

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 81/2024 OF 21ST AUGUST 2024

BETWEEN

FINTECH EDGE COMPANY LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

NATIONAL CEREALS AND PRODUCE BOARD.....1ST RESPONDENT

NATIONAL CEREALS AND PRODUCE BOARD.....2ND RESPONDENT

Review against the decision of the Accounting Officer, National Cereals and Produce Board in respect of Tender No. NCPB/FERTILIZER/01/2024-2025 for Supply and Delivery of Various Types of Fertilizer on Consignment Based Contractual Agreement Under Fertilizer Subsidy Program.

BOARD MEMBERS PRESENT

1. Mr. George Murugu FC Arb - Chairperson
2. CPA Alexander Musau - Member
3. Ms. Jessica M'mbetsa - Member

IN ATTENDANCE

- Mr. Philemon Kiprop - Secretariat
- Mr. Anthony Simiyu - Secretariat



PRESENT BY INVITATION

APPLICANT

FINTECH EDGE COMPANY LIMITED

Mr. Justus Omollo

Advocate, Sigano & Omollo Advocates LLP

RESPONDENT

**ACCOUNTING OFFICER, NATIONAL
CEREALS AND PRODUCE BOARD**

**NATIONAL CEREALS AND PRODUCE
BOARD**

Mr. Peter Mutemi

Advocate, National Cereals and Produce Board

BACKGROUND OF THE DECISION

The Tendering Process

1. National Cereals and Produce Board, the Procuring Entity together with the 1st Respondent herein, vide an advert in the PPIP Portal (www.tenders.go.ke) and the Procuring Entity's website (www.ncpb.co.ke), invited interested suppliers to submit their tenders in response to Tender No. NCPB/FERTILIZER/01/2024-2025 for Supply and Delivery of Various Types of Fertilizer on Consignment Based Contractual Agreement Under Fertilizer Subsidy Program (herein "the subject tender") through under an Open International Tender method. The tender had a tender closing date of Monday, 26th August 2024 at 12:00 noon.

REQUEST FOR REVIEW

2. However, days before the tender closing date, on 21st August 2024, the Applicant through the firm of Sigano & Omollo Advocates LLP filed a Request for Review dated 21st August 2024 supported by an affidavit



sworn on 21st August 2024 by Susan Wangui Ngugi, a Director at the Applicant, seeking the following orders from the Board in verbatim:

- a) The public procurement proceedings commenced by the Respondents through the Tender No. NCPB/FERTILIZER/01/2024-2025- SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER ON CONSIGNMENT BASED CONTRACTUAL AGREEMENT UNDER FERTILIZER SUBSIDY PROGRAM be and are hereby annulled in entirety and set aside;***
- b) The Accounting Officer of National Cereals and Produce Board be and is hereby directed to comply with its obligations under Section 44 of the Public Procurement and Asset Disposal Act by ensuring that all existing contractual obligations of the National Cereals and Produce Board for the supply of fertilisers are complied with before commencing new procurement proceedings.***
- c) The Accounting Officer of National Cereals and Produce Board be and is hereby directed to, upon compliance with (b) above issue a fresh tender document for Tender No. NCPB/FERTILIZER/01/2024-2025-SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER ON CONSIGNMENT BASED CONTRACTUAL AGREEMENT UNDER FERTILIZER SUBSIDY PROGRAM taking into consideration the findings and orders of the Public Procurement Administrative Review Board herein within such period to be stipulated.***
- d) The Accounting Officer of National Cereals and Produce Board be and is hereby directed to allow bidders to***



withdraw their bids (if they wish to do so) pursuant to section 76(1) of the Act and submit new bids, taking in to consideration, the new tender document that would be issued by the Respondents in compliance with the orders of the Review Board;

e) Any other relief that the Board may deem fit and just to grant;

f) Costs of the Review.

3. In a Notification of Appeal and a letter dated 21st August 2024, Mr. James Kilaka, the Ag. Board Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 21st August 2024.

4. On 26th August 2024, the Respondents filed their Memorandum of Response sworn on 26th August 2024 by Samuel K. Ndung'u, the Procuring Entity's Ag. Managing Director together with a Notice of Motion Application and Notice of Preliminary Objection, both dated 26th August 2024. The Respondents equally forwarded to the Board the Confidential Documents under Section 67(3) of the Act



5. On 29th August 2024, the Ag. Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 2nd September 2024 at 2:00 p.m. through the link availed in the said Hearing Notice.
6. On 2nd September 2024 at 2:00 p.m., when the Board convened for the online hearing, all parties were present and represented by their respective Advocates.
7. The Board read through a list of the documents filed in the matter and asked parties to confirm having filed and been served the said documents, to which Counsel confirmed in the affirmative. Thereafter, the Board directed that since the Respondents had filed a Preliminary Objection, the same would be considered together with the Request for Review in line with Regulation 209 (4) of the Regulations 2020. The Board also gave hearing directions and the order of address as follows:
 - i. The Respondents would start by arguing their Preliminary Objection in 3 minutes.
 - ii. The Applicant would respond to the Preliminary Objection and prosecute the Request for Review in 13 minutes.
 - iii. Thereafter, the Respondents would offer a response to the Request for Review in 10 minutes.
 - iv. The Applicant would then close with a rejoinder in 1 minute.

