

REPUBLIC OF KENYA

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 55/2007 OF 20TH SEPTEMBER, 2007

BETWEEN

ZTE CORPORATION EAST AFRICA..... APPLICANT

AND

MINISTRY OF INFORMATION
AND COMMUNICATIONS.....PROCURING ENTITY

**Appeal against the decision of Ministry of Information and
Communications in the matter of the procurement procedure for Phase
II of Government CDMA Rural Telecommunications Project**

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Amb. C. M. Amira	-	Member
Mrs. L. G. Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Ms. J. A. Guserwa	-	Member
Mr. S. K. Munguti	-	Member

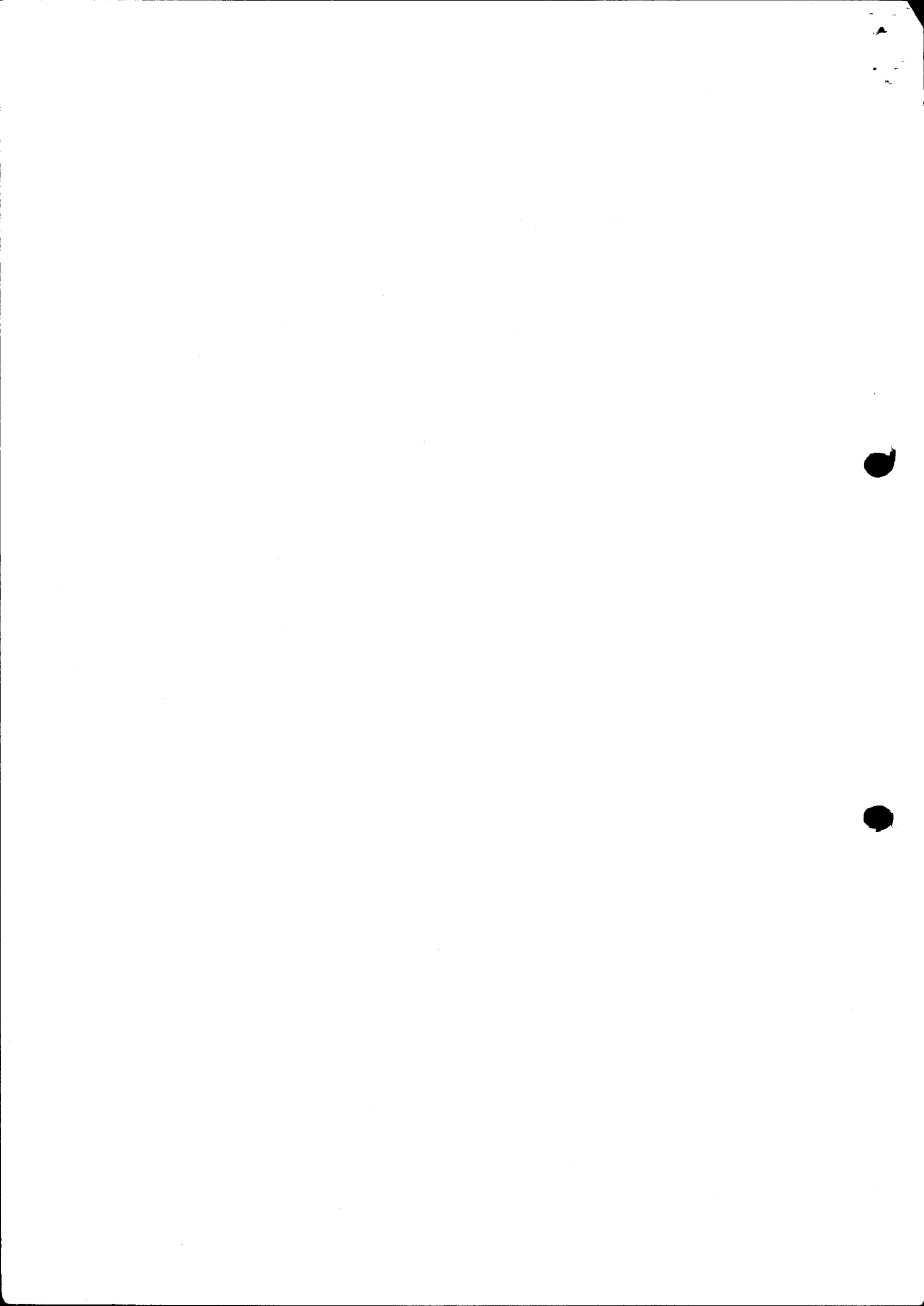
IN ATTENDANCE

Mr. I. K. Kigen	-	Holding Brief for Secretary
