioned technically responsive bidders, which had been selected using the binary system, were compared and the lowest quoted prices were considered for award as follows:

TENDER NO.TH/GITS/01/2005-2006: HARAMBEE HOUSE

| | Bidder's name | Score | Price quoted |
|---|------------------------------|-------|---------------|
| 1 | Lantech Africa Limited | 65.5 | 23,315,021.76 |
| 2 | MFI Office Solutions Limited | 57.5 | 21,916,585.00 |

TENDER NO.TH/GITS/02/2005-2006: BIMA HOUSE

| | Bidder's name | Score | Price quoted |
|---|-------------------------|-------|---------------|
| 1 | Web Engineering Limited | 66.0 | 25,312,543.30 |
| 2 | Computech Limited | 56.0 | 24,592,874.49 |

TENDER NO.TH/GITS/03/2005-2006: ARDHI HOUSE

| | Bidder's name | Score | Price quoted |
|---|------------------------------|-------|---------------|
| 1 | Systech Limited | 84.0 | 47,987,367.00 |
| 2 | Computech Limited | 56.5 | 44,237,678.90 |
| 3 | MFI Office Solutions Limited | 48.5 | 41,932,018.00 |

TENDER NO.TH/GITS/07/2005-2006: LAW COURTS

| | Bidder's name | Score | Price quoted |
|---|-------------------------|-------|---------------|
| 1 | Web Engineering Limited | 67.0 | 22,238,504.00 |
| 2 | Computech Limited | 56.5 | 17,369,975.13 |

TENDER NO.TH/GITS/09/2005-2006: TREASURY
BUILDING

| | Bidder's name | Score | Price quoted |
|---|------------------------------|-------|---------------|
| 1 | Systech Limited | 81.0 | 14,258,982.90 |
| 2 | MFI Office Solutions Limited | 48.0 | 11,475,416.00 |

Following the comparison of the prices shown in each of the tables above, the Ministerial Tender Committee in its meeting held on 25th August, 2005 awarded each of the tenders to the firm with the lowest prices as shown below:

- (i) Tender No.TH/GITS/01/2005-2006:Harambee House. Awarded to MFI Office Solutions Limited at a price of Kshs.21, 916,585.00 being the lowest priced of the two responsive bidders as identified by binary selection.
- (ii) Tender No.TH/GITS/02/2005-2006: Bima House. Awarded to Computech Limited at a price of Kshs.24, 592,874.49 being the lowest priced of the two responsive bidders as identified by binary selection. However it was noted that some temporary Local Area Networks had been installed and there was need to make negotiations with the successful bidder for the purpose of taking into account the temporary LAN done earlier.
- (iii) Tender No.TH/GITS/03/2005-2006: Ardhi House. Awarded to MFI Office solutions at a price of Kshs.41, 932,018 being the lowest priced of the three responsive bidders as identified by binary selection.
- (iv) Tender No.TH/GITS/07/2005-2006: Law Courts. Awarded to Computech Limited at a price of Kshs.17, 369,975.13 being the lowest priced of the two responsive bidders as identified by binary selection.

- (v) Tender No.TH/GITS/09/2005-2006:Treasury Building. Awarded to MFI Office Solutions Limited at a price of Kshs.11, 475,416 being the lowest priced of the two responsive bidders as identified by binary selection.

Letters of notification of award to the unsuccessful bidders were written on 31st August 2005 whereas the successful bidders were notified between 1st and 5th September 2005.

THE APPEALS

The Applicants filed the respective appeals against the Procuring Entity's award on 19th and 20th September 2005.

The Applicants were represented by Mr. Cecil Miller, Advocate, and the Procuring Entity was represented by Mr. E. G. M. Ndekele, the Deputy Director, Government Information Technology Services.

Each of the Applicants sought individual orders as follows:

For Appeal Numbers 31 and 32/2005: Web Engineering Limited

- a) That the Board finds that the Ministry of Finance has acted or proceeded in an unlawful manner and has reached an unlawful and unjust decision and prohibits the Ministry of Finance from acting or deciding unlawfully or from following an unlawful procedure in disregard of Public Procurement Regulations.
- b) That the Board compels the Ministry of Finance to award the Contract to it, being the bidder with highest combined evaluated score as specified in the Tender Document.

