

**REPUBLIC OF KENYA**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO.58/2007 OF 12<sup>TH</sup> OCTOBER, 2007**

**BETWEEN**

**KENROOF COMPANY LIMITED.....APPLICANT**

**AND**

**KENYA AIRPORTS AUTHORITY .....PROCURING ENTITY**

Appeal against the decision of the Tender Committee of the Kenya Airports Authority of 26<sup>th</sup> September, 2007 in the matter of Tender No. KAA/ES/EIA/524/C for Rehabilitation of Flat Roofs Building at Eldoret International Airport.

**PRESENT**

Mr. J. W. Wambua	-	Member (Acting Chairman)
Amb. C. M. Amira	-	Member
Mrs. L. G. Ruhiu	-	Member
Mr. Akich Okola	-	Member
Eng. C. A. Ogut	-	Member
Ms. J. A. Guserwa	-	Member
Ms. Natasha Mutai	-	Member
Mr. S. K. Munguti	-	Member

**IN ATTENDANCE**

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



## **PRESENT BY INVITATION FOR APPLICATION NO.58/2007**

### **Applicant, Kenroof Company Limited**

Mr. Martin Kiai Muthu - Advocate, Gachiri Kariuki and Kiai Advocates  
Mr. Wachira - Gachiri Kariuki and Kiai Advocates

### **Procuring Entity, Kenya Airports Authority**

Mr. Mayiani Sankale - Advocate, Tobiko Njoroge and Company Advocates  
Mr. Mutembei Marete - Lawyer, Tobiko Njoroge and Company Advocates  
Ms. Sinkiyian Tobiko - Lawyer, Tobiko and Company Advocates  
Mr. Allan Muturi - Procurement Manager  
Mr. Hodadiah Orora - Senior Procurement Officer  
Mr. Fred Odamo - Architect  
Mr. George K. Kamau - Legal Department

### **Interested Candidate**

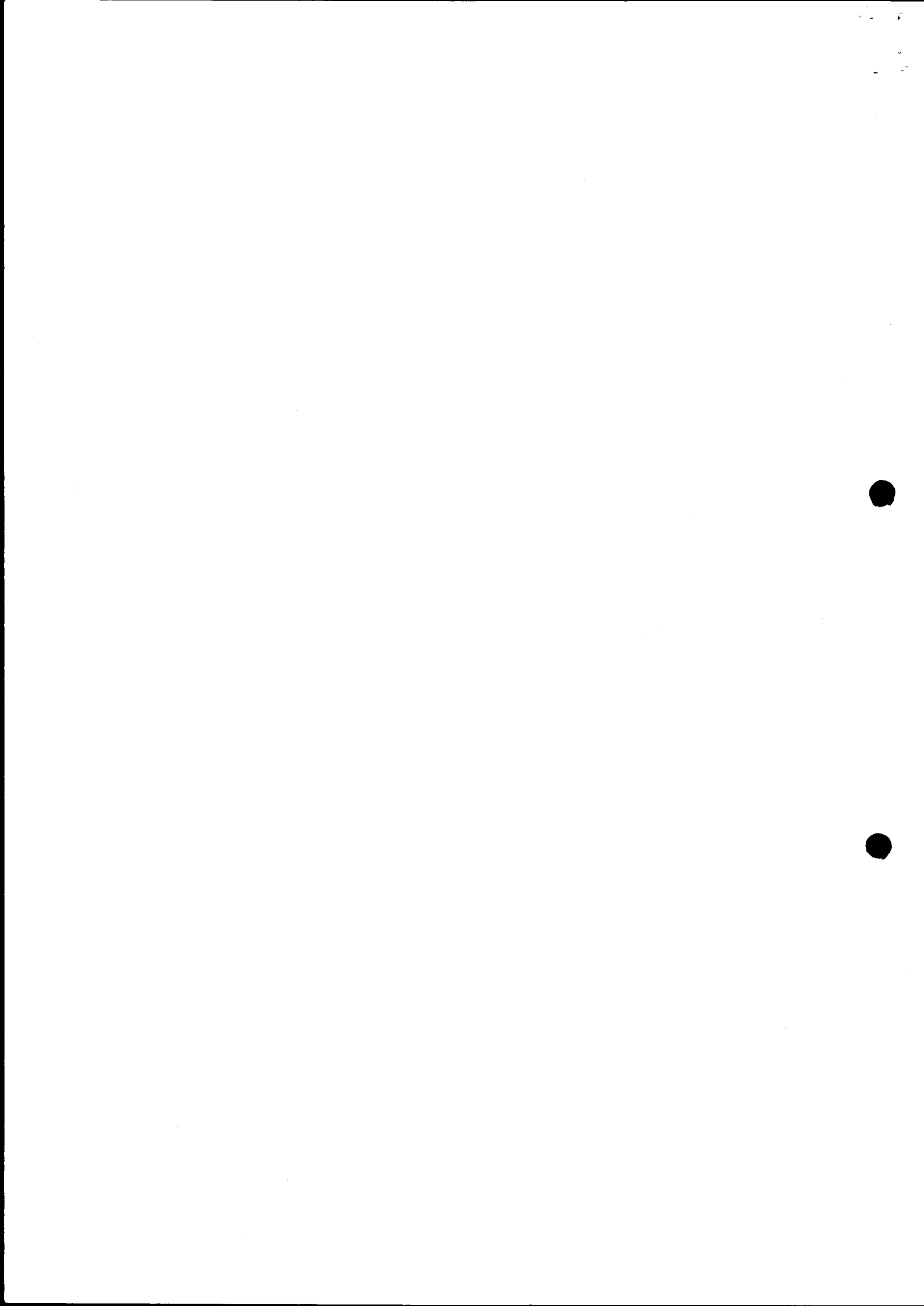
Mr. William Yidah - Administration Manager, Thwama Building Services and General Contractors