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PRESENT BY INVITATION FOR APPLICATION NO. 55/2007

Applicant, ZTE Corporation East Africa

Mr. C. N. Kihara	-	Advocate for the Applicant
Mr. John Thuita	-	Advocate for the Applicant
Mr. Frank Mei	-	Director



Mr. Richie Lwo	-	Technical Manager
Ms. Grace Chen	-	Marketing Manager
Mr. Zhang Rey	-	Finance Manager
Ms. Juliet Gichengo	-	Technical Manager
Mr. Moez Hassanali	-	Technical Manager

Procuring Entity, Ministry of Information and Communications

Mr. Peter Alubale	-	Senior Deputy Secretary
Mrs. A. C. Omari	-	Chief Procurement Officer

Interested Candidate, Telkom Kenya Limited

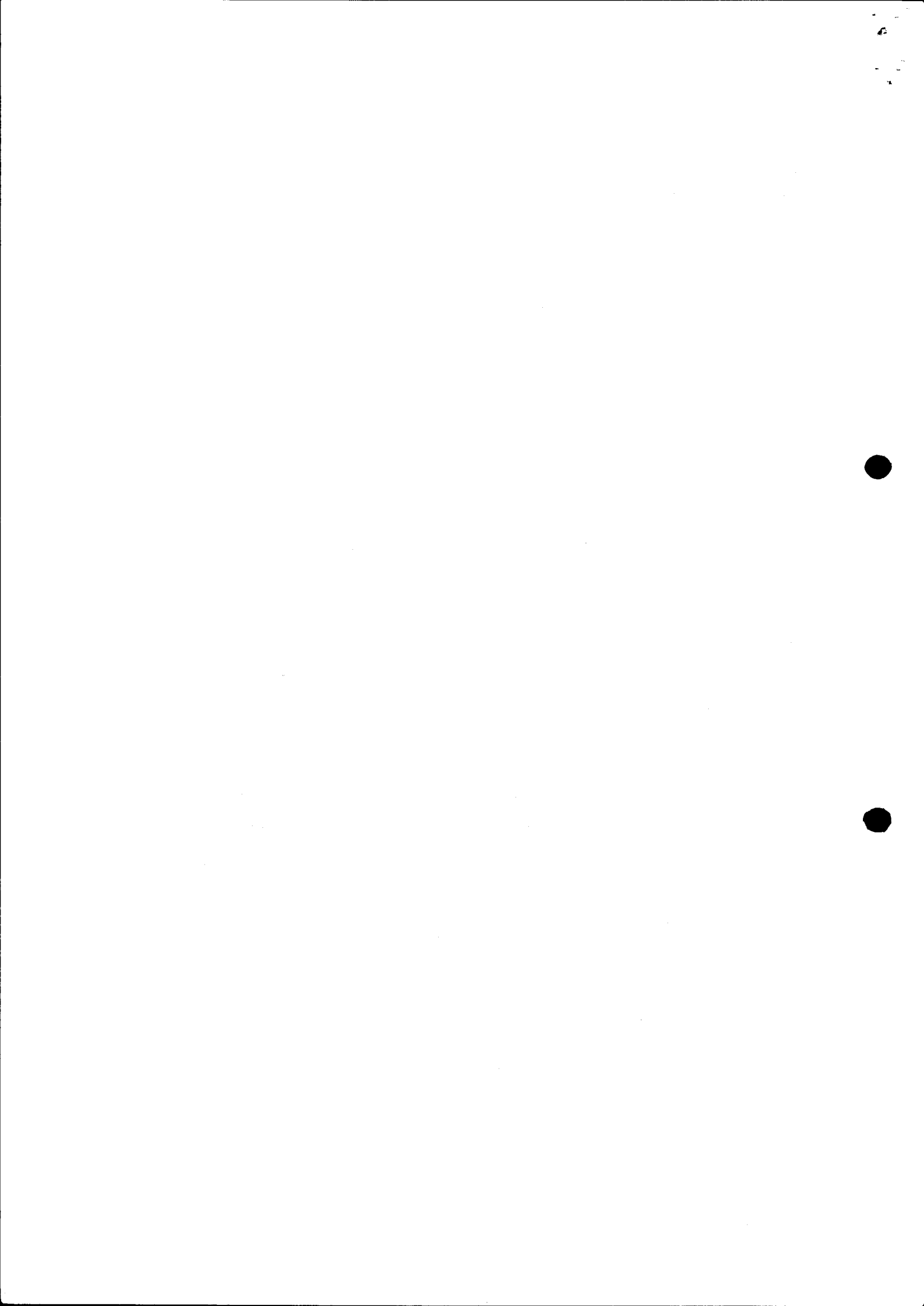
Mr. David S. Majanja	-	Advocate, Mohammed Muigai Advocates
Ms. Florence Mitey	-	Lawyer

