

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO.8/2007 OF 8<sup>TH</sup> FEBRUARY, 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 10<sup>th</sup> January, 2007 in the matter of Tender for the 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 - Head of Secretariat  
Mr. I. K. Ruchu - Secretariat

## **PRESENT BY INVITATION FOR APPLICATION NO.8/2007**

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

Mr. Alex S. Masika - Advocate  
Mr. Fiddis Maithya - Advocate  
Mr. Wafula Mbayaki - Lawyer  
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  
Mr. Karechu Zachary - Assistant Quantity Surveyor  
Mr. J. A. Okwado - Principal Quantity Surveyor Administration

### **Interested Candidates**

Mr. Geoffrey Kibiru - Director, Elem Investment  
Mr. J. Ngugi - Manager, Buildmore Construction  
Mr. D. Wanjau - Architect, Buildmore Construction

## **BOARD'S DECISION**

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

## BACKGROUND

This was an open tender advertised in the dailies on 2<sup>nd</sup> November 2006. The tender opening/closing date was 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.

Thirteen (13) firms bought the tender documents but ten (10 ) returned their tenders documents. Table 'A' below shows tenders returned in ascending order of the tendered amount. The table also shows the comparison of the tenders returned and the official estimate.

**"Table A - Tenders received and their comparison with the estimate**

Item	Tenderer	Tender Sum	Bid % of Estimate	Variance	% Error
1.	M/s Unispan Ltd P.O. Box 31377 – 00600 Nairobi	89,218,493.00	75.30%	(-) 24.70%	Not Checked
2.	M/s Kitek (K) Ltd P.O. Box 65582 – 00607 Nairobi	98,889,000.00	83.55%	(-) 16.53%	(-)21.03%
3.	M/s Marimo Construction Ltd P.O. Box 44090 – 00100 Nairobi	102,129,262.00	86.20%	(-) 13.80%	(-)11.49%
4.	M/s Buildmore Construction Ltd P.O. Box 13240 – 00100 Nairobi	102,904,065.00	86.85%	(-) 13.15%	(-)0.02%
5.	M/s Elem Investments Ltd P.O. Box 43989 – 00100 Nairobi	109,740,547.00	92.63%	(-) 7.37%	(-)0.15%
6.	M/s Magic General Contractors Ltd P.O. Box 28548 – 00200 Nairobi	113,819,115.00	96.07%	(-) 3.93%	Not Checked
7.	M/s Richardson Ltd P.O. Box 54757 – 00200 Nairobi	114,953,121.00	97.03%	(-) 2.97%	Not Checked
8.	M/s Kemu Housing (1979) Eng. P.O. Box 51412 – 00200 Nairobi	121,579,488.00	102.62%	(+) 2.62%	Not Checked
9.	M/s Capital Construction Co. Ltd P.O. Box 30604 – 00100 Nairobi	122,413,501.96	103.32%	(+) 3.32%	Not Checked
10.	M/s Ongata Works Ltd P.O. Box 58160 – 00200 Nairobi	125,001,600.00	105.51%	(+) 5.51%	Not Checked
11.	<b>OFFICIAL ESTIMATE</b>	<b>118,477,580.20</b>	<b>100.00%</b>	<b>0.00%</b>	

## **THE EVALUATION OF THE TENDER**

### **RESPONSIVENESS**

The firms were tested for responsiveness based on the following parameters as provided for under Clause 5.5 of the tender document:

1. Proper filling and signing of the form of tender.
2. The tender should be accompanied by Bid Bond from an established Bank as per Clause 3.7 and the amendment thereto as Item A Page 50 of Particular Preliminaries.
3. Business Questionnaire must be filled.
4. Tender Questionnaire must be filled.
5. Past Performance Records, plant and equipment, staff information and Financial status
6. Be registered With Ministry of Roads and Public Works category 'A' or 'B' only.
7. Be without material Deviation.

Based on the aforementioned criteria, the result was as indicated in Table B", which, together with the observations following, are extracted from the Procuring Entity's Tender Evaluation Report as quoted.