## **BOARD'S DECISION**

Upon hearing the representations of the parties and upon considering the information in all the documents before it, the Board hereby decides as follows:

## **BACKGROUND**

This was an open tender advertised in the local dailies on 29<sup>th</sup> June, 2007. The Tender No. KAA/ES/EIA/524/C was for Rehabilitation of Flat Roofs to Terminal Building at Eldoret International Airport.



The tender closing/opening date was 20<sup>th</sup> July, 2007. Ten (10) firms bought the tender documents and only nine (9) returned their duly completed bids. The tender was opened on the due date and attracted the following bidders: -

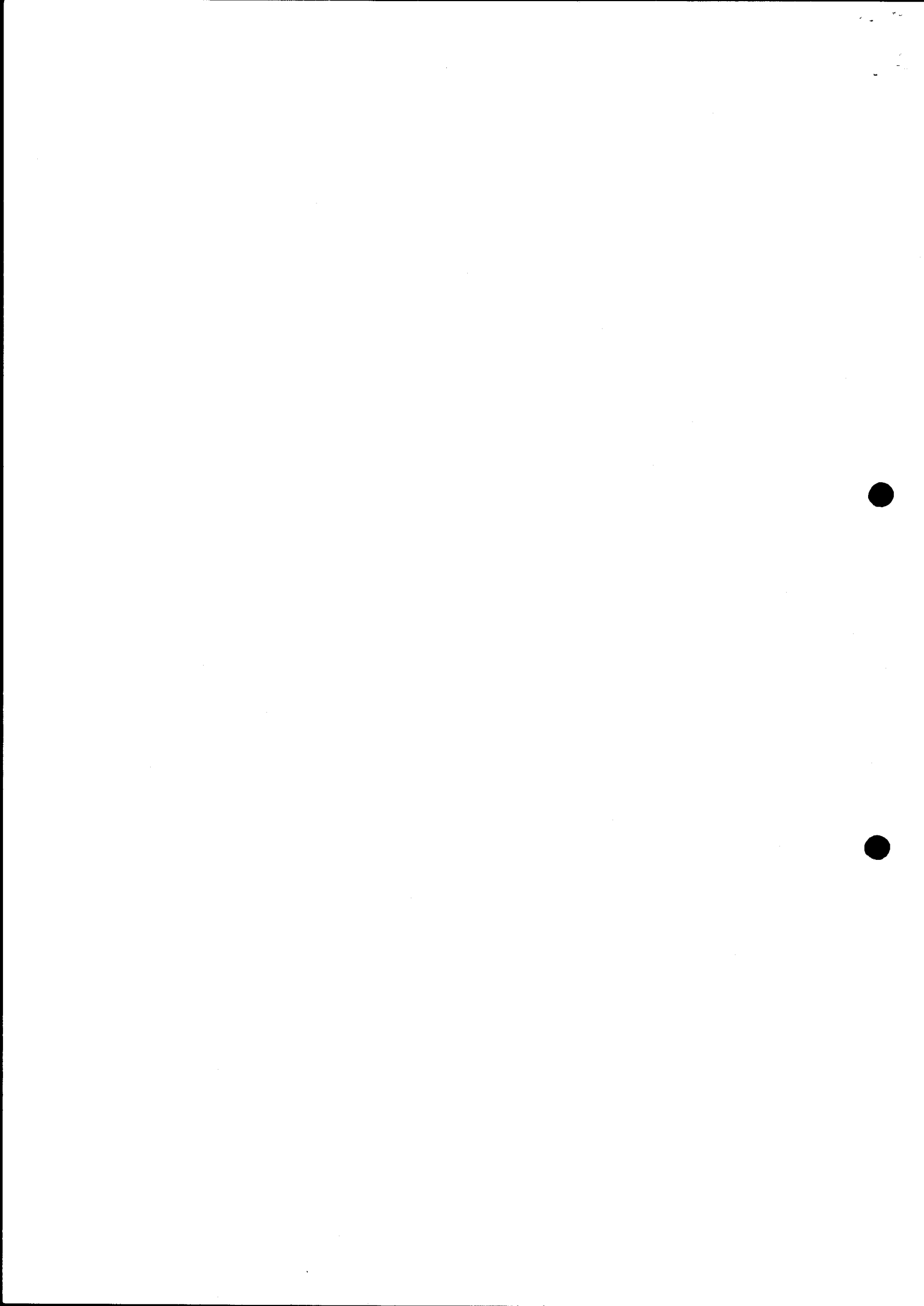
1. Pyramid Construction Ltd;
2. Kenya Builders and Concrete Co. Ltd;
3. Kioni Constructions;
4. Ital Build Imports Ltd;
5. Aswa Developers and Contractors;
6. Marimo Construction Ltd;
7. Kenroof Company Ltd;
8. Thwama Building Services and General Contractors; and
9. Careful Construction.

### **THE EVALUATION OF THE TENDER**

The above bidders were examined based on the following requirements: -

1. Ministry of Public Works Registration category D;
2. Proof of 3 similar works, 10M each for the last 3 years;
3. Form of Power of Attorney;
4. Personnel and Equipment;
5. Access to 5 million liquidity;
6. Audited accounts for the last 3 years;
7. Company registration certificate;
8. Trade license;
9. Tax compliance certificate;
10. Bid bond;
11. Statement of association with KAA;
12. Work Method and Schedule;
13. Annual average turnover of works 20 M;
14. Authority to seek references from bankers;
15. Litigation in the last 5 years;
16. Proposals for subcontracting 10% of works;
17. Contract manager, 5 years experience; and
18. Mandatory site visit.

Based on the above requirements, eight out of the nine aforementioned bidders failed to satisfy the mandatory requirements and could not proceed to the financial evaluation stage. Thwama Building Services and General



Contractors was the only firm that met the requirements and proceeded to the financial evaluation stage.