BOARD'S RULING ON PRELIMINARY ISSUES

At the commencement of the hearing of this appeal, the Board raised three issues relating to jurisdiction that needed to be considered by the parties before the appeal could proceed to hearing on merit. These were:-

1. Whether the Applicant, ZTE Corporation East Africa was a candidate within the meaning of Section 3(1) of Public Procurement and Disposal Act, 2005.
2. Whether the Applicant could lodge a Request for Review pursuant to Section 93(1) of Public Procurement and Disposal Act.
3. Whether Request for Review related to choice of a procurement procedure and whether the Board had jurisdiction pursuant to Section 93(2) to entertain the Request for Review.

In raising the preliminary issues, the Board was guided by the decision of the High Court in **HIGH COURT MISCELLANEOUS CAUSE NO. 50 OF 2004, REPUBLIC VERSUS THE PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD AND KENATCO LIMITED (IN RECEIVERSHIP EXPARTE: THE KENYA AIRPORT AUTHORITY.**



In that said High Court decision, the court in holding that the Board had no jurisdiction to entertain the Request for Review stated as follows:-

.....“before the Respondent assumes jurisdiction to entertain the Appeal, it must be satisfied that the matter concerns Public Procurement by a Public Entity....”.

The court further stated as follows:-

“..... in the result we hold that the Respondent erred in relying on the preamble provisions of the Act to give purposive interpretation of the statute to confer upon itself a jurisdiction which it did not have. A literal interpretation of the provisions of the statute that were otherwise clear and unambiguous would have sufficed”

Therefore, it is trite law that before the Board entertains an Appeal for hearing it must be satisfied that it has jurisdiction to hear the Appeal.

In answer to the issues raised by the Board, counsel for the Applicant submitted as follows:-

Counsel for the Applicant argued that section 3(1) of the Act did not confer the right to Request for Review exclusively to a party who had bought and submitted a tender to a Procuring Entity. Counsel submitted that although the Applicant did not submit a tender for this project, the definition of a ‘candidate’ in the Act was wide. Therefore, the Applicant had properly filed the Request for Review.

In addition, counsel for the Applicant further submitted that the jurisdiction of the Board to hear any complaint was not exclusively provided under Section 93(1) of the Act. Counsel stated that the jurisdiction of the Board was given by the Act and that the Board should also consider the pre-ample and the spirit of the Act. Finally counsel submitted that the Board had powers under section 96(d) to determine who should be parties to a review. The Applicant urged the Board to exercise that power in this Appeal and hold that the Applicant was entitled to file the Appeal.