**"TABLE 'B'- TENDER RESPONSIVENESS**

**(Minimum qualifying criteria)**

X- means not responsive or to be disqualified;

✓ means responsive

Tenderer	Bid Bond	Properly filled & Signed Form of Tender	Tender Ques t.	Buss. Quest.	Tender Qualifie d/ Counter offer	Tender Price Level	Past Perfo rman ce	Plant Equip.	Sta ff	Financ ial Report	Remarks
							Past &cur rent Proje cts				
M/S UNISPAN (Discounted totals)	X	X	✓	✓	✓	✓	✓	✓	✓	✓	Not Responsive
M/S KITEK (7) (Discounted)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	Responsive
M/S MARIMO CONST LTD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	Responsive
M/S BUILDMORE CONST LTD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	Responsive
M/S ELEM INVESTMENT S LTD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	Responsive
M/S MAGIC GENERAL CONTRACTORS LTD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	Responsive
M/S RICHARDSON LTD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	Responsive
M/S KEMBU HOUSING	X	✓	X	✓	✓	✓	X	X	X	X	Not Responsive
M/S CAPITAL CONST LTD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	Responsive
M/S ONGATA WORKS LTD	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	Not Responsive

## **GENERAL OVERVIEW ON NON RESPONSIVE BIDS; Under Minimum Qualifying Criteria**

1. M/s Unispan Ltd did not submit a valid Bid Bond for the works together with its bid by the closing date of 01/12/2006. They had not yet finalized its processing with their bankers, and could only produce a letter communicating the same. Their offered Tender sum stated in words, in their Form of Tender, was inconsistent with that given in figures (Kshs 89,218,493.00). Further, it was also incomprehensibly written out in words as; *'Eighty Nine Million Two Hundred Eighteen Million Four Hundred Ninety Three only'* Since the amount in words takes precedence over that stated in figures (Clause 5.7(a) of the Tendering Instructions), their offer is invalidated as the amount in figures is incomprehensible
2. M/s Kembu Housing Ltd did not indicate their Tender validity date. Further, their Bid Security was the sum of Kshs 300,000.00 only in contravention of the requirements of the Tender Notice as advertised, which stated the required Bid Security to be in the sum of Kshs 500,000.00. Their tender is hence unacceptable.
3. M/s Ongata Works Ltd indicated a Tender validity date of 01/03/2007, or 91 days. According to Clause 3.6 of the Tendering Instructions, further amended and communicated to all bidders (Particular Preliminaries; page 52 Item A), the Tender ought to be valid for 120 days, i.e. 30<sup>th</sup> March 2007. M/s Ongata's Tender was hence unacceptable.

## **RESPONSIVENESS IN TERMS OF V.A.T. PROVISIONS**

All tenders compliant to mandatory conditions above were again subjected to evaluation in relation to:-

Compliance with provision for insertion of 16% V.A.T at the Grand Summary as Item C Page 50 of Particular Preliminaries to identify tenders which have undue advantage in contravention of clause 5.5(d),(iii). The result was as indicated in Table C.

**TABLE "C"**

Rank	TENDERER	Tender price	V.A.T Quote	Corrected V.A.T	Corrected Tender
1	M/S KITEK (7)	98,889,000.00	2,986,792.64	15,601,434.08	113,110,397.08
2	M/S MARIMO CONST LTD	102,129,262.00	7,800,450.00	15,099,093.12	109,468,425.12
3	M/S BUILDMORE CONST LTD	102,904,065.00	14,359,181.00	14,351,805.44	104,050,589.44
4	M/S ELEM INVESTMENTS	109,740,547.00	9,294,701.44	16,666,908.16	120,835,084.16
5	M/S MAGIC GENERAL CONTRACTORS LTD	113,819,115.00	8,714,085.00	16,816,804.80	121,921,834.80
6	M/S RICHARDSON LTD	114,953,131.00	13,933,712.00	16,163,105.44	117,182,514.44
7	M/S CAPITAL CONST LTD	122,413,501.96	16,884,620.96	16,884,620.96	122,413,501.96