For Appeal Number 33-2005: Lantech Africa Limited

That the Board:

- a) declares as unlawful and require the Procuring Entity that has acted and proceeded in an unlawful manner and has reached an unlawful decision of awarding the tender to MFI Office Solutions Limited, to act or to proceed in a lawful manner or to reach a lawful decision;
- b) annuls in whole the unlawful act and decision of the Procuring Entity and not award the tender to any other bidder apart from Lantech Africa Limited.
- c) prohibits the Procuring Entity from entering an unlawful contract with any other bidder apart from Lantech Africa Limited
- d) revises the unlawful decision of the Procuring Entity and award the tender to Lantech Africa Limited being the participant with the highest evaluated combined score in accordance with regulation 30 (8a) of the Exchequer and Audit (Public Procurement Regulations 2001) and the criteria set in the tender document.

For Appeals Numbers 35 and 36/2005: Systech Limited

That the Board:

- a) declares as unlawful and require the Procuring Entity that has acted and proceeded in an unlawful manner and has reached an unlawful decision of not awarding the tender to Systech Limited, and to act or to proceed in a lawful manner or to reach a lawful decision;
- b) annuls in whole the unlawful act and decision of the Procuring Entity not to award the tender to SysTech Limited;

- c) prohibits the Procuring Entity from entering an unlawful contract;
- d) declares Systech Limited the lawful successful tenderer
- e) revises the unlawful decision by the Procuring Entity and award the contract to SysTech Limited.

The Board noted that although the Appeals were filed by various Applicants, they are all against the same Procuring Entity and in respect of similar tenders. Further, all the Applicants have raised one major ground of appeal on breach of Regulations 24(2) (j), 30(7), 30(8) and Clauses 3.2 and 4 of the Special Conditions of Contract. We have accordingly decided to consolidate the appeals with the consent of the parties, and will hear them together. In addition, the Applicant for Appeals Numbers 31 and 32 has raised another ground separately, which touches on breach of Regulation 33(1) regarding notification of candidates on the outcome of the tender.

We deal with each of the grounds of appeal as follows: -

Ground No. 1: Breach of Regulation 33(1) on notification of award to candidates. Appeals Number 31 and 32/2005.

This was a complaint that the Procuring Entity acted in breach of Regulation 33(1) by not notifying the Applicant of the outcome of the tendering process until 14th September 2005 when the Applicant sent one of its staff, Mr. Muriuki, to inquire about the bid bond. He was then issued with the notification letter dated 31st August 2005 on behalf of the Applicant. The Applicant argued that Regulation 33(1) requires that the Procuring Entity notify all the candidates of the outcome of the tender simultaneously, after the award has

been reached. It had learnt from the other bidders that notifications had been sent out. It was therefore compelled to visit the Procuring Entity to find out what had transpired.

The Procuring Entity in its response argued that all the unsuccessful bidders were notified of the outcome of the tender in letters dated 31st August 2005.

We have carefully considered the parties' arguments. We find that the Procuring Entity had notified the unsuccessful bidders in letters dated 31st August, 2005 whereas the notification to the successful bidders were done on 1st and 5th September 2005. We note that Regulation 33(1) is mandatory in nature and that the Procuring Entity should have notified all the parties, whether successful or unsuccessful, simultaneously. We therefore find that this Regulation was breached when the Procuring Entity failed to notify all the parties simultaneously. We further note that the Procuring Entity has not made any submissions to the Board on the reasons or circumstances for its failure to comply with this Regulation.

Accordingly, this ground of appeal succeeds.

Ground Number 2: Breach of Regulation 24(2) (j), 30(7), 30(8) and Clauses 3.2 and 4 of the Special Conditions of Contract.

This is a complaint that the Procuring Entity breached the above Regulations and conditions by not awarding tenders to the Applicants who were the rightful winners if the criteria shown in the tender documents at Clauses 3.2 and 4 of the Special Conditions had been adhered to. In their submissions the Advocate submitted on all the appeals as follows:

That the Ministry of Finance did not follow the procedure and criterion set out in Section D, Clauses 3.2 and 4 of the Tender Document, in determining the winning tender. Section D of the Tender Document clearly formed the basis of

interpretation of Regulation 30(7) and 30(8)(b), which the Ministry should have followed in determining the winning bid.