On the issue of the choice of procurement procedure, the Applicant argued that the issue could only be determined upon hearing of the Appeal on merit. The Applicant asserted that this was an unusual procurement proceeding and therefore, the Board should hear the Appeal on merit.

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In response, the Procuring Entity stated that they had no records on the procurement proceedings regarding ZTE Corporation East Africa. The tender committee had not deliberated on any tender submitted by the Applicant. Further, the project in question began two years ago and phase I of the project was on-going. The Applicant was not a candidate in that tender and in the present phase. Therefore, the Applicant was not a candidate within the meaning of Section 3(1) and 93 of the Act.

Telkom Kenya Limited, the implementing agency was an interested party in this Appeal. The Counsel for the Interested Party, Mr. David Majanja argued that section 3(1) of the Act was very clear on the definition of a "candidate". Counsel further submitted that section 93(1) of the Act could only be invoked if one was a candidate. In conclusion, Counsel argued that the Applicant did not satisfy the requirements of a candidate and therefore it was not necessary to consider the preamble or the spirit of the Act, as the Act was clear on the definition of the word "candidate".

The Board has carefully considered the parties' submissions and considered the documents before it.

The Board has noted that section 3(1) provides as follows:-

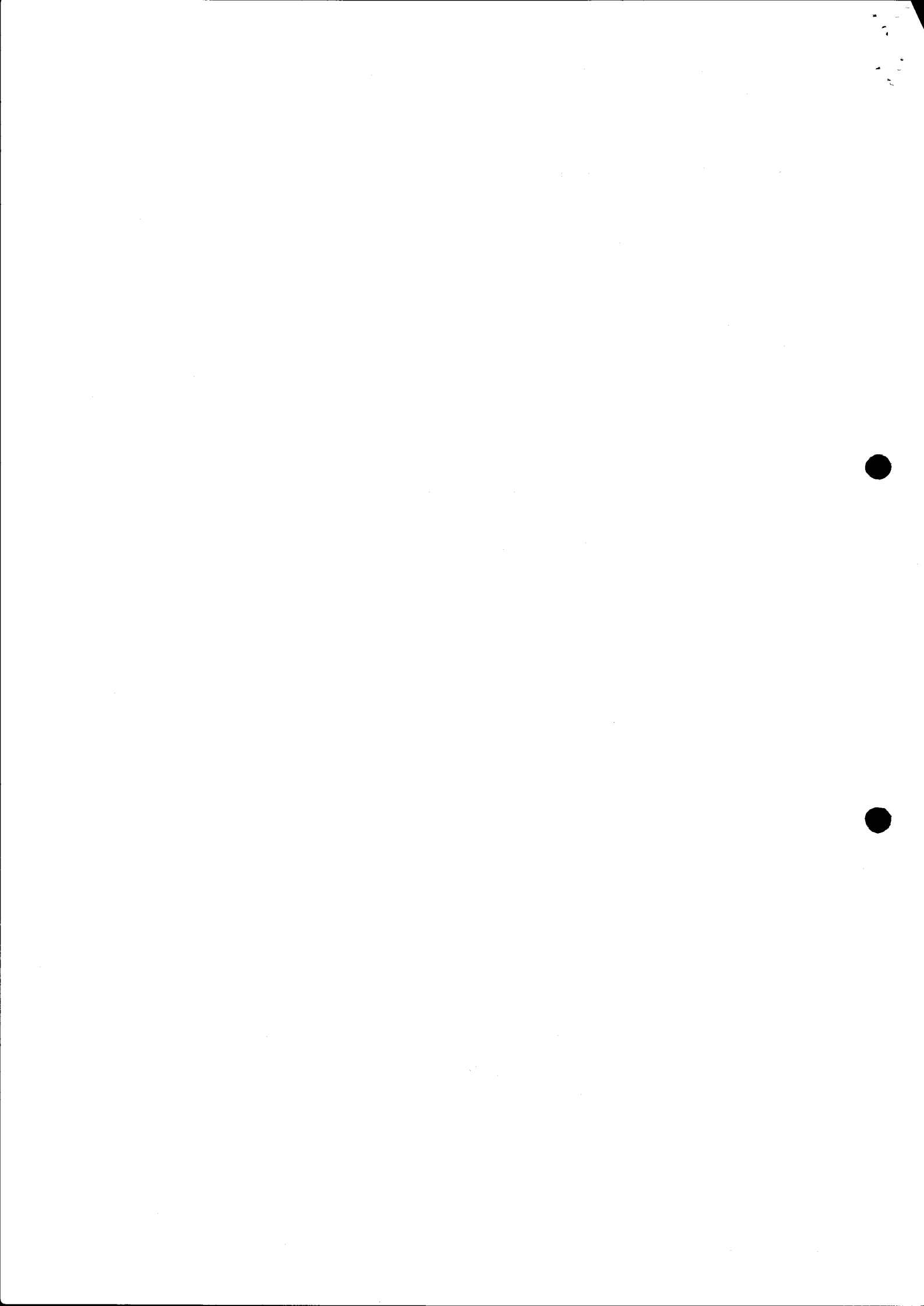
"In this Act, unless the context otherwise requires- 'Candidate' means a person who has submitted a tender to a procuring entity."

