



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Appli 744 of 2007**

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

**Versus**

**PUBLIC PROCUREMENT COMPLAINTS**

**REVIEW AND APPEALS BOARD & ANOTHER.....RESPONDENTS**

**COURT'S RULING**

The Applicant is challenging the decision of the Public Procurement complaints, Review and Appeals Board in dismissing its appeal which challenged the award of a tender advertised by the 2<sup>nd</sup> Respondent to a party called Buildmore Construction Co. Ltd. The ruling of the Appeals Board was rendered on 8<sup>th</sup> March 2007 but made available to the Applicant on 27<sup>th</sup> March 2007. In that appeal the Board agreed with the Applicant, set aside the award but directed restricted re tender on account of VAT component by 2<sup>nd</sup> Respondent and also ordered the 2<sup>nd</sup> Respondent to expunge clause 5.7 (c ) of the instructions to the tenderers. As a result the 2<sup>nd</sup> Respondent changed the bid price to which the Applicant protested.

The Applicant filed a 2<sup>nd</sup> appeal on 18<sup>th</sup> May 2007 and an addendum on 13<sup>th</sup> June 2007. The Appeal was heard on 18<sup>th</sup> June 2007 and ruling dismissing the appeal was delivered on the same date.

The Applicant contends that the 1<sup>st</sup> Respondent refused to consider its addendum memorandum of appeal, acted ultra vires its powers by ordering expunging of Clause 5.7(c ) of the instructions to tenders thus looking out some tenders and misinterpreting S.30 (1) & (2) of the Registration 2001. The Respondents though served failed to file ny reply or attend the hearing of the Chamber Summons interpartes.

I have noted that the 2<sup>nd</sup> decision by the Appeals Board dated 18<sup>th</sup> June 2007. However from the decision of 8<sup>th</sup> March 2007 the question arises whether the Appeals Board had the jurisdiction to allow the tenderer to modify its tender. Regulation 32 of the Exchequer and audit (Public Procurement) Regulations, 2001 prohibits the change in tender documents or the price.

The second issue taken up by the Applicant is that their addendum to their issue of appeal was not considered – but without the ruling the Board, this court cannot tell whether or not the addendum was considered.

However, even on the question of allegation of breach of Section 32 alone, the Applicant has demonstrated that they have an arguable case and leave is hereby granted in terms of prayers 2, 3 of the Chamber Summons dated 12<sup>th</sup> July 2007. No stay is granted as the court has not had the advantage of seeing the Board's second ruling dated 18<sup>th</sup> June 2007.

Substantive Notice of Motion be filed within 14 days of todays date in default the above orders do lapse automatically.

Costs to abide the Notice of Motion.

Dated and delivered this 30<sup>th</sup> day of July 2007.

R.P.V. WENDOH

JUDGE

In presence of Mr. Musike for Applicants

Daniel: Court Clerk