PARTIES SUBMISSIONS

Respondents' Submissions on the Preliminary Objection

8. Counsel for the Respondents, Mr. Mutemi, argued that the Board lacked jurisdiction over the present Request for Review which was in effect a



contractual dispute disguised as a procurement dispute. Mr. Mutemi directed the Board to Grounds 1 to 8 under the Request for Review citing that they all referred to a procurement contract of a related tender i.e. Tender No. NCPB/FERT/23/2023-2024 SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER FOR LONG RAINS 2023/2024 TY UNDER THE FERTILIZER SUBSIDY PROGRAM.

9. Mr. Mutemi submitted that Section 28 of the Act outlines the functions and powers of the Board as determining tender and asset disposal disputes and performing other functions assigned to it under the law. Further, that Section 167(4)(c) of the Act removes procurement contracts signed in accordance with Section 135 of the Act from the jurisdiction of the Board. Counsel indicated that paragraph 13(a) of the Supporting Affidavit to the Request for Review confirmed through an averment by the Applicant that the procurement contract between the Applicant and the Procuring Entity were entered into in accordance with the Section 135 of the Act
10. Relying on the oft-cited case of *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited; Civil Appeal No. 89 of 1989* Counsel urged that the Board should down its tools as it lacked jurisdiction over the present Request for Review.

Applicant's Submissions on both the Request for Review and Preliminary Objection

11. Counsel for the Applicant, Mr. Omollo, argued that the Preliminary Objection was misconceived as the Respondents appeared to have misunderstood the contents of the Request for Review. He contended that

the Request for Review was anchored on Section 167(1) of the Act as read together with Regulations 2020 which provisions allow a candidate or a tenderer who claims having suffered or being at the risk of suffering loss and damage due to breach of a statutory duty by a Procuring Entity to invoke the Board's jurisdiction.

12. Counsel argued that the Applicant was a candidate in the subject tender having obtained the Tender Document in the manner stipulated in the invitation to tender and having sent an email to the Procuring Entity informing it that the Applicant had secured a copy of the Tender Document.
13. Mr. Omollo contended that under Section 44 of the Act, the Accounting Officer is obligated to ensure a Procuring Entity complies with the Act as well Sections 68, 147, 148 and 149 of the Public Finance Management Act (hereinafter "**the PFMA**").
14. Counsel submitted that the Procuring Entity breached various provisions of the PFMA including failure to ensure its resources are used in a lawful, authorized, effective, efficient and transparent manner. He argued that the advertisement of the present tender while there was a live contract between the Procuring Entity and the Applicant constituted an unlawful use of public resources. Further that there was a breach of Section 67 and 68 (2)(d) of the PFMA in that there had been a failure to ensure that all contracts entered into by the Accounting Officer are lawful and completed.

15. Mr. Omollo urged that under Section 167(1) of the Act, the Applicant could invoke the jurisdiction of the Board when the Accounting Officer is in breach of an obligation to ensure that the Procuring Entity complies with the terms of a procuring contract. He contended that in the instant case, the Procuring Entity was attempting to procure and enter into a subsequent contract in the face of non-compliance with an existing contract and that that constituted a breach under the PFMA.

16. Further that there was a breach of Section 68 (2) (e) of the PFMA to ensure that all applicable accounting and financing controls are followed. It was argued that the Procuring Entity failed to ensure adequate arrangement for custody, safeguarding and maintenance of fertilizer that was procured from the Applicant under its subsisting contract and that this element of breach could be litigated before the Board under Section 167 (1) of the Act.

17. Mr. Omollo contended that the Applicant was not assailing the choice of procurement method as erroneously alluded to by the Respondent. He argued that instead, the Applicant's view was that once a Procuring Entity chose a particular procurement method, it was bound to follow the rules of that method as per the Act. In the present Request, having chosen the Open International Tender method, the Procuring Entity was required to make it a requirement that citizen contractors are given a margin of preference but ITT 32.3 of the Tender Document was to the effect that there would be no margin of preference. He argued that this constituted a breach under section 70 (6) (e) of the Act and Regulation 144 of the Regulations 2020.

18. Counsel further argued that the eligibility criteria under the ITT. 3.1 departed from the eligibility requirement under Section 155 of the Act as it purported to restrict members of a joint venture to one (1) contrary to the provisions of the Act
19. Additionally, counsel submitted that the Memorandum of Response by the Respondents constituted an Affidavit that was commissioned by Ms. Veronicah Shiundu, an In-house Counsel of the Procuring Entity contrary to the provisions of the Oaths and Statutory Declarations Act. He contended that the said Act prohibited Advocates from commissioning documents in respect of which they were parties or had an interest in. He maintained that as an In-house Counsel at the Procuring Entity, Ms. Veronicah Shiundu was interested in the outcome of the instant Request for Review and thus could not legally commission the Memorandum of Response.
20. Accordingly, Counsel urged the Board to allow the Request for Review.

Respondents' Submissions on the Request for Review

21. Counsel for the Respondents, Mr. Mutemi, argued that the Respondents had not breached Section 44 of the Act and that to the contrary, the Procuring Entity had prudently used its resources. He argued that when the Applicant refused to honour its contractual obligations, the Procuring Entity sourced for fertilizer from a third party at a contractual price of Kshs. 3,500 which was cheaper compared to the Applicant's contractual price of Kshs. 3,980. Counsel maintained that this was to cushion farmers from any unavailability of fertilizer.