**GENERAL OVERVIEW ON NON RESPONSIVE BIDS;  
Under V.A.T Provision**

1. M/s Kitek (7) Ltd did not adhere to the Provision of V.A.T computation, as communicated to all bidders (Particular Preliminaries; page 50 Item C) which required the tenderers to compute and add 16% V.A.T at the Grand Summary page as provided. This can be seen in the large variance between the V.A.T quoted (Kshs 2,986,792.64) and the corrected V.A.T (Kshs 15,601,434.08). The tenderer may later lodge a claim for the omitted V.A.T which may result in an increase of the Tender Price by KShs 12,614,641.44 on account of the V.A.T error.
2. M/s Marimo Construction Ltd made the same omission which translates to a V.A.T error of KShs 7,298,643.12.
3. M/s Elem Investments Ltd made a similar error on V.A.T of Kshs 7,372,206.72.
4. M/s Magic General Contractors Ltd has an error on V.A.T of Kshs 8,102,719.80.
5. M/s Richardson Company Ltd made an error of KShs 2,229,393.44.

The foregoing 5No. tenderers did not correctly capture their V.A.T accurately thereby giving themselves undue advantage to the tune of the omitted sums indicated as V.A.T errors above. This is in contravention to Clause 5.5(d)(iii) of the Tendering Instructions communicated to all bidders.

This can also be picked out from the decipherable large differences between their Tender Price and the Corrected Tender Price as outline in Table 'C' above.

Table 'D' below, also reveals that the rates for the 1<sup>st</sup> and 2<sup>nd</sup> lowest bidders are higher than the 3<sup>rd</sup> lowest, but due to misapplication of the V.A.T provision, they obtained undue advantage.

The above 5No. bidders, who misapplied the V.A.T provision to their undue advantage, were therefore considered Non-Responsive.

Responsive firms in terms of V.A.T provision were as follows:-

1. M/s Buildmore Construction applied the V.A.T provision correctly. The minimal difference of Kshs 7,375.56 on V.A.T for M/s Buildmore, is attributable to computational errors in the main bill, which upon correction, translate to this difference on V.A.T.
2. M/s Capital Construction Ltd, also properly applied the V.A.T provision as required. Hence the Nil difference in his quoted and corrected V.A.T amounts.

The above 2No tenderers correctly applied the provisions of the V.A.T, as required, and did not misapply it to their undue disadvantage. They were hence adjudged Responsive by the evaluating committee.

## **TENDER ANALYSIS**

### **1<sup>ST</sup> LOWEST RESPONSIVE TENDER—Kshs 102,904,065.00**

M/S Buildmore Construction Co. Ltd of PO BOX 13240 - 00100 Nairobi, Submitted the First lowest responsive bid. The bid is 13.15 % below the overall estimated cost and 21.38% below estimate on relevant Builders Work. A minimal arithmetic error of 0.02 % was noted to the tenderer's disadvantage. The rates are consistent and generally below market rates by a reasonable margin.



## **2ND LOWEST RESPONSIVE TENDER – Kshs 122,413,501.96**

The fourth lowest responsive bid was from M/S Capital Construction Ltd, of P. O BOX 30604 - 00100 Nairobi. The tender was 3.32 % above the overall estimated cost and 6.68% above estimate on relevant Builders work. The pricing is fair and consistently higher than the prevailing market rates.

From the foregoing analysis the Evaluation Committee recommended the lowest responsive tender from Ms Buildmore Construction Company Ltd of P.O. Box 13240 – 00100 Nairobi in the amount of Kenya Shillings One Hundred and Two Million, Nine Hundred and Four Thousand, Sixty Five (Kshs102,904,065.00) for award of Contract.

The Ministerial Tender Committee at its 15<sup>th</sup> meeting held on 10<sup>th</sup> January 2007 awarded the tender to M/S 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 102,904,065 (One hundred and two million, nine hundred and four thousand sixty five only)”.

### **THE APPEAL**

The Applicant in application No.8/2007 of 8<sup>th</sup> February, 2007, filed its Memorandum of Appeal against the Procuring Entity’s decision on 10<sup>th</sup> January, 2007.