Further, section 93(1) provides as follows:-

"Subject to the provisions of this part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review as in such manner as may be prescribed."

In these provisions, the key word is 'candidate'. The two provisions of the Act are clear that the Board can only hear a Request for Review if it was filed by a candidate as defined in the Act. It was common ground that the Applicant had not submitted any tender. Therefore, the Applicant was not a candidate within the meaning of the Act.

On the question of procurement procedure pursuant to Section 93(2), the Board has already found that the Applicant was not a candidate in the



subject tender. Therefore, it is not necessary for the Board to deal with the issue of choice of procurement procedure.

Finally, the Applicant invited the Board to consider the preamble and the spirit of the Act. To the Applicant, the preamble of the Act and Section 2 of the Act which state the purposes of the Act are broad enough to cover the Applicant in this Appeal. Therefore, the Board had jurisdiction to hear and determine the Appeal.

In answer to that submission, the Board hereby quotes the decision in HIGH COURT MISCELLANEOUS CAUSE NO. 50 OF 2004, REPUBLIC VERSUS THE PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD AND KENATCO LIMITED (IN RECEIVERSHIP EXPARTE: THE KENYA AIRPORT AUTHORITY). Their Lordships stated as follows:-

".....when it came to interpretation of a statute, when is recourse to the preamble and the intention of the legislative? In our view as was stated by Chief Justice in the case of Republic Vs Galvin (1987) 2 All ER 851.

..... 'one can have regard to the title of a statute to help resolve an ambiguity in the body of it but it is not, we consider, open to a court to use the title to restrict what is otherwise the plain meaning of the words of the statute simply because they have to be unduly wider'.

..... having perused Section 5A (1) of the Act and Regulation 2 and 3 of the Regulations, we have come to the firm conclusion that the said provisions were clear and unambiguous.

There was therefore no need for the Respondent to revert to the title of the Act in order to enlarge or broaden the meaning and effect of the clear and unambiguous provisions of the Act".

The Board has already held that the meaning of the word "candidate" as defined in Section 3(1) of the Act is clear and that a Request for review can only be filed by a candidate pursuant to Section 93(1) of the Act. Accordingly, it is not necessary for us to look at the preamble and purposes


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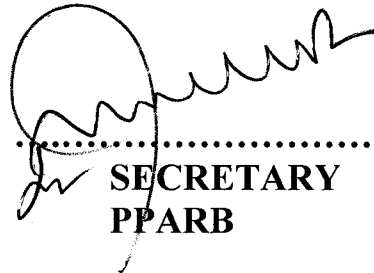
of the Act as submitted by the Applicant as the said provisions are clear and unambiguous.

In view of the foregoing, the Board finds that the Applicant was not a candidate within the meaning Section 3(1) and 93(1) of the Act. Accordingly, this Appeal fails and is hereby dismissed.

Dated at Nairobi this 17th day of October, 2007



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CHAIRMAN
PPARB



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SECRETARY
PPARB