22. Mr. Mutemi submitted further that allowing the Request for Review would cost the taxpayer an extra 50% in the subsidy program while referring to a letter from the Ministry of Agriculture bringing the subsidy program to an end.

23. Counsel argued that ITT 32.3 under the Tender Document related to margin of preference and that indeed no margin of preference was provided for under the said Tender. It was his submission that the Procuring Entity was best suited to determine its procurement needs and accordingly customize its tender document to ensure suppliers participate on an equal footing.

He submitted that the reason the Tender Document limited joint venture partners to one was to enhance quality control, which had previously proven a challenge on the part of the Procuring Entity in its procurement of fertilizer. It was argued that restricting the JV partners to one enabled the Procuring Entity to limit the number of persons to monitor in performance of the contract.

24. Mr. Mutemi relied on ***Republic v Accounting Officer, Kenya Rural Roads Authority [2019] eKLR*** for the proposition that the aim of public procurement is to select a competent supplier with capacity to deliver on a project.

25. An argument was made that Section 167(4) restricts an Applicant from challenging the Procuring Entity's choice of procurement method. It was Counsel's submission in that respect, that, the Respondent knew what it

was looking for in the procurement and that the Board should not substitute itself for the 2nd Respondent.

Further that the Respondents through their Notice of Appointment of Advocates appointed Mr. Mutemi as its Advocate and that it was therefore immaterial to the proceedings whether or not Ms. Veronicah Shiundu was an employee of the Procuring Entity.

Applicant's Rejoinder

26. In a brief rejoinder, Counsel for the Applicant, Mr. Omollo emphasized that the Applicant was not challenging the choice of procurement method but was instead insisting that the Procuring Entity complies with the rules attendant to its chosen procurement method.
27. Further that Section 4 (1) of the Oaths and Statutory Declarations Act restricts Advocates from commissioning documents in court proceedings where they represent any parties or have an interest.

CLARIFICATIONS

28. The Board asked the Applicant to clarify on the relationship between the present tender and the tender for which the Applicant had a contract with the Procuring Entity. Counsel for the Applicant, Mr. Omollo responded that the Procuring Entity's budget meant for the previous tender would be diverted to the present tender.
29. The Board asked the Applicant whether the previous tender and the present tender could run concurrently. Counsel for the Applicant, Mr. Omollo answered in the negative arguing that allowing the present tender

to proceed would mean that the previous tender would have been overtaken by events.

30. The Board asked the Applicant to confirm if the present tender constituted an active breach of the contract under the previous tender to which Counsel for the Applicant answered in the affirmative.
31. The Board inquired from the Applicant on the forum where the breach of the previous contract lay. Counsel for the Applicant argued that the Board was one such fora in view of the fact that Section 174 of the Act makes the right to file a Request for Review an addition to any other remedy available to an applicant.
32. The Board asked why the Applicant did not bring any claim prior to the commencement of the subject tender. Counsel for the Applicant Mr. Omollo responded that this was because the Applicant and the Procuring Entity were attempting an amicable resolution of the matter and it is the advertisement of the present tender that triggered the present Request for Review.
33. Mr. Mutemi clarified to the Board that the fertilizer forming the subject of the subject tender was different from that in the previous tender for which the Applicant and the Procuring Entity have a contract.
34. Further that the Procuring Entity did not refuse to accept supply by the Applicant and that it is the Applicant that failed to comply with the distribution schedule that it was given.

35. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 21st August 2024 had to be determined by 11th September 2024. Therefore, the Board would communicate its decision on or before 11th September 2024 to all parties via email.

BOARD'S DECISION

36. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

I. ***Whether the Board has jurisdiction to hear and determine the instant Request for Review?***

In determining this, the Board will look into:

- i. **Whether the present Request for Review offends Section 167(4)(c) of the Act**
- ii. **Whether the present Request for Review offends Section 167(4)(a) of the Act?**

Depending on the Board's finding on Issue (1) above:

- II. ***Whether the Applicant has laid a proper basis for the Board to expunge the Respondents' affidavit from the record?***
- III. ***Whether the Tender Document in the subject tender offends the provisions of the Act?***
- IV. ***What orders should the Board issue in the circumstance?***



Whether the Board has jurisdiction to hear and determine the instant Request for Review?

37. Following the filing of the present Request for Review, the Respondents fronted a challenge to the Board's jurisdiction over the present Request for Review through a Preliminary Objection dated 26th August 2024. The Respondents contend that the instant proceedings offend the provisions of Section 167(4) of the Act.
38. Counsel for the Respondents, Mr. Mutemi submitted that Section 167(4) of the Act divested the Board of jurisdiction to hear and determine disputes on the choice of procurement method used by a Procuring Entity as well as disputes arising from contracts signed in accordance with Section 135 of the Act. He argued that the instant Request for Review was disguised as a tender dispute when in reality it was a contractual dispute between the parties arising from a contract in a related tender i.e. Tender No. NCPB/FERT/23/2023-2024 SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER FOR LONG RAINS 2023/2024 TY UNDER THE FERTILIZER SUBSIDY PROGRAM. Further, that the Applicant was fronting a challenge on the procurement method used in the subject tender yet the Act prohibited such a challenge from being fronted before the Board.
39. In contrast, the Applicant contended that the Preliminary Objection was misplaced while affirming that the Board had jurisdiction to hear and determine the instant Request for Review. Counsel for the Applicant Mr. Omollo, submitted that under Section 44 of the Act, the Accounting Officer has an obligation to ensure that a Procuring Entity complies with the provisions of the PFMA. Further that breach of the obligations under the PFMA entitled an Applicant to invoke the Board's jurisdiction under Section



167(1) of the Act. Therefore, according to the Applicant, the Procuring Entity's advertisement of the subject tender in the face of non-compliance with the contract with the Applicant constituted a breach under the PFMA, which entitled the Applicant to invoke the Board's jurisdiction. Mr. Omollo equally argued that the Applicant was not challenging the procurement method adopted in the subject tender but was simply insisting that the Procuring Entity abides by the rules of the chosen procurement method as stipulated in the Act.