The Procuring Entity filed its Memorandum of Response and accompanying documents on 14<sup>th</sup> February, 2007. On its part the interested candidate, Buildmore Construction Ltd, filed its memorandum of information and arguments pursuant to the Regulations, on 28<sup>th</sup> February, 2007.

The Applicant was represented by Alex Masika, Advocate and the Procuring Entity was represented by Mr. P. Meyo, Senior Principal Procurement Officer from the Ministry of Youth Affairs in the Office of the Vice President and Mr. Maina Njoroge from the Ministry of Roads & Public Works.

The appeal is based on five (5) grounds, which we deal with as follows:-

## **GROUND 1**

### **Breach of Regulation 33(1)**

The Applicant submitted that Regulation 33(1) was breached in that the letters of notification though dated 18<sup>th</sup> January, 2007, were actually posted to them on 29<sup>th</sup> January, 2007. Proof of posting was evident from the envelope stamped by the Post Office and displayed before the Board, indicating that the letter was indeed posted on 29<sup>th</sup> January, 2007.

The Procuring Entity responded that it tried to reach the Applicant by telephone from the date of notification, on 18<sup>th</sup> January, 2007 to pick the letter from the Procuring Entity's offices at Kencom House, but the telephone lines of the Applicant were out of order. It admitted that it eventually posted the notification letter on 29<sup>th</sup> January, 2007. It further argued that the Applicant filed the appeal out of time since the days should start running from the date of the letter, and hence the appeal was not properly before the Board.

The Board has carefully considered the parties' arguments and the documents submitted. We found that there was indeed no simultaneous notification. It was argued that the Procuring Entity tried to reach the Applicant by telephone but there was no written confirmation of this. Although the Applicant confirmed at the hearing that their landlines were out of order during the period in question, the Board noted that the Procuring Entity admitted posting the letter on 29<sup>th</sup> January, 2007, thus there was no simultaneous notification. The Board further found that the argument by the Procuring Entity that the Applicant had filed the appeal out of time had no basis. Even if the notification date was taken to be 18<sup>th</sup> January 2007, the running of time would begin from 19<sup>th</sup> February, 2007 and the 21 days would have ended on 8<sup>th</sup> February, 2007, the day on which the appeal was filed. The appeal was therefore filed within time.

Accordingly, although this ground of appeal succeeds, we note that no prejudice was suffered by the Applicant, as it was able to file its appeal and adequately ventilate their case.

## GROUND 2

The Applicant contended that Regulation 30(1)-(5) were breached in that the Procuring Entity failed to seek clarification on the Applicant's tender with regard to its inclusion of an erroneous VAT amount and errors found in the tender. According to the Applicant, this was a minor deviation which required clarification, as it had included all the VAT required, but in a different format. The Applicant further argued that the Procuring Entity could have sought clarification from the Applicant of any errors in their calculations pursuant to Regulation 30(1) and notified them pursuant to Regulation 30(2).

The Applicant also argued that it had mistakenly omitted to include its VAT amount in the format required as it had received the tender addendum late, only three days before tender closing, and therefore did not have time to amend its Bills of Quantities to incorporate the VAT.

Finally, the Applicant argued that it had quoted the 16% VAT within the tender sum in the amount of Kshs.98,889,000.00 and that any corrections should only have been done within that figure. In any event, such error did not matter because the Instructions to Tenderers clause 5.7 provided for corrections of errors in rendering the VAT, and further that such errors would not be taken into account since the summary figure in the tender form could not be changed. The Procuring Entity should have also dealt with this error in accordance with Regulation 30(5), by treating it as a minor deviation.

The Procuring Entity responded that there was a major deviation and errors in the Applicant's tender amounting to Kshs.15,601, 434.08. This touched on the substance of the tender and made the Applicant unresponsive. Thus, the Procuring Entity was unable to treat this error as a minor deviation under Regulation 30(5). It further argued that clause 4(c) in the Addendum to the tender had provided for a summary page where the tender sum was to be tabulated and the provision of 16% VAT was clearly required to be indicated separately. The Applicant indicated its VAT as, KShs.2,986,792.64. This was considered a major deviation. The Procuring Entity therefore invoked the provision of Regulation 30(4), and declared the Applicant non-responsive. The Procuring Entity also pointed that the VAT provided by the Applicant for PC and provisional sums was still inadequate.