The Technical Evaluation Committee recommended that Thwama Building Services and General Contractors be considered for award of this contract at their bid price of Kshs. 7, 738, 928.40.

In its meeting held on 26<sup>th</sup> September, 2007, the Tender Committee adjudicated and awarded the contract to Thwama Building Services and General Contractors at Kshs. 7, 738, 928.40.

### **THE APPEAL**

This appeal was lodged on 12<sup>th</sup> October, 2007 by Kenroof Company Limited against the decision of the Tender Committee of Kenya Airports Authority in the matter of Tender No. KAA/ES/EIA/524/C for Rehabilitation of Flat Roofs to Terminal Building at Eldoret International Airport.

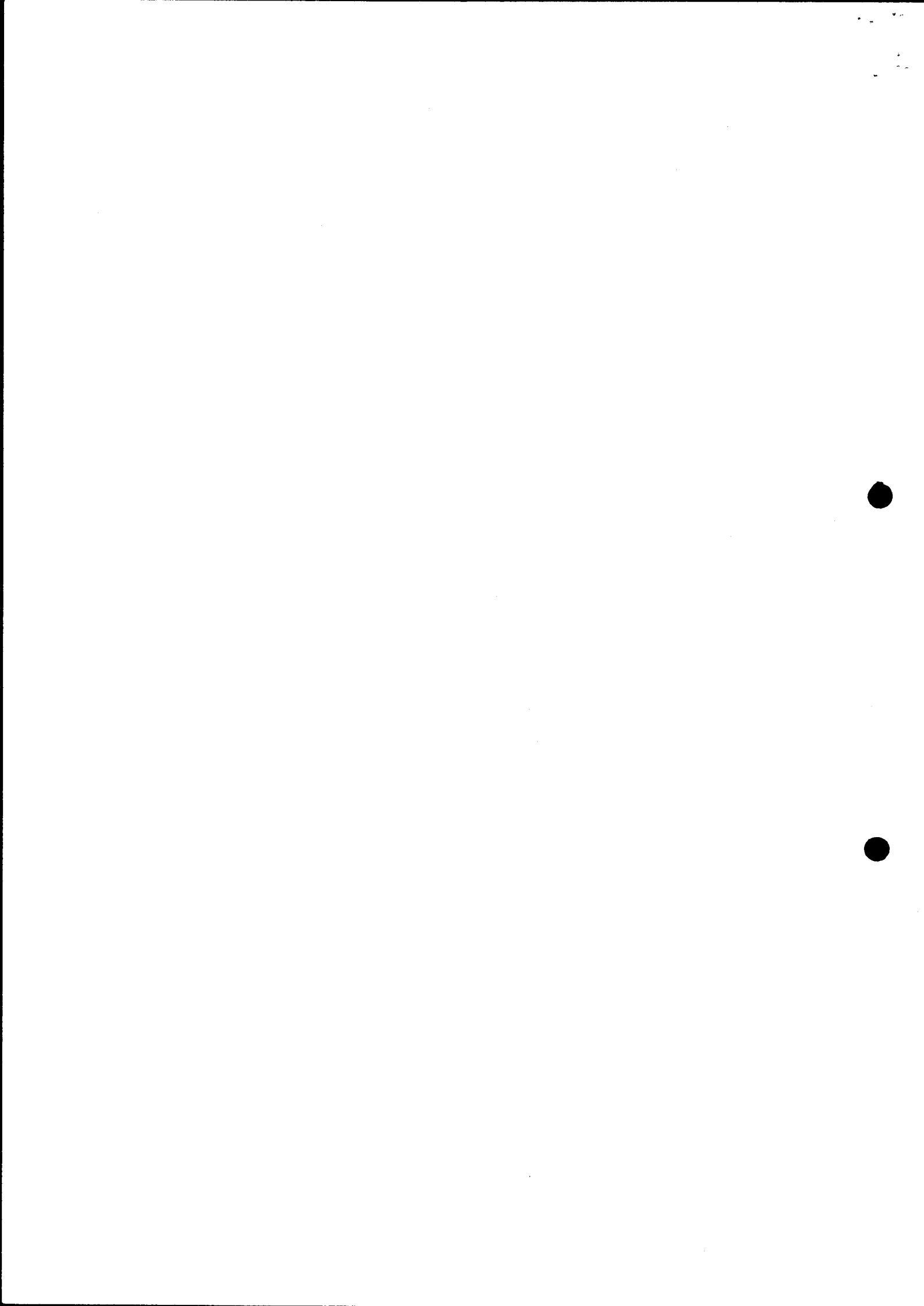
The Applicant requests the Board for orders that:-