40. For starters, this Board recognizes the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

41. The Black's Law Dictionary, 8th Edition, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

42. On its part, Halsbury's Laws of England (4th Ed.) Vol. 9 defines jurisdiction as:

"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

43. The locus classicus case on the question of jurisdiction is the celebrated case of *The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1* where Nyarangi J.A. made the oft-cited dictum:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

44. In the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR*, the Court of Appeal emphasized the centrality of the issue of jurisdiction and held that:

"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

45. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

"(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

46. Further, Section 28 of the Act provides for the functions of the Board as:

***The functions of the Review Board shall be—
reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

47. Further, a reading of Section 167 of the Act denotes the jurisdiction of the Board in the following terms:

"167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, 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...

(2)...

(3)...

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;



***(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and
(c) where a contract is signed in accordance with section 135 of this Act”***

48. Section 135 of the Act provides as follows:

135. Creation of procurement contracts

(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the



authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—

(a) Contract Agreement Form;

(b) Tender Form;

(c) price schedule or bills of quantities submitted by the tenderer;

(d) Schedule of Requirements;

(e) Technical Specifications;

(f) General Conditions of Contract;

(g) Special Conditions of Contract;

(h) Notification of Award.

(7) A person who contravenes the provisions of this section commits an offence.

49. Section 135 of the Act above, outlines requirements in the signing of a contract to include:

- i. The contract should to be signed within a tender's tender validity period.
- ii. The contract should not be signed before the lapse of the 14 days after a Procuring Entity sends to tenderers the notification of intention to award
- iii. The contract must at a minimum contain: Contract Agreement Form; Tender Form; price schedule or bills of quantities submitted by the tenderer; Schedule of Requirements; Technical Specifications; General Conditions of Contract; Special Conditions of Contract and Notification of Award.



50. From the above it would appear that whereas Section 167(1) of the Act outlines the jurisdiction of the Board in general terms Section 167(4) specifically divests the Board of jurisdiction over specific subject matters. Section 167(4) specifically removes the choice of procurement method; termination of procurement proceedings in accordance with Section 63 of the Act and contracts signed in accordance with Section 135 of the Act from disputes that the Board can adjudicate on.

51. The Respondents herein raised a Preliminary Objection based on the grounds of choice of procurement method and contracts signed in accordance with the Section 135 of the Act. These two grounds shall now be analyzed in turn in the following order which the Respondents adopted when arguing their preliminary objection:

- **Objection on account of a procurement contract being signed in accordance with Section 135 of the Act**

52. The Respondents took issue with the instant Request for Review arguing that it was a contractual dispute arising from Tender No. NCPB/FERT/23/2023-2024 SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER FOR LONG RAINS 2023/2024 TY UNDER THE FERTILIZER SUBSIDY PROGRAM that was being disguised as a tender dispute.

53. On the other hand, the Applicant contended that under Section 44 of the Act stipulated that the Accounting Officer had an obligation to ensure that the Procuring Entity complies with the provisions of the Act as well as those of the PFMA and that breach of any of the provisions entitled the Applicant to invoke the Board's jurisdiction under Section 167(1) of the Act. It was argued that the Procuring Entity had breached the provisions

of the PFMA by purporting to advertise the subject tender in the face of clear non-compliance with the contract signed by the Applicant and the Procuring Entity.

54. From the foregoing, the Board is invited to offer guidance on the applicability of Section 167(4)(c) of the Act to present set of facts. On this, the Board can do no better than draw from the guidance offered in multiple judgments by the superior Courts on our jurisdiction:

55. In ***Ederman Property Limited v Lordship Africa Limited & 2 others [2019] eKLR; Civil Appeal No. 35 of 2028*** the Court of Appeal considered an appeal stemming from a decision where this Board had held that it lacked jurisdiction on account of a procurement contract having been executed before the Request for Review was filed. The Board's decision was successfully challenged by way of judicial review at the High Court which held that the Board was duty bound to first satisfy itself that the contract being alluded to was in fact signed in accordance with Section 135 of the Act before it could hold that it lacked jurisdiction. In allowing the appeal, the Court of Appeal agreed with the High Court that this Board has to first satisfy itself that a procurement contract has been signed in accordance with Section 135 of the Act before downing its tools:

The learned Judge who heard the motion considered the way the 2nd respondent had dealt with the request for review. As we have shown in this judgment the Judge found that the 2nd respondent had misapplied the law in finding that it had no jurisdiction. The 3rd respondent had acted contrary to law by flouting clear provisions of the Act and had breached rules of

natural justice in treating the appellant in a different way from the way it treated the 1st respondent and another bidder. The appellant had been accorded what amounted to preferential treatment by being notified of success of its bid and a contract had been signed between the appellant and the 3rd respondent even before the period allowed for challenge had expired. The Judge found that the 2nd respondent was wrong not to examine the process employed in reaching the decision; that because a contract had been signed, the 2nd respondent lacked jurisdiction to deal with the request for review. The Judge correctly found in our view that the 2nd respondent was wrong to divest itself of jurisdiction when it had jurisdiction to examine whether the contract had properly been entered. That was a process issue and the law allowed the Judge in judicial review proceedings to examine the conduct of the 2nd and 3rd respondents and if they acted contrary to law, and it being a process issue, the High Court was entitled to interfere and correct the wrongs committed by the 2nd and 3rd respondents. The grounds of appeal in this respect must fail.