Further, the Procuring Entity argued that the argument of the Applicant that it had included VAT in its tender sum was not correct as it was contrary to the instructions contained in the tender Addendum. It contended that the Applicant wanted to take advantage over other tenderers by quoting the lowest figure.

The Procuring Entity explained that it did not inform the Applicant of the errors in its tender because it had considered its tender as non-responsive on account of VAT. The Board observes that Regulation 30(2) requires a Procuring Entity to advise tenderers of any errors found in their tenders.

The Board found that the Procuring Entity had sold the Addendum together with the tender documents. Indeed from the register of tenders sold, the Applicant had purchased the tender documents on 30<sup>th</sup> November, 2006 only two days before tender closing, and in time to allow it to abide by the Instructions to Tenderers and tender Addenda as given by the Procuring Entity. The Board further noted that the Procuring Entity had in the Instruction to Tenderers clauses 5.7(c) stated as follows:-

*“Tenders determined to be substantially responsive will be checked for any arithmetic errors. Errors will be corrected as follows:-*

. . . . .

*(c) In the event of a discrepancy between the tender amount as stated in the Form of Tender and the corrected tender figure in the main summary of the Bills of Quantities, the amount as stated in the Form of Tender shall prevail.....”*

Section 4(c) Preliminaries of the tender Addendum with regard to Value Added Tax also provided as follows:-

*“The correction shall allow for addition of 16% Value Added Tax (VAT) at the Grand Summary page of the Bills of Quantities. Any omission in respect thereof shall be treated and corrected as an arithmetic error as per clause 5.7 of the instruction to tenderers”.*

The Board noted that both clause 5.7 (a) and (c) of the Instruction to Tenderers and section 4(c) of the tender Addendum stated clearly that arithmetic errors would be corrected, including the correction of the VAT.

The Procuring Entity therefore ought to have corrected these in accordance with the said clause and notified the Applicant accordingly as per Regulation 30(2). The Board further noted that clause 5.7 (c) is in conflict with the provision of Regulation 30(2).

Regulation 30(2) states as follows:-

*“Notwithstanding sub-regulation (1), the Procuring Entity shall correct purely arithmetical errors that are discovered during the examination of tenders and the entity shall give prompt notice of any such correction to the tender that submitted the tender.”*

Undoubtedly, Regulation 30(2) is so worded as to override Regulation 30(1) which provides that the substance of a tender, including changes in tender price, cannot be sought, offered or permitted. However, it is clear from Reg. 30(2) that where purely arithmetical errors are found they may affect the tender price. It is for that reason that tenderers who reject the correction must, under Reg.30(3) withdraw from the tender and forfeit their tender security. Accordingly, we hold that Regulation 30(2) prevails over the Instructions to Tenderers clause 5.7(c).

The Board further found that the issue of responsiveness had been dealt with at preliminary evaluation stage and that the Applicant was found to be responsive. Clarification pursuant to Regulation 30(1) being a discretionary requirement, the Procuring Entity had no obligation to seek the clarification. It is further noted that omissions in VAT were not supposed to be used as a responsiveness criteria, as was treated in this case, but were supposed to be corrected and evaluation carried out accordingly.

The Board found that the errors in VAT were an arithmetic errors which should have been dealt with like any other arithmetic errors detected. The Applicant ought to have been notified of that error. This is a mandatory requirement under Regulation 30(2) which should have resulted in acceptance or rejection by the Applicant. If accepted the tender price would be adjusted as corrected, but if rejected the tender would be withdrawn and the tender security forfeited.

Accordingly, the Board finds that Regulation 30(2) was breached to the extent that the Applicant was not notified of the error which was corrected by the Procuring Entity.

