

**SCHEDULE 1**

**FORM 1**

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO.40/2007 OF 2<sup>ND</sup> JULY, 2007**

**BETWEEN**

**VESTERGAARD FRANSEN (SA) ..... APPLICANT**

**AND**

**THE PROCUREMENT AND SUPPLY CHAIN MANAGEMENT  
CONSORTIUM/MINISTRY OF HEALTH .....PROCURING  
ENTITY**

**Appeal against decision of the Procurement and supply chain  
management consortium of the award dated the 15<sup>th</sup> day of June, 2007  
in the matter of Tender No. IFT No. GFATM-R4-06/07-RNT-015  
supply and delivery of long lasting insecticidal treated bed nets (LLIN's  
- 2) of February, 2007**

**BOARD MEMBERS PRESENT**

Mr. Richard Mwongo	-	Chairman
Adam S. Marjan	-	Member
Mr. John W. Wamaguru	-	Member
Mr. Paul M. Gachoka	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr Joshua Wambua	-	Member
Eng. Daniel W. Njora	-	Member

**IN ATTENDANCE**

Mr C. R. Amoth	-	Holding brief for Secretary
Miss P. Ouma	-	Secretariat

## **PRESENT BY INVITATION FOR APPLICATION NO.40/2007**

### **Vestergaard Frandsen (SA), the Applicant**

- Mr. Francis Muchoki - Vestergaard Frandsen (SA), Representative
- Mr. Steve Otieno - Vestergaard Frandsen (SA), Representative
- Mr. Kamau Karori - Advocate, Iseme, Kamau & Maema
- Ms Karen Mate - Pupil Iseme, Kamau & Maema Advocate
- Ms Millie Jalega - Pupil, Iseme, Kamau & Maema Advocate

### **The Procurement and Supply Chain Management Consortium, Procuring Entity**

- Mr. Robert Nyamweya - Procurement Manager, Procurement & Supply Chain Management
- Mr. David W. Karite - Member Representative, Procurement Consortium
- Mr. David Muttu - Procurement Manager, Consortium/ PSCMC
- Ms Nazima Malik - Partner Advocate, Kaplan & Stratton
- Mr. Mahat Somare - Associate, Kaplan & Stratton
- Dr. Willis Akhwale - Head DOMC, Ministry of Health
- Mr. Kelly Onyango - Senior Procurement Officer, Ministry of Health

### **Interested Candidates**

- Mr. A Shah - Director, A to Z Textile Mills
- Mr. Iqbal Kanji - Marketing, A to Z Textile Mills
- Mr. Ahmednasir Abdullahi - Advocate, A & A Advocates
- Mr. James Wangai - Consultant, Sumitomo Chemical
- Ms Milka Njunge - Marketing, Sumitomo Chemical

### **BOARD'S DECISION**

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

## **BACKGROUND**

The tender was for supply of Long Lasting Insecticidal Nets (LLINs 2) in line with Section 60 of the Public Procurement and Disposal Act, 2005. It was a Restricted National Tender and letters for invitation for tender dated 28<sup>th</sup> February, 2007 were sent out to three (3 No.) firms. The tender closed/opened on 28<sup>th</sup> March, 2007 after the three invited firms submitted their tenders.

The firms were:-

A to Z Textile Mills Ltd  
Sumitomo Chemical Company Limited  
Vestergaard Frandsen (SA) Limited

Letters of notification to both successful and non-successful bidders were dated 15<sup>th</sup> June, 2007. The successful bidder collected its letter on 20<sup>th</sup> June, 2007 and the unsuccessful ones collected on 21<sup>st</sup> June, 2007.

### **Technical Evaluation**

#### **Responsiveness to Restricted Tender**

In response to the Restricted Tender, a total of three (3) firms obtained the tender documents.

All three (3) firms submitted their tenders on or before 28/3/2007, 10.00am. Representatives from the three (3) firms were present during the public opening session.