56. The above position was once again restated by the Court of Appeal in ***Public Procurement Administrative Board v Four M Insurance Brokers Limited & 3 others (Civil Appeal E1009 of 2023) [2024] KECA 79 (KLR)*** where the High Court was faulted for suggesting that this Board could not interrogate into the signing of a contract to establish whether it was in accordance with Section 135 of the Act before

establishing the position as regards the Board's jurisdiction over a Request for Review:

49. As already observed, the appellant's jurisdiction emanates from Section 167(1) of the Act. Section 167(4) provides matters that shall not be subject to the jurisdiction of the appellant and, Section 167(4) (c) of the Act specifically, ousts the appellant's jurisdiction where a contract is signed in accordance with Section 135 of the Act. Section 135 in this regard sets out various requirements to be met in the creation and signing of procurement contracts, and an ordinary and purposive interpretation of section 167(4) is that the appellant is required to inquire into whether a procurement contract has been signed in accordance with section 135 of the Act when deciding on whether it has jurisdiction to hear and determine a request for review filed before it in cases where a contract has already been signed, and its jurisdiction is only ousted once this preliminary inquiry establishes that the provisions on creation of a procurement contract under Section 135 of the Act have been met, or where it makes an error as to the existence of this statutory precondition...

51....Put another way, section 164(7) implies a jurisdiction on the part of the appellant to entertain an application as to whether a contract is signed in accordance with Article 135, and is meant to address the obvious mischief of the signing of illegal procurement contracts so as to oust the jurisdiction of the appellant. The Learned Judge of the superior Court therefore adopted a restrictive interpretation of the provisions of Section 167(4) (c) of the Act and erred in not



appreciating and considering the existence of the condition- precedent to the ouster of the appellant's jurisdiction where a contract has been signed. Accordingly, it is our finding that that the Learned Judge erred in law in holding that the appellant had no jurisdiction solely on the basis that a procurement contract had been signed without checking on compliance with Section 135 of the Act.

57. Drawing from the above pronouncements by the Court of Appeal and Section 135 of the Act, whenever a jurisdictional issue is fronted on account of Section 167(4)(c), the Board is required to first satisfy itself that the contract forming the basis of the Preliminary Objection was regularly signed in accordance with Section 135 of the Act. It is only in instances where the Board is satisfied that the contract was signed in compliance with Section 135 of the Act that it can down its tools. Conversely, in instances where the Board finds that the contract was not signed in accordance with Section 135 of the Act, it must affirm its jurisdiction over the tender dispute.
58. Turning to the instant Request for Review, it is not disputed that the contract between the Procuring Entity and the Applicant in respect of Tender No. NCPB/FERT/23/2023-2024 SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER FOR LONG RAINS 2023/2024 TY UNDER THE FERTILIZER SUBSIDY PROGRAM was signed in accordance with Section 135 of the Act. This position is confirmed by the Applicant's own pleadings and was also urged by Counsel for the Respondents.

59. Ground 1 at page 1 of the Request for Review reads:

1.The 1st Respondent has floated the subject tender for procurement of fertilizers under open international competitive tender without first complying with its obligations under existing and valid procurement contract (arising from Tender No. NCPB/FERT/23/2023-2024 SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER FOR LONG RAINS 2023/2024 TY UNDER THE FERTILIZER SUBSIDY PROGRAM (SFP) which was executed by and between the Applicant and the 2nd Respondent pursuant to section 135 of the Public Procurement and Asset Disposal Act. In so doing, the 1st Respondent has grossly violated his obligations under section 44 of the Public Procurement and Asset Disposal Act.

60. The import of the above Ground of the Request for Review is that it constitutes an express admission on the part of the Applicant that the contract forming the basis of Tender No. NCPB/FERT/23/2023-2024 SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER FOR LONG RAINS 2023/2024 TY UNDER THE FERTILIZER SUBSIDY PROGRAM was regularly signed as per the requirements of Section 135 of the Act. It would therefore follow that Section 167(4)(c) having divested the Board from entertaining disputes arising from contracts signed in accordance with Section 135 of the Act, the instant Request for Review in as far as it touches on the signed contract cannot form the subject of determination by this Board.

61. It may well be that the Applicant has genuine grievances as against the Respondents herein arising from the obligations under the signed

contract, but such grievances, if any, cannot form the subject of determination before this Board in light of the express provisions of Section 167(4) (c) of the Act.

62. The Board has keenly examined Annexure **SW-02** annexed to the affidavit of Susan Wangui Ngugi in support of the Request for Review. The annexure is the contract between the parties herein in respect of Tender No. NCPB/FERT/23/2023-2024 SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER FOR LONG RAINS 2023/2024 TY UNDER THE FERTILIZER SUBSIDY PROGRAM.

