

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 90/2024 OF 17TH SEPTEMBER 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; and Amended Tender No. NCPB/FERTILIZER/01/2024-2025 for Supply and Delivery of Various Types of Fertilizer on Consignment Based Framework Contractual Agreement Renewable Every Season for a Period of Two Years Under Fertilizer Subsidy Program.

BOARD MEMBERS PRESENT

- | | | |
|-----------------------------------|---|-------------|
| 1. Mr. George Murugu FCI Arb, I.P | - | 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

RESPONDENTS

**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 bids 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 Open International Tender method. The tender had a tender closing date of Monday, 26th August 2024 at 12:00 noon.

REQUEST FOR REVIEW NO. 81 OF 2024

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 seeking the following orders:

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 fertilizers 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. The Board heard parties on the Request for Review and on 6th September 2024 delivered a Decision with the following final orders:

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/FERT/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/FERT/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.

Addenda

4. On various dates between 6th and 13th September 2024 the Procuring Entity issued multiple addenda offering clarity on the provisions of the Tender Document. According to the 4th Addendum issued on 13th September 2024, the tender closing date was set as Thursday, 19th September 2024.

Submission of Bids and Tender Opening

5. According to the signed Tender Opening Minutes dated 19th September 2024, submitted under the Confidential File submitted by the Procuring

Entity, the following thirty-six (36) bidders were recorded as having submitted their bids in response to the subject tender by the tender submission deadline:

| # | Name of Bidder |
|-----|--------------------------|
| 1. | Sahman Global |
| 2. | Yara EA Limited |
| 3. | Catemo Holdings |
| 4. | Balbans Group Investment |
| 5. | Ageno Group |
| 6. | Shabeel K Limited |
| 7. | ETG |
| 8. | Maisha Minerals |
| 9. | Zanckie Limited |
| 10. | Elgon (K) Limited |
| 11. | Hooose Farm |
| 12. | Chiromo Fertilizer |
| 13. | First Quality Supplies |
| 14. | Vision Energy |
| 15. | Affcott Ventures |
| 16. | Moiben Marketing Limited |
| 17. | Moiben Connections |

| | |
|-----|----------------------------|
| 18. | Lachlan K |
| 19. | Plan & Trend |
| 20. | Tiriki Agriscience |
| 21. | Itracom |
| 22. | Midgulf Fertilizer |
| 23. | Dutron Limited |
| 24. | Alida Supplies |
| 25. | Home Fix |
| 26. | Chorus Merchants |
| 27. | High Point |
| 28. | OCP Kenya |
| 29. | Al Hudha Construction |
| 30. | The Dante Logistics |
| 31. | Saco Ventures |
| 32. | SLDR International Limited |
| 33. | Purma Limited |
| 34. | Balimend |
| 35. | Mediterranean Fertilizers |
| 36. | Jeko Limited |

6. However, before the Evaluation Committee could undertake evaluation of the bids received in the subject tender, the procurement process in the subject tender was stopped following the filing of the instant Request for Review.

REQUEST FOR REVIEW

7. On 17th September 2024, the Applicant through the firm of Sigano & Omollo Advocates LLP filed a Request for Review dated 16th September 2024 supported by an affidavit sworn on 16th September 2024 by Susan Wangui Ngugi, a Director at the Applicant, seeking the following orders from the Board in verbatim:

a) The Amended Tender Document for Tender No. NCPB/FERTILIZER/01/2024-2025- AMENDED; FOR SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER ON CONSIGNMENT BASED FRAMEWORK CONTRACTUAL AGREEMENT RENEWABLE EVERY SEASON FOR A PERIOD OF TWO YEARS UNDER FERTILIZER SUBSIDY PROGRAM be and are hereby annulled in entirety and set aside;

b) The Accounting Officer's Addendum II dated 6th September 2024 which materially alters the substance of the original Tender Number NCPB/FERTILIZER/01/2024-2025-SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER ON CONSIGNMENT BASED CONTRACTUAL AGREEMENT UNDER FERTILIZER SUBSIDY PROGRAM be are hereby annulled in entirety and set aside;

- c) The Accounting Officer's Addendum IV dated 13th September 2024 which materially alters the substance of the original Tender Number NCPB/FERTILIZER/01/2024-2025-SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER ON CONSIGNMENT BASED CONTRACTUAL AGREEMENT UNDER FERTILIZER SUBSIDY PROGRAM be are hereby annulled in entirety and set aside;***
- d) The Accounting Officer of National Cereals and Produce Board be and is hereby directed to issue a fresh addendum for Tender Number NCPB/FERTILIZER/01/2024-2025-SUPPLY AND DELIVERY OF VARIOUS TYPES OF FERTILIZER ON CONSIGNMENT BASED CONTRACTUAL AGREEMENT UNDER FERTILIZER SUBSIDY PROGRAM in compliance with the decision of the Public Procurement Administrative Review Board in Review Application No. 81 of 2024.***
- e) 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;***
- f) Any other relief that the Board may deem fit and just to grant;***



g) Costs of the Review.