1. The tender process be annulled and repeated.
2. Costs of the review.

The Applicant was represented by Mr. Martin Kiai Muthu, Advocate, while the Procuring Entity was represented by Mayiani Sankale, Advocate.

At the commencement of the hearing, the Board requested the Procuring Entity to clarify the issue of whether the appeal was filed out of time as stated in their response to request for review and whether they intended to handle the issue as a preliminary point. The Procuring Entity informed the Board that they were ready to argue this point within their response to the representations of the Applicant.

The Board noted that the two grounds raised revolved around the same issue, namely ambiguity, and has therefore decided to consolidate them.





**Ground one and two on Breach of Sections 34(1) & (2) read together with Section 52(2) and breach of the requirements of the tender document on page 53.**

Counsel for the Applicant argued that the process was fundamentally flawed in that there were discrepancies in the requirements on the materials to be used in the repair works, contrary to Sections 34(1), (2) and 52(2) of the Public Procurement and Disposal Act, 2005. It argued that on page 53 of the tender documents, the Procuring Entity described the works in the contract to include laying of EPDM membrane, among others, while on page 72, it provided for laying of SBS Elastometric Water Roofing Bitumen Membrane. The Applicant submitted that the two different requirements on the specifications created ambiguity as the cost of each was different and their life spans were also different.