63. Clause 10 of the said contract offers a dispute resolution clause which reads in part:

10. Settlement of Disputes

10.1 The Procuring Entity and the Supplier shall make every effort to resolve amicably by direct negotiation any agreement or dispute arising between them under or in connection with the contract.

10.2 If, after thirty (30) days the parties have failed to resolve their dispute or difference by such mutual consultation, then either the Procuring Entity or the Supplier may give notice to the other party of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given. Any dispute or difference in respect of which a notice of intention to commence arbitration has been given in accordance with this clause shall be finally

settled by arbitration. Arbitration may be commenced prior to or after delivery of the Goods under the Contract.

10.3 Arbitration proceedings shall be conducted as follows:

...

10.4 Arbitration proceedings with national suppliers will be conducted in accordance with the Arbitration Laws of Kenya...

64. Flowing from the above, it is apparent that the parties herein designated a distinct dispute resolution forum in the event of a dispute arising from the obligations under the signed contract and are bound by the contract to resolve their disputes in the designated forum. Consequently, this ground of the Respondents' Notice of Preliminary Objection succeeds to the extent that the Request for Review relates to the concluded contract in **Tender No. NCPB/FERT/23/2023-2024 SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER FOR LONG RAINS 2023/2024 TY UNDER THE FERTILIZER SUBSIDY PROGRAM.**

65. In the circumstances, the Board finds that it lacks jurisdiction to hear and determine the instant Request for Review in as far as it relates to **Tender No. NCPB/FERT/23/2023-2024 SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER FOR LONG RAINS 2023/2024 TY UNDER THE FERTILIZER SUBSIDY PROGRAM.**

- **Challenge on the Choice of Procurement Method.**

66. The Respondents equally assailed the Request for Review arguing that under Section 167(4)(a) of the Act, the Applicant could not challenge the Procuring Entity's choice of procurement method in the subject tender before the Board. Differently, counsel for the Applicant submitted that the

applicant was not assailing the choice of procurement method as erroneously alluded to by the Respondent. He argued that instead, the Applicant's view was that once a Procuring Entity chose a particular procurement method, it was bound to follow the rules of that method as per the Act.

67. He urged further that in the present Request for Review, having chosen the Open International Tender method, the Procuring Entity was required to make it a requirement that citizen contractors are given a margin of preference but ITT 32.3 of the Tender Document was to the effect that there would be no margin of preference. He argued that this constituted a breach under section 70 (6) (e) of the Act and Regulation 144 of the Regulations 2020.
68. In the Board's view and based on the submissions by Counsel regarding this limb of the Preliminary objection, it is apparent that this challenge will require the Board to interrogate merits of the Request for Review on the specific requirements to complied with when floating an Open International Tender with regards to preference and reservation schemes and whether the Tender in question made provision for the same, which in turn would be required to be substantiated by evidence.
69. Having perused the Request for Review and the issues raised therein, we note that the question of choice of procurement method is tied to the Applicant's allegation that the Respondents in preparing the Tender Document failed to make provision for a margin of preference. Consequently, this Board thus finds it appropriate to tackle this issue not as a preliminary point of law, which it is not, but as a substantive issue to

be interrogated on its merits alongside the related issue of the Applicant's allegation that the Tender Document fell foul of the provisions of the Act and Regulations.

70. We take this direction appreciating that our legal system eschews dealing with Preliminary Objections that are tied with contested facts. This position was captured by the Court in ***Jamii Bora Kenya Limited v Esther Wairimu Mbugua & another [2019] eKLR***, where the court stated: -

"A preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...."

71. The Board will now proceed to determine the Request for Review in so far as it touches on the subject tender.

Whether the Applicant has laid a proper basis for the Board to expunge the Respondents' affidavit from the record?

72. During the hearing Counsel for the Applicant, Mr. Omollo made an application for the Board to expunge the Respondent's Memorandum of Response. According to Counsel, the Respondents' Memorandum of Response constituted an affidavit commissioned by Veronica M. Shiundu, whom Counsel alleged was an in-house counsel at the Procuring Entity and that this was in breach of Section 4 (1) of the Oaths and Statutory Declarations Act.
73. Counsel for the Respondents, Mr. Mutemi opposed this application arguing that the allegation was baseless since the Procuring Entity had appointed him to represent it in the matter and not Ms. Veronica Shiundu.
74. Section 4 of the Oaths and Statutory Declarations Act provides as follows:
- 4. Powers of commissioner for oaths***
- (1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:***
- Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or***

matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.

75. The proviso to Section 4 above forbids a Commissioner for Oaths from administering any oath or commissioning any affidavit in proceedings where they are representing a party or they are interested in.

76. Further, Section 107 of the Evidence Act encapsulates the established principle that "he who alleges must prove":

107. Burden of proof.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

77. It would therefore follow that the Applicant as the party alleging that Ms. Veronicah Shiundu was in the employment of the Procuring Entity shouldered the burden of demonstrating this fact by way of evidence. Unfortunately, the Applicant did not offer any evidence in support of the allegation that was orally made in passing during the hearing. Absent any evidence on Ms. Shiundu being in the employment of the Procuring Entity and having an interest in the present Request for Review, the Board cannot presume that the Respondents' Memorandum of Response offends Section 4 of the Oaths and Statutory Declarations Act.