Clause 3.2 of Section D; Special Conditions of Contract in the Tender Documents stated that Quality Cost Based Selection (QCBS) would be used to calculate the relative weight for the financial proposals, and gave the formula to be used to obtain the percentage score for the financial proposal as follows;

$P_c = L_p / P \times 20$ where;

P_c = Percentage allocated to bid price P

L_p = Lowest price

Further, the technical score shall be allocated (or weighted) 80% and the price 20%, the combination of which shall be out of 100%. Clause 4 of Section D; Special Conditions of Contract in the Tender Document stated that the contract shall be awarded to the bidder with the highest evaluated combined score.

It was their opinion that the Ministry of Finance did not follow the evaluation criteria specified in the Tender documents to select the winning bid. If the Ministry of Finance had used the above-stipulated evaluation criteria to determine the winning tender, then all the Applicants would have obtained the highest evaluated combined score and should have been awarded the contract.

It submitted that from the Technical evaluation, all the applicants scored the highest marks in each of the particular tender as follows:

APPEAL NUMBER 31/2005: BIMA HOUSE

| | Bidder's Name | Technical score |
|---|----------------------|------------------------|
| 1 | Web Engineering Ltd | 66.0 |
| 2 | Computech Ltd | 56 |

APPEAL NUMBER 32/2005: LAW COURTS

| | Bidder's Name | Technical score |
|---|----------------------|------------------------|
| 1 | Web Engineering Ltd | 67.5 |
| 2 | Computech Ltd | 56.5 |

APPEAL NUMBER 33/2005:HARAMBEE HOUSE

| | Bidder's name | Technical score |
|---|------------------------|------------------------|
| 1 | Lantech Africa Limited | 65.5 |
| 2 | MFI Office solutions | 57.5 |

APPEAL NUMBER 35/2005: ARDHI HOUSE

| | Bidder's name | Technical score |
|---|----------------------|------------------------|
| 1 | Systech Limited | 84 |
| 2 | Computech Limited | 56.5 |
| 3 | MFI Office Solutions | 48.5 |

APPEAL NUMBER 36/2005:TREASURY BUILDING

| | Bidder's name | Technical score |
|---|------------------------------|------------------------|
| 1 | Systech Limited | 81 |
| 2 | MFI Office solutions Limited | 48.0 |

It argued that the prices quoted were to be evaluated using the QCBS and awarded a score out of 20%. This was to be done using the formula stipulated in Clause 3.2 of the Special Conditions of Contract in the Tender document section D. If this had been done it would result to the following scores:

BIMA HOUSE: APPEAL NUMBER 31/2005

| Bidder's Name | Bid Price | Percentage Score (Out Of 20%) |
|----------------------|------------------|--|
| Web Engineering Ltd | 25,312,543.28 | 19.4 |
| Computech Ltd | 24,592,874.49 | 20.0 |

APPEAL NUMBER 32/2005: LAW COURTS

| Bidder's Name | Bid Price | Percentage Score (Out Of 20%) |
|----------------------|------------------|--|
| Web Engineering Ltd | 22,238,504 | 15.6 |
| Computech Ltd | 17,369,975 | 20.0 |

APPEAL NUMBER 33/2005: HARAMBEE HOUSE

| Bidder's Name | Bid Price | Percentage Score (Out Of 20%) |
|------------------------------|------------------|--|
| Lantech Africa Limited | 23,303,021.76 | 18.8 |
| MFI Office Solutions Limited | 21,916,585.00 | 20.00 |

APPEAL NUMBER 35/2005: ARDHI HOUSE

| Bidder's Name | Bid Price | Percentage Score (Out Of 20%) |
|------------------------------|------------------|--|
| SysTech Limited | 47,987,367.00 | 17.48 |
| Computech Ltd | 44,237,678.00 | 18.96 |
| MFI Office Solutions Limited | 41,932,018.00 | 20.00 |

APPEAL NUMBER 36/2005: TREASURY BUILDING

| Bidder's Name | Bid Price | Percentage Score (Out Of 20%) |
|------------------------------|---------------|----------------------------------|
| MFI Office Solutions Limited | 11,475,416.00 | 20.0 |
| SysTech Limited | 14,258,982.90 | 16.10 |
| Copy Cat Limited | 17,475,416.00 | 12.90 |

The next step was to convert the technical score as a percentage of the weighted score of 80%. If this was done it would yield to the following scores for each of the tenders:

BIMA HOUSE

| Bidder's name | Technical score | Weighted score |
|---------------------|-----------------|----------------|
| Web Engineering Ltd | 66.0 | 52.8 |
| Computech limited | 56.0 | 44.8 |

LAW COURTS

| Bidder's name | Technical score | Weighted score |
|---------------------|-----------------|----------------|
| Web Engineering Ltd | 67.5 | 54.0 |
| Computech limited | 56.5 | 45.2 |

HARAMBEE HOUSE

| Bidder's name | Technical score | Weighted score |
|------------------------------|-----------------|----------------|
| Lantech Africa Limited | 65.5 | 52.4 |
| MFI Office Solutions Limited | 57.5 | 46 |

ARDHI HOUSE

| Bidder's name | Technical score | Weighted score |
|------------------------------|-----------------|----------------|
| Systech Limited | 84 | 67.2 |
| Computech Limited | 56.5 | 45.2 |
| MFI Office Solutions Limited | 48.0 | 38.4 |

TREASURY BUILDING

| Bidder's name | Technical score | Weighted score |
|------------------------------|-----------------|----------------|
| Systech Limited | 81 | 64.9 |
| MFI Office Solutions Limited | 48.5 | 38.4 |

Clause 4 of the Special Conditions required that the scores be combined to arrive at the bidders with the highest total combined score. The scenario would then be as follows:

BIMA HOUSE

| Bidder's name | Financial score | Weighted technical score | Total combined score |
|-------------------|-----------------|--------------------------|----------------------|
| Web Engineering | 19.4 | 52.8 | 72.20 |
| Computech Limited | 20 | 44.8 | 64.8 |

LAW COURTS

| Bidder's name | Financial score | Weighted technical score | Total combined score |
|-------------------|-----------------|--------------------------|----------------------|
| Web Engineering | 15.6 | 54 | 69.6 |
| Computech Limited | 20 | 45.2 | 65.2 |

HARAMBEE HOUSE

| Bidder's name | Financial score | Weighted technical score | Total combined score |
|------------------------------|------------------------|---------------------------------|-----------------------------|
| Lantech Africa Limited | 18.8 | 52.4 | 71.2 |
| MFI Office solutions Limited | 20 | 46 | 66 |

ARDHI HOUSE

| Bidder's name | Financial score | Weighted technical score | Total combined score |
|------------------------------|------------------------|---------------------------------|-----------------------------|
| Systech Limited | 17.48 | 67.2 | 84.68 |
| Computech Limited | 18.96 | 45.2 | 64.16 |
| MFI Office Solutions Limited | 20 | 38.4 | 58.4 |

TREASURY BUILDING

| Bidder's name | Financial score | Weighted technical score | Total combined score |
|------------------------------|------------------------|---------------------------------|-----------------------------|
| Systech Limited | 16.1 | 64.9 | 81.0 |
| MFI Office solutions Limited | 20 | 38.8 | 58.8 |

Counsel argued that having attained these scores, the Procuring Entity should have awarded the tenders to the bidders with the highest evaluated score who were the Applicants in each of the cases.

He faulted the Procuring Entity for failing to follow the procedure of evaluation as stated in the tender document, thus breaching regulation 30(7), which states that the Procuring Entity shall not use any other procedure not set out in the tender documents.

In reply, the Procuring Entity argued that after technical evaluation, it used the binary system of evaluation to select the bidders who were technically responsive. This method allowed it to arrange bidders in descending order. Regardless of their scores the top half of the bidders were automatically considered qualified. Any of the bidders who were considered to be qualified were deemed to be capable of performing the job. It is with this in mind that it was agreed that since all the selected bidders were capable of performing the job then those with the lowest prices should be awarded.

Secondly, the Procuring Entity submitted that it could not apply the Quality Cost Based Selection method because it was a procedure for use for the selection of consultancy services and not for procurement of works. In this regard, it could not abide by the Special Conditions of Contract as provided for in Section D of its tender documents and opted to apply the lowest evaluated price criteria under Regulation 30(8)(a) and Tender condition 26.1.

Further, it submitted that the tender documents contained section B clauses 23,25 and 26, which set out the evaluation and award criteria. When these are read together with Section C clauses 3 and 4 the result was that the firms to be awarded were the lowest evaluated bidders and not the highest evaluated among those who were technically responsive. These were then recommended by the Technical Evaluation Committee as per Regulation 30(7) and (8).