#### **Examination of tenders and determination of responsiveness (ITT 29)**

Pursuant to ITT Clause 29 the tenders submitted were examined to determine whether they were complete, whether any computational errors were made, whether required sureties were furnished, whether the tenders were properly signed and whether the tenders were generally in order.

Pursuant to ITT 27.1 clarifications was sought from tenderers where necessary.

## **Preliminary tender Examination (General and Commercial)**

Pursuant to ITT Clause 14, (documents constituting the tender), the preliminary examination (general and commercial) identified which tenders were non compliant with the requirements for the submission of tenders.

All three (3) tenders were determined to be responsive and compliant with ITT.18.1. However, Bidder JPN0008 – SUMITOMO AND Bidder SWI0005 – Vestergaard requested for different payment terms. This was considered acceptable at the preliminary stage but subject to negotiation if either was awarded the contract.

See details under Table 5: Preliminary Bid Examination (General and commercial)

### **Lot 001 – Long Lasting Insecticidal Nets I**

Three (3) offers for the above lot were found responsive under commercial aspects and were examined for technical responsiveness.

All three (3) offers were determined to be complete and responsive and submitted for financial evaluation.

However, the technical evaluation team had concern over the durability of the material of the nets offered by bidder SWI0005 – Vestergaard.

Samples provided were considered acceptable subject to proper labeling.

See details under table 6: Preliminary Bid Examination (Technical) Table 6.2: Tender Evaluation charts (Technical).

### **Lot 001 – Long Lasting Insecticidal Nets II**

Three (3) offers for the above lot were found responsive under commercial aspects and were examined for technical responsiveness.

All three (3) offers were determined to be complete and responsive and submitted for financial evaluation.

However, the technical evaluation team had concern over the durability of the material of the nets offered by bidder SWI0005 – Vestergaard.

Samples provided were considered acceptable subject to proper labeling.

See details under table 6: Preliminary Bid Examination (Technical) Table 6.2: Tender Evaluation charts (Technical).

### **Lot 001 – Long Lasting Insecticidal Nets III**

Three (3) offers for the above lot were found responsive under commercial aspects and were examined for technical responsiveness.

All three (3) offers were determined to be complete and responsive and submitted for financial evaluation.

However, the technical evaluation team had concern over the durability of the material of the nets offered by bidder SWI0005 – Vestergaard.

Samples provided were considered acceptable subject to proper labeling.

See details under table 6: Preliminary Bid Examination (Technical) Table 6.2: Tender Evaluation charts (Technical).

### **Tender Examination (Financial)**

Technically responsive bids were submitted for financial evaluation.

The results are summarized below:-

### **Lot 001 – Long Lasting Insecticidal Nets I**

<b>Tenderer</b>	<b>Code</b>	<b>Unit Pack Price</b>	<b>Quantity (60 UPS)</b>	<b>Total Price (USD)</b>
Vestergaard Frandsen	SWI0005	USD 5.87	300,000	1,761,000.00
A to Z Textile Mills	TAN0001	USD 5.96	300,000	1,788,000.00
Sumitomo Chemical	JPN0008	USD 6.29	300,000	1,860,000.00

### **Lot 001 – Long Lasting Insecticidal Nets II**

<b>Tenderer</b>	<b>Code</b>	<b>Unit Pack Price</b>	<b>Quantity (60 UPS)</b>	<b>Total Price (USD)</b>
Vestergaard Frandsen	SWI0005	USD 5.87	300,000	1,761,000.00
A to Z Textile Mills	TAN0001	USD 5.96	300,000	1,788,000.00

Sumitomo Chemical	JPN0008	USD 6.29	300,000	1,860,000.00
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### Lot 001 – Long Lasting Insecticidal Nets III

Tenderer	Code	Unit Pack Price	Quantity (60 UPS)	Total Price (USD)
Vestergaard Frandsen	SWI0005	USD 5.87	300,000	1,761,000.00
A to Z Textile Mills	TAN0001	USD 5.96	300,000	1,788,000.00
Sumitomo Chemical	JPN0008	USD 6.29	300,000	1,860,000.00

See details under Table 7: Financial Examination Summary, Table 7.1: Financial Examination – Details to Table 11: Price Comparison.

### Delivery Period

Pursuant to GCC 11.1 tenderers were expected to offer a delivery schedule of 6-8 weeks in accordance with the schedule of requirements to comply.

Tenderer	Delivery Period
Vestergaard Frandsen	15 weeks
A to Z Textile Mills	6 weeks
Sumitomo Chemical	20 weeks

Only bidder TAN0001 – A to Z Textile Mills offered a delivery period which is within the required period.

### Detailed Examinations

#### Conversion to Single Currency (ITT 31)

Currency conversion was done at the selling rate established by the Central Bank of Kenya as at 22<sup>nd</sup> March 2007, five (5) days before the public tender opening.

See details under Table 8: Foreign Currency Exchange Rates

#### Evaluation and Comparison of Tenders (ITT 32)

In order to evaluate the tenders that were determined to be substantially responsive and in line with ITT Clause 29, any additions, adjustments and

priced deviations were identified and computed. In line with ITT 32.5(a) (ii), prices were adjusted within the acceptance range of weeks with 0.5% per week.

As a result of the delivery period inclusion in price adjustment, the offer from bidder TAN0001 – A to Z Textile Mills was determined to be more competitive than the other two.

See details under Table 10: Additions, Adjustments and Priced Deviations.

### Recommendation of Award (ITT 34.1)

Upon evaluation and comparison of tenders the following recommendations for award were made:-

### Departmental Recommendations

#### Summary of Recommended Tenderers

Lot		Bidder		Price Offered	
001	Long Lasting Insecticidal Nets I	01	A to Z Textile Mills	1,788,000.00	USD
002	Long Lasting Insecticidal Nets II	01	A to Z Textile Mills	1,788,000.00	USD
003	Long Lasting Insecticidal Nets III	01	A to Z Textile Mills	1,788,000.00	USD
Total amount of recommended Contracts				<b>5,364,000.00</b>	USD
Conversion to KES based on the CBK mean rate of 69.3567 as at 22 <sup>nd</sup> March, 2007				<b>372,029,338.80</b>	KES

### MTC's Approval

By a letter dated 13<sup>th</sup> June, 2007, the Ministerial Tender Committee made its approval as follows:-

Lot	Item Description	Qty	Supplier	Unit Price	Total Cost	
001	Long Lasting Insecticidal Nets I	300,000	A to Z Textile Mills	5.96	1,788,000.00	USD
002	Long Lasting Insecticidal Nets II	300,000	A to Z Textile Mills	5.96	1,788,000.00	USD

003	Long Lasting Insecticidal Nets III	300,000	A to Z Textile Mills	5.96	1,788,000.00	USD
Total amount of recommended Contracts					<b>5,364,000.00</b>	USD
Conversion to KES based on the CBK mean rate of 69.3567 as at 22 <sup>nd</sup> March, 2007					<b>372,029,338.80</b>	KES

## THE APPEAL

The Applicant filed the Appeal against the Procuring Entity's award on 2<sup>nd</sup> July, 2007. The Applicant seeks the following remedies:-

1. The procurement proceedings requests be annulled in their entirety.
2. The decision made by the Procuring Entity to award the contract to A-Z Textiles Mills Ltd be annulled.
3. The Procuring Entity do commence the tender process afresh in accordance with the provisions of the Act and the Regulations.
4. Such further/other order(s)/direction(s) that this Honourable Board may deem just and expedient to grant.
5. The Procuring Entity do pay the Applicant the costs of these proceedings on full indemnity basis.

We now deal with each of the grounds of Appeal as follows:-

### **GROUND 1 - BREACH OF SECTION 66 ON EVALUATION CRITERIA**

The Applicant argued that the tender document did not have an objective and quantifiable criteria as per the requirements of Section 66 of Public Procurement and disposal Act, 2005 (hereinafter referred to as the Act).

Counsel submitted that clause 32.5 of the Instructions to Tenderers (hereinafter referred to as ITT) did not set out an objective and quantifiable evaluation criteria. The said clause, according to the Applicant, failed to take into account international and inland transportation time for overseas supplies. Therefore, there was no basis for calculation of reasonable international and inland transportation time. The tender document did not give the expected time of arrival of the goods.



The Applicant further submitted that the Procuring Entity in its letter dated 2<sup>nd</sup> July, 2007 indicated that prices were calculated and adjusted within the acceptance range of 0.5% per week in accordance with provisions ITT32.5(a)(i) of the instructions to tenderers and ITT 32.5(a)(ii) of the Tender Data Sheet.

Counsel pointed out that calculation method provided stated in the Instructions to Tenderers at clause 32.5(a) did not apply to clause ITT32(a)(i) as stated in the Procuring Entity's letter dated 2<sup>nd</sup> July, 2007.

In addition, the Applicant submitted that an objective and reasonable criteria is one that can be identified on perusal of the tender document. However, in the tender, the quantification methods that were to be applied as per clause 35(a)(i)(ii) and (iii) had different requirements.

Finally, the Applicant submitted that relying on ITT clause 32.5(a)(i), it provided a range 12 – 15 week and had indicated that its goods would originate from Vietnam. It stated that it expected that an allowance would be made for international and inland transportation time for overseas suppliers.

In response, the Procuring Entity submitted that the contents of the letter dated 2<sup>nd</sup> July, 2007 was immaterial. It stated that the Board should rely on the technical evaluation report to confirm the criteria that was used. It also submitted that the Tender document contained a clear evaluation criteria at clauses 32.5 (a) (i)(ii) and (iii) of the ITT and clause 32.5(a)(ii) of the Tender Data Sheet.

The Procuring Entity further stated that it applied the criteria set out in clause ITT 32.5 (a)(ii). The Tender prices were calculated and adjusted within the acceptance ~~of~~ range of 0.5% per week in accordance with clause ITT 32.5(a) of the Tender Data Sheet.

In addition, the Procuring Entity stated that the Applicant had given a range of 12-15 weeks as against the stipulated delivery period of 6-8 weeks in the schedule of requirements.

Finally, the Procurement Entity submitted that ITT 32.5(a)(i)(ii) and (iii) clearly stated that any or a combination of the three methods would be used. The Applicant did not at any time request for clarification, and therefore its submission that the range of 6-8 weeks as provided was unreasonable and had no merit. In any event, the Procuring Entity stated that the Applicant had written to the Procuring Entity on 28<sup>th</sup> June, 2007 after the tender had closed indicating that it was in a position to deliver within the provided range of 6-8

weeks. Therefore, the argument that the period of 6-8 weeks was unreasonable had no merit

On its part, the successful candidate associated itself with the submissions of the Procuring Entity. It further stated that on its part, it would take a more legalistic approach and raised other points law which we shall address later.

The Board has carefully considered the parties arguments and the documents that were submitted.

The Board has noted that the tender provided and required evaluation under the following heads:-

- ITT 6 - Documents establishing eligibility
- ITT 7 - Qualification of Tenderers
- ITT 14 - Documents constituting the Tender
- ITT 29 - Examination of Tenders and determination of Responsiveness
- ITT 30 - Correction of errors
- ITT 31 - Conversion to single currency
- ITT 32 - Evaluation and compensation of Tenders

The Board has further noted that the Applicant's complaint concerned the application of ITT Clause 32.5 regarding the delivery period. The said clause ITT32.5 clearly stipulated that the Procuring Entity had the discretion to apply sub-provisions 32.5(a)(i) or (a)(ii) or (a)(iii) or a combination of them. The said clauses are clear and none of the bidders raised any questions or sought clarification on the use of either or all of the said provisions.

The Board has also noted that the Applicant in its arguments relied heavily on the letter of 2<sup>nd</sup> July, 2007 in which the Procuring Entity stated that it applied ITT clause 32.5(a)(i) and ITT32.5(a)(ii) of the Tender Data Sheet. However, the Board has observed that in Technical Evaluation report, the Procuring Entity applied ITT clause 32.5(a)(ii) and adjusted the prices within the acceptance range of weeks with 0.5% per week.

The Evaluation Committee found that as a result of the delivery period inclusion in the price adjustment, the bid of A to Z Textile Mills Ltd, the successful candidate was determined to be the most competitive. It therefore, recommend award of all 3 lots of LLINS to the successful candidate at a price of US Dollars 1,788,000 per lot. By a letter dated 13<sup>th</sup> June, 2007, the Ministerial Tender Committee concurred with the Evaluation

Committee's recommendation and awarded the tender to A to Z Textile Millers at US Dollars 1,788,000 for each of the 3 lots.

The Board has further noted that the criteria used and the calculation method applied was stipulated in the tender document. The argument that the criteria was not objective and quantifiable is therefore not tenable. Accordingly, the Board holds that the Procuring Entity did not act outside or in breach of the tender requirements.

Taking into account the foregoing, this ground of appeal fails.

### **GROUND 2 AND 3 – BREACH OF SECTIONS 67 AND 68 OF THE ACT**

The Applicant submitted that ITT clauses 37 and 38 of the tender document were in breach of the Sections 67 and 68 of the Act. It submitted that ITT clause 37.2 provided that the notification of the contract would constitute the formation of the contract. This was in contravention of Section 68(2) of the Act which requires a contract should not be signed until fourteen days have elapsed following the notification of the successful and the unsuccessful candidate.

Counsel for the Applicant further submitted that ITT clause 37.3 provided that the successful tenderers would only be notified after the successful tenderer had been notified and upon its signing of the contract form and furnishing of the performance security. This provision was in contravention of Section 67(2) of the Act that requires that both the successful and unsuccessful tenderers be notified at the same time.

Finally, the Applicant submitted that ITT clause 38.2 of the Tender Data Sheet provided that the successful tenderer was to sign and return the contract form within five days. It stated that the letter of notification was dated 15<sup>th</sup> June, 2007 and the Applicant was notified on 21<sup>st</sup> June, 2006 to collect the letter. This meant that the intention was to notify the Applicant after the lapse of five days and after the signing of the contract within five days as per ITT clause 38.2 of the Tender Data Sheet. This was further evidence that the tender was conducted unfairly and in contravention of the Act.

In response, the Procuring Entity stated that though clauses ITT 37.1, 37.2, 37.3 and 38.1 as drafted, were in contravention of the Act, they were not complied with and notification was done as per the requirements of the Act. It stated that the letters to the successful and unsuccessful candidates were dated 15<sup>th</sup> June, 2007. The successful candidate collected its letter on 20<sup>th</sup>

June, 2007 and the Applicant collected its letter on 21<sup>st</sup> June, 2007. All the bidders had been called on telephone to collect their letters or notification at the same time but the Applicant collected its letter a day later. It further submitted that no contract had been signed and there was no breach of Section 68(2) of the Act.

Finally, the Procuring Entity submitted that the Board should examine how the process was actually conducted, and not what was stated in the ITT clauses 37.1, 37.2, 37.3, 38.1 and 38.2 of the tender document. In any event, the Applicant had not suffered any prejudice as it was able to lodge its Appeal within time.

The Board has noted that it is clear that ITT Clause 37.1, 37.2, 37.3, 38.1 and 38.2 on notification of the award as drafted, contravened the provisions of the Act. However, the issue to be determined was whether the Procuring Entity's actions conformed to those tender provisions and therefore were in breach of the law.

At the hearing, the Procuring Entity demonstrated that it did not follow those tender conditions but instead it applied the provisions of the Act.

The Board has observed that the letters of notification to all bidders were dated 15<sup>th</sup> June, 2007. The successful bidder received its letter on 20<sup>th</sup> June, 2007 and the successful bidders on 21<sup>st</sup> June, 2007. Further no contract was signed although receipt of the notification was not achieved on the same date, the Applicant did not suffer any prejudice as it was able to lodge its Appeal on time. However, the Board reiterates the need for Procuring Entities to strictly observe the Law of ensuring that notification is done at the same time.

Accordingly, these grounds also fail.

**GROUND 4, 5, 6 AND 8 – BREACH OF SECTIONS 2(A) (B), (C), (D) AND (E) OF THE TENDER DOCUMENT**

These grounds have been consolidated as they raise similar issues.

The Applicant submitted that the stipulated delivery period of 6 – 8 weeks was unreasonable and unachievable. It stated that the delivery was skewed in favour of the successful tenderer and against the overseas tenderers.

The Applicant further submitted that it was invited to collect its tender documents on 6<sup>th</sup> March, 2007. The successful tender had been invited to

collect its tender documents on 28<sup>th</sup> February, 2007. The tender documents were to be returned by 28<sup>th</sup> March, 2007 at 10. 00 am. Therefore, the Applicant was given less time to prepare its tender documents. To the Applicant, this was further evidence that the tender was skewed in favour of the successful tenderer which was locally based.

Finally, the Applicant argued that the procedure adopted by the Procuring Entity did not maximize economy and efficiency as envisaged by the Act. As a result of the award, the Procuring Entity was likely to incur an additional cost of Shillings Five Million because of a difference in delivery period of four weeks. This was in contravention of the spirit of the provisions of Section 2(a) of the Act. As a result the award that was made was uneconomical.

In response, the Procuring Entity submitted that the tender conditions were fair and were not skewed in favour of the successful candidate. It stated that a delivery period of 6-8 weeks was reasonable and achievable. Indeed, the Applicant had written a letter on 7<sup>th</sup> June, 2007 which indicated that it was in fact in a position to deliver the goods tendered for within the range of 6-8 weeks.

The Procuring Entity further submitted that all parties were called to collect the tender document at the same time. Upon receipt of the tender document the Applicant never complained that it did not have enough time to prepare its tender. This issue was raised for the first time at the hearing.

Finally, the Procuring Entity submitted that the award was economical. It stated that all the three bidders passed the technical evaluation stage. The successful tenderer had provided a delivery period of 6 – 8 weeks. After the adjustment of the prices within the acceptance range of weeks with 0.5% per week as provided in ITT clause 32.5(a)(ii), the bid of the successful candidate was determined to be the most competitive.

On its part, the successful candidate associated itself with the submissions of the Procuring Entity and submitted that these grounds had no merit and should be dismissed.

The Board has carefully considered the submissions made on these grounds of appeal and has perused the tender documents availed.

The Board has noted that the Procuring Entity used the criteria that had been set out in the tender document as to delivery period. It is clear that none of the bidders complained at or before the time of tendering that the delivery period was either unreasonable or unachievable and none requested for

extension of the delivery period. It is also noteworthy that the Applicant sought clarification on quality of the goods by an email of 8<sup>th</sup> March, 2007 but did not seek any clarification in respect of the delivery period.

The Board has also noted that the Applicant by its letter of 7<sup>th</sup> June, 2007 which was written after the tender had closed/opened on 28<sup>th</sup> March, 2007, unequivocally asserted that it could deliver the nets within the 6 – 8 weeks delivery period set out in the tender document. Therefore, the Applicant's submission that the delivery period was unreasonable and unachievable has no merit.