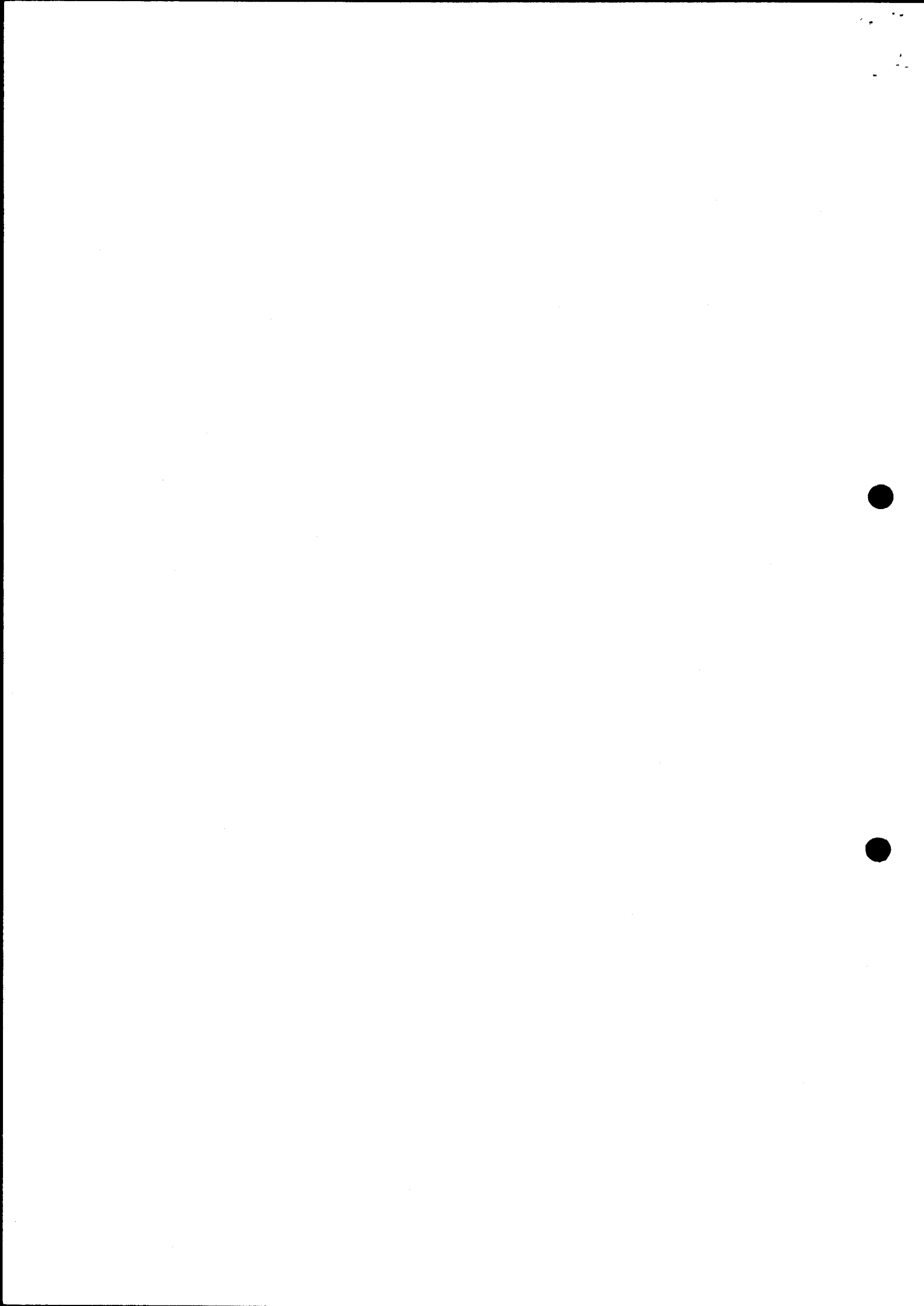
The Applicant further argued that based on page 68 of the tender document, on demolition of Works on the Terminal Building, the work involved carefully removing SBS Elastometric Bitumen membrane and cart away Debris. The Applicant stated that the successful tenderer submitted a sample of APP Bituminous membrane which was not provided for in the tender document. It submitted that the integrity of the whole tendering process was fundamentally flawed.

In response, the Procurement Entity stated that it had on page 53 of the Tender document, set out the general description of the works in the contract to comprise:

- (i) Remove and cart away existing water proofing membrane
- (ii) Remove and cart away thermal membrane
- (iii) Supply and fix timber base
- (iv) Supply and install thermal membrane
- (v) Lay EPDM membrane
- (vi) Supply and fix metal fulboras

The Procuring Entity therefore argued that it had clear specifications of the works.

In addition, it pointed out that at page 72 of the Tender document, there was a specific requirement for quotation on Double layer SBS Elastometric Water Proofing Bitumen membrane.



Further the Procuring Entity argued that at page 68 of the Tender document, the specification dealt with demolition of works and in particular the removal of SBL Elestrometric Bitumen membrane and thermal insulation from the roof.