It also argued that all bids submitted were opened and the financial bids read out during the tender opening and recorded. In addition to completing the mandatory Form of Tender, bidders had read clause 6 which gave the Procuring Entity the authority to accept or reject any tender received.

Further it submitted that the lowest evaluated bidders among those who scored higher technical scores were awarded the tenders after considering both quality and cost involved and not the highest evaluated bidders. This was due to the fact that the technical evaluation team had the knowledge of both technical and financial proposals and this was in order to avoid mischief or vested interests.

Finally, it submitted that the formula for financial evaluation was to be used for weighting purposes only and indicated that the lowest bid price would be considered. In addition, Lantech Africa Limited had not completed the Confidential Business Questionnaire in the Tender Document and this meant that it was not compliant and so could not have been awarded the tender.

The Board upon considering the arguments on this ground finds that the Procuring Entity wrongly invoked clauses 26.1 of the tender documents in its award since condition 26.1 of the tender documents contradicted conditions 3.2 and 4 of the Special Conditions of Contract. With these two conditions, one requiring the award to the lowest evaluated bidder and the other requiring award to the bidder with the highest combined score, it would be impossible for the Procuring Entity to reach a fair or logical decision. One of the conditions would have had to be revoked in order to apply the other.

Further, the Procuring Entity is under obligation pursuant to Regulation 24 to draw up tender documents that would enhance competition amongst candidates. The documents

should be neutral and objective and include a criterion for evaluation and award of tenders.

The Procuring Entity adhered to this Regulation by including in the tender documents the criteria for evaluation, but did not comply with one of those criteria in evaluating the bids.

The Board therefore finds that the Procuring Entity included in its tender documents Clause 26.1 which reads "*subject to paragraph 10,23 and 28 the Procuring Entity will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily*" and Clause 4 of Special Conditions which reads "*the contract shall be awarded to the bidder with the highest evaluated combined score as per Section 3 above*". The two criteria are mutually exclusive, and cannot be used in the same tender.

Further, after scrutiny of the Technical Evaluation reports the Board noted that the evaluation team used the binary system of selection to arrive at the responsive bidders. The Board observed that this method as used by the Procuring Entity was not objective and was arbitrary in that it did not have a cut-off mark. In the absence of a cut-off mark, the Procuring Entity stood the risk of picking candidates who are not qualified. Candidates could prepare very complicated designs to score more marks in design yet they did not have other relevant credentials. This makes the Procuring Entity susceptible to poor services from such bidders. The evaluation report revealed instances where some bidders scored 0 or 1 mark on their experience and past performance on similar projects, yet scored very high marks on design creating a perception of superiority over others. It is therefore necessary for the Procuring Entity to establish a cut-off mark for every technical parameter and overall technical performance.

The use of the binary system as explained and applied by the Procuring Entity is not competitive nor does it give it value for money. It is an inherently inappropriate system as applied by the Procuring Entity particularly where the candidates in the top half scored poor marks.

Accordingly this ground of appeal succeeds as there was breach of Regulation 30(7) and 30(8)

Damages and loses to be suffered

These are not grounds of appeal but statements of loss and damages to be suffered as a result of not being awarded the tenders. All the bidders have stated the losses that they would incur by not winning each particular tender.

The Board's view is that this was an open tender which was expected to attract interested bidders, and the one with the lowest evaluated tender price was to be awarded the tender pursuant to Regulation 30(8) (a). There was no guarantee from the outset of the tendering process that the Applicant was going to win the tender. This is competitive bidding and we do not consider that the Applicants can fairly claim, at this stage, that they would suffer financial loss and any other damages as these are considered to be necessary tendering risks.

As already stated above the Applicants have succeeded in their grounds of appeal. The Board now has to consider what remedy to grant. We have already observed that both the selection process under the binary system and Financial Evaluation were done in an unsatisfactory manner. This amounts to a seriously flawed tender process. Accordingly we hereby annul the tender awards of Tender Nos. TH/GITS/01/2005-2006: Harambee House to MFI Office Solutions Limited, TH/GITS/02/2005-2006: Bima House to M/s Computech Limited, TH/GITS/03/2005-2006: Ardhi