78. In offering his clarifications to the Board, Counsel for the Applicant clarified that his submission that Ms. Shiundu is a legal officer employed by the procuring entity had not been opposed by Counsel for the Respondents. This submission can be interpreted to be that it was upon the Respondent to prove that indeed Ms. Shiundu was not an employee of the procuring Entity Ideally that the burden of proving that Ms. Shiundu was not an employee of the procuring entity had shifted to Counsel for the Applicants.
79. The incidence of burden operates such that a person who makes an allegation must lead evidence to prove the fact they allege. They bear the initial legal burden of proof which they must discharge. It is upon the party alleging to first prove their allegation before the other party can be called upon to discharge the evidential burden of disproving the allegation as made.
80. Turning to the present case, the Applicant did not lead any evidence as regards the employment status of Ms. Shiundu and the interest, if any, that the said Ms. Shiundu has in the present proceedings. Absent any evidence from the Applicant, it cannot be said that the evidential burden shifted to the Respondent. Accordingly, the Applicant failed to discharge its burden as required under law.
81. In view of the foregoing, the Board finds that the Applicant has not laid a proper basis for the Board to expunge the Respondents' affidavit from the record.

Whether the Tender Document in the subject tender offends the provisions of the Act?

82. The Respondents took issue with the instant Request for Review arguing it was challenging the choice of procurement method used in the subject tender in breach of Section 167(4)(a), enlisting the choice of procurement method as one of the matters the Board lacks jurisdiction over.
83. On its part the Applicant maintained that it was not challenging the procurement method adopted in the subject tender but was in fact insisting that the Procuring Entity should adhere to the rules attendant to the chosen procurement method. Specific to the procurement method, the Applicant decried that the subject tender did not make room for a margin of preference for citizen contractors as required of an Open International Tender at Sections 155 and 157 of the Act.
84. In order for the Board to pronounce itself on whether Section 167(4)(a) acts as a bar to the Board's jurisdiction, this Board will first have to interrogate whether the Procuring Entity in choosing to proceed with the subject tender under Open International Tender method complied with the Act's prescription on how to conduct Open International Tenders.
85. Section 89 of the Act is instructive on the conduct of international tenders in the following terms: ***89. International tendering and competition***
If there will not be effective competition for a procurement unless foreign tenderers participate, the following shall apply—
(a) the invitation to tender and the tender documents shall be in English;

(b) if the procuring entity is required to advertise the invitation to tender under sections 96(2) and 118(1), the procuring entity shall also advertise the invitation to tender in Kenya's dedicated tenders portal or one or more English-language newspapers or other publications that, together, have sufficient circulation outside Kenya to allow effective competition for the procurement;

(c) the period of time between the advertisement under paragraph (b) and the deadline for submitting tenders shall be not less than the minimum period of time prescribed for the purpose of this paragraph;

(d) the technical requirements shall, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade;

(e) a tenderer submitting a tender may, in quoting prices or providing security, use a currency that is widely used in international trade and that the tender documents specifically allow to be used; and

(f) where local or citizen contractors participate they shall be entitled to preferences and reservations as set out in section 155.

(g) any other conditions as may be prescribed.

86. From Section 89 (f) above, citizen or local contractors are entitled to preferences set out under Section 155 of the Act. The referenced Section 155 of the Act reads:

155. Requirement for preferences and reservations

(1) Pursuant to Article 227(2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part.

(2) Subject to availability and realisation of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and produced in Kenya shall be subject to preferential procurement.

(3) Despite the provisions of subsection (1), preference shall be given to—

(a) manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or

(b) firms where Kenyans are shareholders.

(4) The threshold for the provision under subsection (3) (b) shall be above fifty one percent of Kenyan shareholders.

(5) Where a procuring entity seeks to procure items not wholly or partially manufactured in Kenya—

(a) the accounting officer shall cause a report to be prepared detailing evidence of inability to procure manufactured articles, materials and supplies wholly mined or produced in Kenya; and

(b) the procuring entity shall require successful bidders to cause technological transfer or create employment opportunities as shall be prescribed in the Regulations.

87. From the above, Section 155 (3) (a) and (b) of the Act permit the granting of preference to cases where the goods being procured are locally manufactured or to firms whose shareholders are Kenyans.

88. Additionally, Section 157(8)(b) and (9) of the Act are instructive that during evaluation, a margin of preference should be extended to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya; or works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed:

157. Participation of candidates in preference and reservations

(1)

(2) ...

(8) In applying the preferences and reservations under this section—

(a) exclusive preferences shall be given to citizens of Kenya where—

(i) the funding is 100% from the national government or county government or a Kenyan body; and

(ii) the amounts are below the prescribed threshold;

(iii) the prescribed threshold for exclusive preference shall be above five hundred million shillings;

(b) a prescribed margin of preference shall be given—

(i) in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya; or

(ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.

(9) For the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.

89. Flowing from the foregoing provisions, it is apparent the Act contemplates that when the Open International Tender method is used, the Tender Document should have a margin of preference being extended to citizen contractors.

90. Turning to the subject tender, the Board has keenly studied the Tender Document in the subject tender and spotted that clause 3 under Section III-Evaluation and Qualification Criteria at page 29 provides for margin of preference in the following terms:

MARGIN OF PREFERENCE

3.1 If the TDS so specifies, the Procuring Entity will grant a margin of preference of 15% (fifteen percent) to Tenderers offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya. Goods assembled or semi-processed in Kenya shall have a local content of not less than 40%.