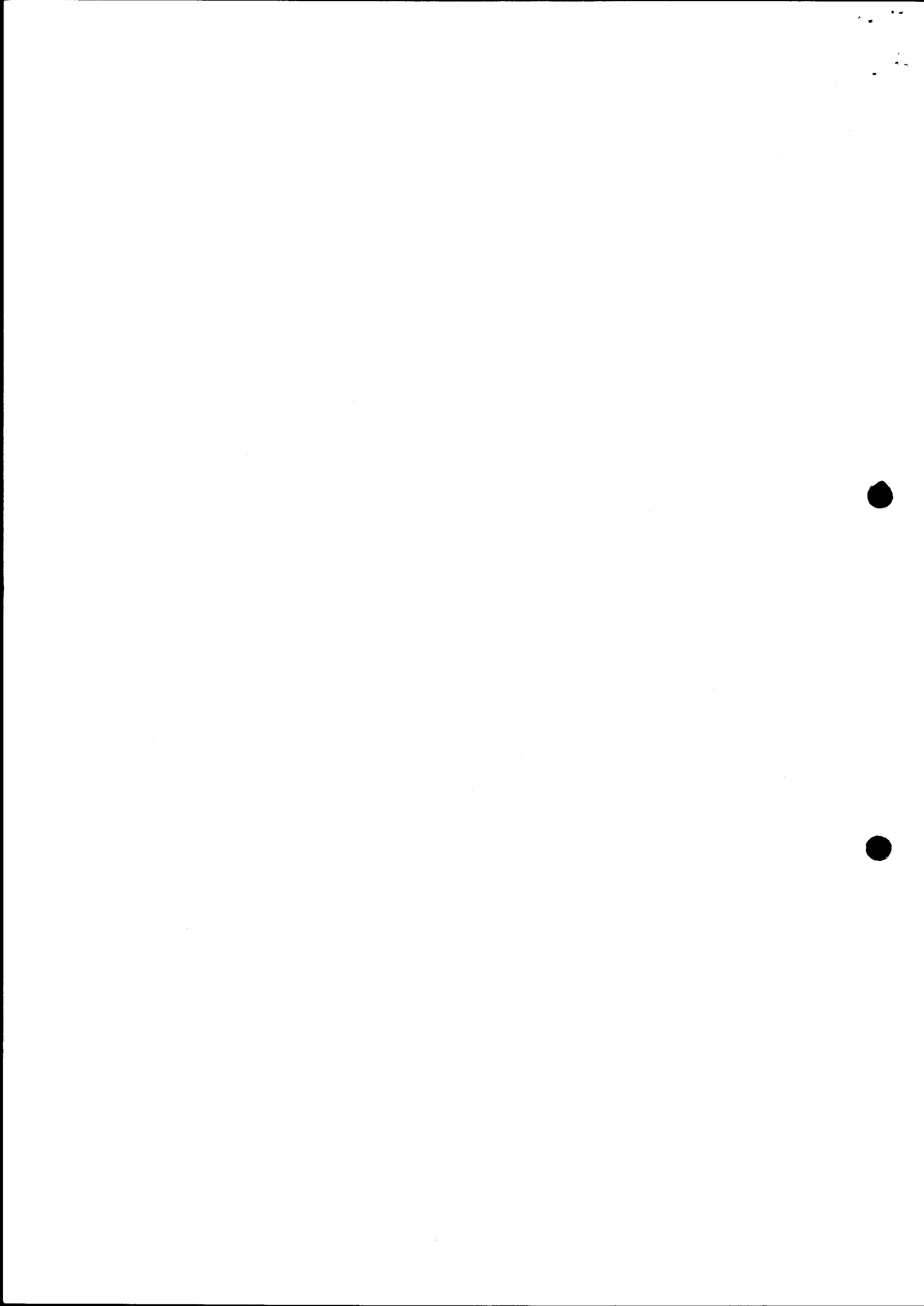
The Procuring Entity further submitted that both the Applicant and the successful tenderer quoted in respect of the Double Layer SBS Elestrometric Waterproofing Bitumen Membrane;

The Procuring Entity stated that under the tender requirements, the tenderers were to quote in respect of Double Layer SBS Elastrometric Waterproofing Bitumen Membrane, or similar approved. However, the successful tenderer went further, after quoting for the tender material, and suggested and provided another sample material, namely, APP Bituminous Membrane, as an alternative material and gave a quotation for it, in the event that the Procuring Entity deemed it proper to consider. It further stated that the cost of the alternative was not reflected in the tender sum. The Procuring Entity stated that it did not evaluate the alternative material, and therefore, the issue of the alternative sample provided by the successful tenderer is immaterial and inconsequential. In conclusion, the Procuring Entity stated that no prejudice was suffered by the tenderers due to this treatment. Therefore, the specific requirements under the tender were clear, unambiguous and not contradictory.