8. In a Notification of Appeal and a letter dated 17th September 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 17th September 2024.
9. On 20th September 2024, the Respondents filed their Memorandum of Response sworn on 20th September 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 20th September 2024. The Respondents equally forwarded to the Board the Confidential Documents under Section 67(3) of the Act
10. On 23rd September 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 25th September 2024 at 2:30 p.m. through the link availed in the said Hearing Notice.



11. On 25th September 2024 at 2:30 p.m., when the Board convened for the online hearing, all parties were present and represented by their respective Advocates.
12. The Board read through a list of the documents filed in the matter and asked parties to confirm having filed and been served with the said documents, to which Counsel confirmed in the affirmative. Thereafter, the Board directed that since the Respondents had a 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.
13. The hearing proceeded as per the directions of the Board and below is a summary of the parties' respective submissions.

PARTIES SUBMISSIONS

Respondents' Submissions on the Preliminary Objection

14. Counsel for the Respondents, Mr. Mutemi, argued that the present Request for Review offends the doctrine of res judicata under Section 7 of the Civil Procedure Act. Reliance was made on the case of **John**

Florence Maritime Limited & another v Cabinet Secretary Transport and Infrastructure and 3 Others [2015]eKLR where it was explained that the doctrine of res judicata underpins the position that there should be an end to litigation and parties should be shielded from a multiplicity of litigation over the same subject matter.

15. He argued that for one to prove res-judicata they must satisfy the following conditions:

- i. The parties to a case must be the same;
- ii. The parties must be litigating under the same title;
- iii. The issues raised must have been substantially in issue ; and
- iv. There has to be judgment issued in finality on the issues.

16. He argued that the above conditions were present in the instant case since:

- i. The parties to the instant Request for Review are the same as those in Request for Review No. 81 of 2024;
- ii. The parties herein are litigating under the same titles they were litigating under in Request for Review No. 81 of 2024;
- iii. The issues raised herein were substantially in issue in Request for Review No. 81 of 2024. In both cases the Applicant raises the issue of margin of preference; and
- iv. This Board issued a Decision in Request for Review No. 81 of 2024 addressing the issues arising therein which are also arising in the present proceedings.

17. Mr. Mutemi further argued that this Board lacked jurisdiction under Section 167(4)(a) of the Act since the Applicant was challenging the

Procuring Entity's choice of procurement method, a subject the Act excludes from the jurisdiction of the Board.

18. Counsel urged that the present proceedings were an abuse of the Board's proceedings and were premature as the Applicant had not exhausted all available remedies before approaching the Board. Specifically, clause 6.1 of the Tender Document which made room for clarifications. Therefore, he urged the Board to strike out the Request for Review in limine.

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

19. Counsel for the Applicant, Mr. Omollo, opposed the Preliminary Objection arguing that the Applicant was not challenging the choice of procurement method but the manner in which the Procuring Entity was going about the chosen procurement method. Further that the present Request for Review is different from Request for Review No. 81 of 2024 as it addresses the Respondents' non-compliance with the Board's Directions in Request for Review No. 81 of 2024. Additionally, that the ground of the Preliminary Objection urging that the present proceedings constituted an abuse of the Board's processes did not constitute a pure point of law and thus ought to have been raised through an application to strike out the Request for Review and not a Preliminary Objection.
20. Mr. Omollo submitted that there was nothing under Section 167(1) of the Act that obligated the Applicant to seek a clarification from the Procuring Entity before moving the Board. That in the event the Applicant took that route, time for bringing the Request for Review would run out. Further that in the event that the Procuring Entity entertained clarifications 7 days



to the close of the subject tender, the same would have been an irregularity.