### **Breach of Regulation 30(7)**

The Applicant submitted that the inclusion of heavy work load on the part of the Applicant was a new criteria contrary to Regulation 30(7). They further submitted that according to the advertisement for the works, contractors in Category 'C' and above were invited, and the advertisement did not in any way bar the Applicant from participating in the tender. They stated that the issue of heavy workload does not therefore arise. They further contended that the Applicant's workload currently stands at approximately Kshs.360 million of which most of the projects are substantially complete. They had also previously successfully undertaken works worth over Kshs.500 million, concurrently.

The Procuring Entity on its part maintained that the Applicants were overloaded, and that any additional workload would affect their performance. This could affect the completion of this project, or unduly delay it if they were awarded. The argument that the Applicant could execute works to the tune of Kshs.500 million concurrently, was baseless as it was not supported by any documentary evidence. The Applicant was registered in Category 'B' whose ceiling was Kshs.250 million. The Applicant's total workload was Kshs.402,664,417.00, with most of the projects far from completion. Additional workload may therefore affect the ongoing projects, to the detriment of the Government. In contrast, the successful bidder, M/s Buildmore, who was awarded this tender had no ongoing projects. The Procuring Entity finally indicated that the rule of equity demands that available projects be spread out to all eligible bidders instead of being concentrated on one contractor who, in this case, was already overloaded.

On consideration of the parties' arguments and the documents submitted, the Board noted that there was no criteria in the tender document for evaluating workload. What the Procuring Entity did was to make an observation on workload when the tender committee was awarding the tender. Such an observation was not essential or necessary to the award since the evaluation had already been carried out, and the Applicant had been found non responsive on account of VAT and other omissions. The Board does not find from the wording in the Tender Committee minutes that the applicant was denied the award on the basis of workload. What is recorded is that the Tender Committee agreed with the Evaluation

Committee's recommendations, which found the Applicant non-responsive. The Evaluation Committee did not make an evaluation on workload.

Accordingly, this ground of Appeal fails.

### **Breach of Regulation 30(8)**

The Applicant alleged that the Procuring Entity was biased in its decision to award the tender to Buildmore Contractors, whereas it had presented the lowest evaluated tender. The reasons on which the Procuring Entity had based their decision were weak and should not be used to deny it the contract.

The Procuring Entity in response submitted that the Applicant's tender was not the lowest evaluated. Its corrected tender figure was Kshs.113,110,397.05 and not Kshs.98,889,000.00 as claimed. With such a huge error it was very unlikely that such a contractor could perform to completion without compromising the quality of the work.

As earlier stated, the Applicant did not quote for VAT in the Bills of Quantities as per the Instructions to tenderers. Its bid was therefore not the lowest evaluated as errors should have been corrected in accordance with the law. The Applicant had not stated in the tender document whether their total figure of KShs.98,889,000.00 was inclusive of the VAT or otherwise, and their arguments at the hearing that the VAT was incorporated within prices cannot stand. Nor can the argument that the VAT quoted in the summary page was for the PC sums, as it was shown at the hearing that 16% VAT on the PC sums would be KShs.3,518,720.00, which is higher than the sum the Applicant quoted. The Board finds that the Applicant failed to abide by the Instructions to Tenderers.

Accordingly this ground fails.

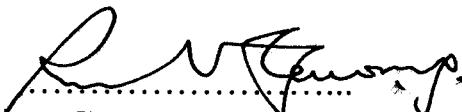
Taking the above matters into consideration and the remedies prayed for by the Applicant, the appeal succeeds to the extent that Regulation 30(2) was not complied with by the Procuring Entity. The Board, pursuant to Regulation 42(5)(c) hereby orders as follows:-

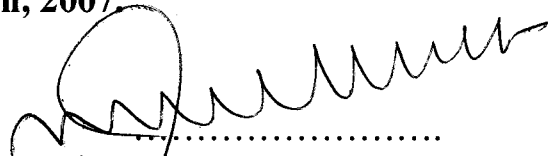
1. That the Procuring Entity's award is hereby set aside and the Procuring Entity is ordered to conduct a limited re-evaluation of the

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.

Rendered at Nairobi this 8<sup>th</sup> day of March, 2007

  
.....  
**CHAIRMAN**  
**PPCRAB**

  
.....  
**SECRETARY**  
**PPCRAB**