In addition, the Procuring Entity argued that if the Applicant required any clarification or additional information, it could have requested for the same, pursuant to section 3.15 of the tender document.

The Procuring Entity pointed out that, since the Applicant's representative had attended the mandatory site visit held on **13<sup>th</sup> July 2007**, he ought to have sought any clarification prior to signing the certificate of site visits by the tenderers. During the site visit, the works and materials to be used were discussed and examined and the Applicant did not raise any issue for clarification.

The Board has examined the alleged breaches and the tender document and noted that Sections IV to VII of the tender document contained detailed specific requirements related to the works the Procuring Entity intended to procure.



The Board further noted that the Applicant signed the tenderers' certificate on the visit to site on 18<sup>th</sup> July, 2007 committing himself that he had studied the contract documents, had carefully examined the site and was satisfied with the description of the works.

The Board also noted that there was no evidence submitted by the Applicant that clarification was sought from the Procuring Entity regarding certain disparities in the tender document, pursuant to Section 62 of the Act or Paragraph 3.15 of the tender document.

In addition the Board has reviewed the evaluation report and noted that the Applicant was disqualified for failure to provide evidence on access to shillings 5 million worth of liquid assets, Form of power of attorney, evidence of annual turnover of shillings 20 million and evidence that they had a contract manager with 5 years experience, which were mandatory requirements set out in paragraphs 1.1, 1.3 and 1.4 of the Tender Document, which grounds the Applicant never challenged at the hearing hereof.

The Board has scrutinized the tender document and noted that page 53 contained the description of works that included:- Remove and cart away existing water proofing membrane; Remove and cart away thermal membrane; Supply and fix timber base; Supply and install thermal membrane; Lay EPDM membrane; and Supply and fix metal fulboras. The Board has also observed that the Applicants original tender documents and that of the successful bidder, have been signed against the description of works in the rate's column. The quotation of the EPDM membrane by the Applicant indicated "*1.2 mm WPDM rubber membrane same as what is there now.*" The Board noted that this was an indication that the Applicant knew what he was quoting for. The Board finally noted that the Applicant had failed to meet the aforesaid mandatory requirements.

Accordingly, this ground of appeal fails.

With regard to whether the Appeal was filed outside the Appeal window, the Procuring Entity argued that the letter of notification was dated 27<sup>th</sup> September, 2007 and therefore the 14 days appeal window should be counted beginning from 27<sup>th</sup> September, 2007.

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In response the Applicant argued that they received the notification on 1<sup>st</sup> October, 2007 through fax. The letter was dated 27<sup>th</sup> September, 2007. Taking into consideration that the Appeal window runs from 1<sup>st</sup> October, 2007, then the Appeal as filed by the Applicant was within the time period as provided for in the Act.

The Board observed that it was not in dispute that the notification letter was dated 27<sup>th</sup> September, 2007. However, the Applicant received the notification letter via fax on 1<sup>st</sup> October, 2007. The Board noted that the 14 days of appeal runs from this date. Therefore the Appeal lodged on 12<sup>th</sup> October, 2007 was within the statutory period provided for under Section 68 (2) of the Act.

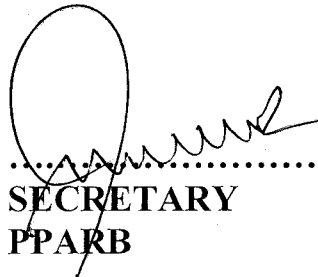
Taking into account all the foregoing matters, the Appeal fails and is hereby dismissed.

Accordingly, the procurement process may proceed.

Dated at Nairobi on this 12<sup>th</sup> day of November, 2007.



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**CHAIRMAN**  
**PPARB**



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**SECRETARY**  
**PPARB**

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