The margin of preference will be applied in accordance with, and subject to, the following provisions:

91. The above clause made the application of the margin of preference conditional on provision for it being made under the Tender Data Sheet.
92. The Board has equally spotted ITT 32.3 under Section II-Tender Data Sheet at page 24 of the Tender Document and the same reads:

SECTION II – TENDER DATA SHEET (TDS)

The following specific data shall complement, supplement, or amend the provisions in the Instructions to Tenderers (ITT). Whenever there is a conflict, the provisions herein shall prevail over those in ITT.

ITT 32.3 A margin of preference and/or reservation ["shall not"] apply.

93. From ITT 32.3 above, the Tender Document prescribed that the margin of preference did not apply to the subject tender. The Board finds fault in the exclusion of the application of a margin of preference in the subject tender which has been advertised as an international tender, with regards to which, the Act prescribes should contain a margin of preference for citizen contractors.
94. The above finding mirrors the Boards finding in ***PPARB Application No. 12 of 2021; Five Blocks Enterprises Limited v Managing Director, KEBS and another*** wherein the Board held:

Notably, section 157 (8) (b) (ii) of the Act categorically states that a prescribed margin of preference 'shall' be applied in the procurement of interalia services depending on the

percentage of shareholding of the locals on a graduating scale as prescribed in Regulation 164 of the Regulations 2020, giving the impression that it is necessary (rather than discretionary) in international tendering and competition for the Procuring Entity to provide for a margin of preference in the subject tender, if applicable, and failure to do so would amount to breach on the part of the Procuring Entity.

In this regard therefore, the Board finds that the Procuring Entity breached the provisions of section 158 of the Act read together with section 157 (8) (b) (ii) of the Act and Regulation 164 of the Regulations 2020 for failure to provide for a margin of preference in the Tender Document.

95. The Board finds that the Procuring Entity needs to clarify on and provide for a margin of preference in the Tender Document for citizen contractors. We are equally alive to Section 75 of the Act which speaks to modifications of the Tender Document by the Procuring Entity:

75. Modifications to tender documents

(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.

(2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.

(3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.

(4) The addendum shall be deemed to be part of the tender documents.

(5) If the tender documents are amended when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, or the time remaining is less than the period indicated in instructions to tenderers, the accounting officer of a procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.

96. Section 75 above permits a Procuring Entity to amend a Tender Document any time before the deadline for submitting of tenders, on its own initiative or in response to an inquiry by a candidate or tenderer, through the issuance of an Addendum without materially changing the substance of the original Tender Document. The Addendum is deemed to be part of the original Tender Document and the Accounting Officer is mandated to extend the tender submission deadline to allow candidates and tenderers to factor in the alterations made to the Tender Document in the preparation of their bids.

97. The Board has also taken note that the item which is the subject of procurement in the subject tender is planting and top-dressing fertilizer, which facilitate food production and food security in our country. It would therefore be prudent that the procurement proceedings in the subject tender are concluded in a timely fashion to avert a scenario where there is no fertilizer in the country when the planting season sets in. Accordingly, the Board finds it appropriate to direct the Procuring Entity

which it hereby does to urgently and as a matter of priority issue an Addendum to the Tender Document directing interested suppliers on the applicability of a suitable margin of preference in the subject tender.

What orders the Board should grant in the circumstances?

98. The Board has found that Section 167(4) divests it the jurisdiction to hear and determine the instant Request for Review in as far as it relates to Tender No. NCPB/FERT/23/2023-2024 SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER FOR LONG RAINS 2023/2024 TY UNDER THE FERTILIZER SUBSIDY PROGRAM.
99. The Board has equally found that the Applicant has not laid a proper basis for it to expunge the Respondents' affidavit from the record.
100. Additionally, the Board has found that the Tender Document in the current tender requires clarification by issuance of an apt addendum to address the question of the margin of preference in the tender for citizen contractors.
101. The upshot of our finding is that the Request for Review dated 21st August 2024 in respect of Tender No. NCPB/FERTILIZER/01/2024-2025 for Supply and Delivery of Various Types of Fertilizer on Consignment Based Contractual Agreement Under Fertilizer Subsidy Program partially succeeds in the following specific terms:



FINAL ORDERS

102. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 21st August 2024:

1. The Notice of Preliminary Objection dated 26th August 2024 be and is hereby upheld to the extent that it relates to issues concerning Tender No. NCPB/FERT/23/2023-2024 SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER FOR LONG RAINS 2023/2024 TY UNDER THE FERTILIZER SUBSIDY PROGRAM.

2. The 1st Respondent be and is hereby directed to issue an Addendum to the Tender Document in respect of Tender No. NCPB/FERTILIZER/01/2024-2025 for Supply and Delivery of Various Types of Fertilizer on Consignment Based Contractual Agreement Under Fertilizer Subsidy Program so as to provide for clarity on and a margin of preference for citizen contractors.

3. The 1st Respondent be and is hereby directed to extend the tender submission deadline for a further 7 days from the date of issuance of the Addendum referred in (2) above and proceed with Tender No. NCPB/FERTILIZER/01/2024-



2025 for Supply and Delivery of Various Types of Fertilizer on Consignment Based Contractual Agreement Under Fertilizer Subsidy Program to its lawful and logical conclusion thereafter, taking note of our findings in this decision.

4. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 5th Day of September 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB



