

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO.29/2007 OF 18<sup>TH</sup> MAY, 2007**

**BETWEEN**

**KITEK (7) LIMITED.....APPLICANT**

**AND**

**MINISTRY OF YOUTH AFFAIRS..... PROCURING ENTITY**

Appeal against the decision of the Tender Committee of Ministry of Youth Affairs, Procuring Entity dated 4<sup>th</sup> May, 2007 in the matter of Tender for Proposed Completion of Stalled Structures and Re-roofing of 17 No. Type 'E' Block of Flats and Associated Civil Works at National Youth Service – Gilgil

**BOARD MEMBERS PRESENT**

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. J. W. Wamaguru	-	Member
Mr. P.M. Gachoka	-	Member
Eng. D. W. Njora	-	Member
Mr. Joshua W. Wambua	-	Member

## **IN ATTENDANCE**

Mr. C. R. Amoth - Holding brief for Secretary  
Mr. I. K. Ruchu - Secretariat

## **PRESENT BY INVITATION FOR APPLICATION NO.29/2007**

### **Applicant, Kitek (7) Limited**

Mr. Alex S. Masika - Advocate  
Mr. J. K. Kimani - Director  
Mr. Lennington Karanja - Quantity Surveyor

### **Procuring Entity, Ministry of Youth Affairs/Ministry of Roads & Public Works**

Mr. P. P. Meyo - Senior Principal Procurement Officer  
Mr. Maina Njoroge - Senior Superintendent Quantity Surveyor,  
Ministry of Roads and Public Works  
Mr. J. A. Okwado - Deputy Quantity Surveyor Administration,  
Ministry of Roads and Public Works

### **Interested Candidate, Buildmore Construction Ltd**

Mr. J. Ngugi - Manager  
Mr. Raymond Wanjau - Consultant

## **BOARD'S DECISION**

Upon hearing the Applicant, the Procuring Entity and the Interested Candidate herein and upon considering the documents and information submitted, the Board decides as follows:

## **BACKGROUND**

Tenders for the above mentioned works were advertised in the dailies on 2<sup>nd</sup> November 2006. They were opened on 1<sup>st</sup> December, 2006 at 10.00am in the

Chief Quantity Surveyor's Boardroom 5<sup>th</sup> floor Ministry of Roads and Public Works Headquarters.

An Evaluation was made and a tender Report written to that effect (Ref Q.D42/0906R/188 and dated 15<sup>th</sup> December, 2006.

The report recommended the tender of M/s Buildmore Construction Co. Ltd at Kshs. 102,904,065.00 for acceptance. The Client Department agreed with the recommendation and made an award to the contractor. A letter of notification was issued to M/s Buildmore Construction Co. Ltd dated 18<sup>th</sup> January 2007.

## **APPEAL**

M/s Kitek (7) Ltd, who was one of the bidders, appealed to the Public Procurement Review Board in its Memorandum of Appeal application No. 8/2007 dated 8<sup>th</sup> February 2007.

The Board subsequently made its ruling on 8<sup>th</sup> March 2007 and in its ruling directed that a limited re-evaluation be done and an award made as appropriate. This was done and the report is as follows:-

## **TENDER RE-EVALUATION REPORT**

### **CORRECTION AND COMMUNICATION OF V.A.T ERRORS**

In view of the ruling by the Board, a limited re-evaluation of the Contractors disqualified on the ground of misapplication of VAT was done.

These were Kitek (7) Ltd, Marimo Construction Ltd., Magic General Contractors Ltd. and Richardson Ltd. The bidders were notified in writing of their errors and asked to respond accordingly. They were also asked to extend the validity of their tenders and bid bond up to 30<sup>th</sup> May 2007.

Builmore Construction Ltd was also notified of their arithmetic error.

The corrected Tender Sum as compared to the Tender price is as tabulated in table "A" hereunder:

**TABLE 'A'**

	<b>TENDERER</b>	<b>Tender price Kshs</b>	<b>Error</b>	<b>Corrected Tender sum</b>
1	KITEK (7)	98,889,000.00	14,221,397.08	113,110,397.08
2	MARIMO CONST LTD	102,129,262.00	7,339,163.12	109,468,425.12
3	BUILDMORE CONST LTD	102,904,065.00	1,146,524.44	104,050,589.44
4	ELEM INVESTMENTS	109,740,547.00	11,094,537.16	120,835,084.16
5	MAGIC GENERAL CONTRACTORS LTD	113,819,115.00	8,102,719.80	121,921,834.80
6	RICHARDSON LTD	114,953,131.00	2,229,314.44	117,182,514.44

### **COMPARISON OF CORRECTED TENDERS**

The corrected Tender Sums indicate that Buildmore Construction Ltd is the Tenderer with the lowest Price and Magic General Contractors Ltd has the highest price.