In view of the above observations, there is nothing to demonstrate that the tender was skewed in such a way that other bidders were not treated fairly. Indeed, there was no objection on that issue and the bidders also had an opportunity for prior clarification.

Finally, the Board finds that the award was made to the lowest evaluated tenderer based on the criteria contained in the tender documents. Although the successful bidder's price was higher than the Applicant's price, it was not arrived at using a flawed evaluation process and was, to that extent therefore, not uneconomical.

Accordingly, these grounds of appeal fail.

The Board will now deal with two legal issues raised by the Advocate for the successful candidate.

Firstly, Counsel argued that the Appeal was filed out of time. He contended that since the letter of notification was dated 15<sup>th</sup> June, 2007 that was the date of notification and the Appeal should have been filed within fourteen days from that date. He stated that the Regulation 73(2) (c) provides that appeal be filed within fourteen days from the date of notification and not the date of receipt. Therefore, the Appeal should have been filed on or before 30<sup>th</sup> June, 2007. However it was filed on 2<sup>nd</sup> July, 2007.

In response, the Advocate for the Applicant submitted that the date the letter was written cannot be the date of notification. Section 67 provides for notification, and not the date on which the notification letter was written. The fourteen days appeals window commences on the day the notification was done or effected. Since the Applicant was notified on 21<sup>st</sup> June, 2007, the Appeal was filed within the fourteen days as per the requirement of Regulation 73 2(e).

The Board has considered the submissions of the parties.

The Board has consistently held that time for the Appeal window begins to run upon communication of award or communication of failure to be awarded. The Applicant has stated that it received the letter of the notification on 21<sup>st</sup> June, 2007. That has not been challenged. The fourteen days Appeal window would therefore have begun to run on that day. Therefore, the Board finds that the Appeal was filed within time, and this objection fails.

The second objection to the Appeal was that the Applicant should have filed the Appeal within fourteen days from the date on which the Applicant's cause of action on the allegedly defective tender documents arose. The successful candidate argued that under Section 93(1), as read together with Regulation 73(2)(a), an aggrieved party has to lodge an appeal within fourteen days of the occurrence of the breach. Since the complaints of the Applicant relate to defects in the tender document, it should have filed its appeal within fourteen days from the time the Applicant noted the ~~said~~ defects.

In response, the Applicant submitted that under Section 93, an aggrieved party is entitled to apply for review upon suffering loss, or if there was a risk of suffering loss. Regulation 73 2(e) provides that an Appeal should be filed within fourteen days of occurrence of breach if the request is made before award or within fourteen days of notification. Accordingly, Regulation 73 2(c) has two options which an Applicant can invoke. It stated that since its appeal was filed within fourteen days of notification, it was properly filed within time.

The Board has considered the arguments by the parties. The Board has noted that Regulation 73(2) (c) gives an aggrieved bidder the discretion as to when to make a request for review. This may be:-

- (a) Within fourteen days of occurrence of the breach in cases where the aggrieved party choose to make its request for review before the award or;
- (b) Within fourteen days of the notification required under Section 67 and 83.

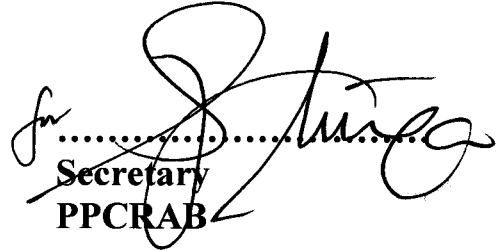
There is nothing in that provision of the Regulations that can be construed as ousting an Applicant's right to file a request for review, if it exercises its discretion not to file a review before the award. Accordingly, this objection also fails.

Taking into account all the foregoing findings, the Appeal fails and is hereby dismissed. The procurement process may proceed.

**DATED at NAIROBI this 1st day of August, 2007**



**Chairman  
PPCRAB**



**Secretary  
PPCRAB**