### **RESPONSE**

The response from the Tenderers were as follows:

#### **1) KITEK (7) LTD**

The Tenderer agreed to extend its bid security up to 30<sup>th</sup> May 2007. The Tenderer, however, did not agree to his Corrected Tender Sum (Kshs. 113,110,397.08). Instead, they stated that 'We stand by our Tender

(Kshs 98,889,000.00) as quoted'. They also stated that any arithmetic errors should be dealt with as provided for in the Tender Documents. They did not address themselves to the ruling of the Board, despite the fact that they were the applicants.

## **2) MARIMO CONSTRUCTION CO. LTD**

The Tenderer agreed to extend its bid security up to 30<sup>th</sup> May 2007. The Tenderer, however did not agree to the corrected tender sum (Kshs 109,468,425.12). The tenderer stated that errors should be dealt with in accordance with instructions to Tenderers; Clause 5.7(c), Conditions of Contract and Procurement Regulations; Regulation 30(1). They also claimed that they did not have details of the ruling by the Board.

## **3) BUILDMORE CONSTRUCTION CO. LTD**

The Tenderer agreed to extend its bid security up to 30<sup>th</sup> May 2007. The Tenderer, agreed to their error being corrected and assented to the corrected Tender Sum of Kshs 104,050,589.44.

## **4) ELEM INVESTMENTS LTD**

The Tenderer, did not agree to their Corrected Tender Sum of Kshs 120,853,084.00. It stated that it would stand by its Tender of Kshs 109,740,547.00.

## **5) RICHARDSON CO. LTD**

The tenderer, agreed to its error being corrected and confirmed their agreement to the Corrected Tender Sum of Kshs 117,182,514.44.

## **6) MAGIC GENERAL CONTRACTORS LTD**

The Tenderer gave no response to the letter from the Procuring Entity.

## **OBSERVATIONS**

From the above, Kitek (7) Ltd, Marimo Construction Co. Ltd and Elem Investment Ltd did not agree to their errors being corrected and their Tender

Sums adjusted in accordance with Regulation 30(2) of the Public Procurement Regulations 2001.

Magic General Contractors Ltd did not respond, and this was construed to mean concurrence with the letter written to them.

Richardson Co. Ltd and M/s Buildmore Construction Co. Ltd, agreed to their errors being corrected and the consequent of the Tender Sums.

The provisions of Regulation 30(3) should apply to Kitek (7) Ltd, Marimo Construction Co. Ltd and Elem Investments Ltd, and their Bid Bonds be forfeited. This means that only the Tenderers who qualify for consideration of award are Magic General Contractors Ltd, Richardson Co. Ltd, Buildmore Construction Co. Ltd and Capital Construction Co. Ltd.

Their tender Price and consequent Corrected Tender Sums are tabulated below in ascending order.

#### **TABLE 'B'**

#### **COMPARISON OF RESPONSIVENESS AND CORRECTED TENDERS**

	<b>Tenderer</b>	<b>Tender price Kshs.</b>	<b>Corrected Tender Sum Kshs.</b>
1	BUILDMORE CONSTRUCTION LTD	102,904,065.00	104,050,589.44
2	MAGIC GENERAL CONTRACTORS LTD	113,819,115.00	121,921,834.80
3	RICHARDSON LTD	114,953,131.00	117,182,514.44
4	M/S CAPITAL CONSTRUCTION LTD	122,413,501.96	122,413,501.96

#### **RECOMMENDATION**

From the original Tender Analysis and report, as carried out before, the ruling by the Public Procurement, Review and Board, the subsequent

notification and limited re-evaluation, the tender of Buildmore Construction Company Ltd of P.O. Box 13240 – 00100 Nairobi, who offered the lowest evaluated Tender Price of Kenya Shillings **One Hundred and Four Million, Fifty Thousand, Five Hundred and Eighty Nine and Cents Forty Four**(Kshs104,050589.44) only, is hereby recommended for acceptance, in accordance with Regulation 30(8a)

### **TENDER COMMITTEE AWARD**

The Ministerial Tender Committee at its 23<sup>rd</sup> meeting held on 30<sup>th</sup> April 2007 awarded the tender to Buildmore Construction Company Ltd who submitted the lowest evaluated tender as per the recommendation of the Technical Evaluation Committee at a total cost of **Kshs. 104,050,589.44 (One hundred and four million, fifty thousand, five hundred and eighty nine and forty four cents only)**

### **THE APPEAL**

This Appeal arises following Appeal No. 8 of 8<sup>th</sup> February, 2007 between the parties in which the Board ordered.

- “1. That the Procuring Entity’s award is hereby set aside and the Procuring Entity is ordered to conduct a limited re-evaluation of the tenders of those tenderers that were disqualified as non-responsive on account of VAT..
2. That the Procuring Entity do expunge clause 5.7(c) of the Instructions to Tenderers which was found to be in conflict with Regulation 30(2) of the Public Procurement Regulations 2001.
3. That the Procuring Entity should apply the tender addendum as issued and correct arithmetic errors as per Regulations 30(1) and (2), and thereafter notify the tenderers pursuant to Regulation 30(2) as appropriate.
4. That the Procuring Entity upon fulfilling (1) to (3) above, makes an award as appropriate”.

In the current Appeal the Applicant claimed that the Procuring Entity failed to comply with the orders of the Board, while the Procuring Entity submitted that it complied with the Orders of the Board.

The Board has heard the parties and considered their submissions and finds as follows:-

1. That the Procuring Entity conducted a limited re-evaluation of tenders which were disqualified on account of VAT and the report presented to the Tender Committee on 30/04/07. In the re-evaluation, the Evaluation Committee excluded Clause 5.7 (c) of the Instructions to Tenders as directed by the Board.
2. By Procuring Entity's letter dated 10<sup>th</sup> April, 2007 the Applicant was notified that its corrected tender sum was KShs.113,110,397.08 in accordance with Regulation 30(1) and 30(2). The Applicant was requested to confirm whether it concurred with the corrections in reply by a letter dated 17<sup>th</sup> April, 2007. The Applicant responded that it stood by its tender sum of Kshs.98,889,000/= as in its tender.
3. The Procuring Entity observed, at minute 3 of Ministerial Tender Committee minutes of 30<sup>th</sup> April, 2007 that the Applicant, amongst others, did not agree to their tenders being corrected in accordance with Regulation 30(2).

The Procuring Entity in the said minutes decided that provisions of Regulation 30(3) should apply to Applicant and others who did not agree to correction of arithmetical errors in their respective tenders and that their bid bonds be forfeited.

In its Memorandum of Appeal, the Applicant cited breaches of Regulation 4, 30(1) and (2), 30(7) and (8) and 32 by the Procuring Entity.

The Board finds that the Procuring Entity complied with the Board's orders and that none of the above cited Regulations were breached.

On allegation by the Applicant that the bid bond of successful candidate was not valid at the time of the award, we find that the bid bond was valid as at 30<sup>th</sup> April, 2007 when the award was made.



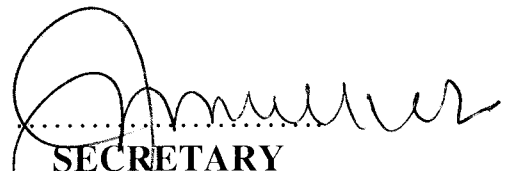
On allegation by the Applicant that Regulation 32 was breached, we note that this Regulation requires that a tender shall not be required as a condition for award "to undertake responsibilities not stipulated in the tender documents, to change its price or otherwise to modify its tender."

The Board finds that the Procuring Entity's letter of 10<sup>th</sup> April, 2007 did not require the Applicant "as a condition for award ..... to change its price." All that the letter sought was the Applicant's acceptance of the arithmetical error pursuant to Regulations 30(2).

In view of the above, the Appeal fails and is hereby dismissed. The Procurement may proceed.

Rendered at Nairobi this 18<sup>th</sup> day of June, 2007

  
CHAIRMAN  
PPARB

  
SECRETARY  
PPARB