21. Mr. Omollo contended that this Board in Request for Review No. 81 of 2024 directed the Respondents to issue an addendum providing for a margin of preference on a graduated scale to citizen contractors. He argued that under the Act, a margin of preference has 2 elements i.e. goods manufactured or assembled locally and companies whose shareholding consists of local citizens. Counsel argued that the Respondents only made provision for a margin of preference with respect of locally sourced goods while ignoring the other component of local shareholding of companies.
22. It was Counsel's argument that the Respondents had admitted in their pleadings before the Board that the goods forming the subject of procurement were not manufactured locally and thus the provision of a margin of preference on locally sourced material was inconsequential.
23. He argued that whereas the Board directed the Procuring Entity not to issue an addendum that materially altered the Tender Document, the Procuring Entity in fact issued an Amended Tender Document that significantly increased the quantities of the fertilizer being procured from 1 Million bags to 4.9 Million bags. Further that instead of providing for a margin of preference, it introduced a reservation scheme for international bidders and that the reservation scheme did not comply with the requirements of the Act in terms of spelling out the criteria to be met by bidders.

24. He contended that the Applicant had specifically pleaded how the Procuring Entity ought to have complied with the 40% local content requirement under the Act but the Amended Tender Document did not make provision as to how the same was to be complied with.
25. Counsel refuted the suggestion that the Applicant was trying to dictate how the Tender Document was to be prepared arguing that he only wanted the Tender Document to adhere to the provisions of the Act. This he argued was because this Board had in multiple Decisions held that Applicants should move the Board at the earliest opportune time they discover a breach of the Act. He indicated that the Amended Tender Document breached the provisions of the Act.
26. He therefore urged the Board to allow the Request for Review and find the Amended Tender Document a nullity as it was made in breach of the Decision by the Board in request for Review No. 81 of 2024.

Respondents' Submissions on the Request for Review

27. Counsel for the Respondents, Mr. Mutemi, argued that the Applicant had while terming the amendments "material alterations" not offered a definition of what amounts to material alteration. While referring to the Black's Law Dictionary, he argued that an alteration can only be deemed as material if it significantly makes something different with no tendency to produce the same effect. He contended that this was not the current case as the subject tender still remained that of procuring fertilizer. Counsel submitted on the difference between chemically compounded fertilizer and blended fertilizer being that whereas the former undergoes a scientific process that results in the required elements being present in

each granule, the latter only undergoes a manual mixing of the different elements with the result that the individual granules contain different elements.

28. He contended that in compliance with the Board's Decision in Request for Review 81 of 2024, the Respondents had introduced a 15% margin of preference at ITT 32.3 at page 116 of the Amended Tender Document. He argued that the 15% was actually anchored on Regulation 164(b) of the Regulations 2020. Counsel argued that this Board did not provide that the margin of preference had to be 40% as argued by the Applicant at Ground 7 of the Request for Review.
29. It was Counsel's contention that the use of framework agreement in place of consignment based agreement was not a material alteration as they both meet a common end. He indicated that under a consignment based agreement the successful bidder is issued with a contract with specified quantities to supply together with the specific distribution centers. Further, under a framework agreement the Procuring Entity and the successful bidder agree on a supply for a specified period where the quantities and delivery schedules are not determined from the outset. That in either case, upon contracting, the successful bidder is given the quantities to supply.
30. Mr. Mutemi argued that the Applicant had confirmed that they are registered under the Persons With Disability Category of AGPO and thus they did not stand to be prejudiced.

31. Counsel further argued that the Addenda were publicized on the Public Procurement Portal in accordance with Clause 7.2 of the Tender Document. Accordingly, the Respondents sought for the Request for Review to be dismissed.

Applicant's Rejoinder

32. In a brief rejoinder, Counsel for the Applicant, Mr. Omollo argued that there had been a misrepresentation by the Respondents on the Board's finding in Request for Review No. 81 of 2024. He contended that the correct position was that under Section 157(8)(b), and 116 of the Act and Regulation 164(b) of the Regulations 2020 the margin of preference was to be on a graduated scale.
33. He contended that the Procuring Entity could not apply the margin of preference limb on sourcing of local content and ignore the other one on citizen contractors and Regulation 164 does not make the 2 limbs disjunctive.
34. Further that framework agreements are provided for under Section 92 of the Act and that that required there being a minimum of 7 alternative suppliers per item.
35. Additionally, that the reservation scheme including Persons With Disability as provided for would require them to offer a tender security equivalent to Kshs. 100 Million just like the international firms.

36. Further that if there was a reservation scheme, the same was not to be advertised but would simply be inserted in the amended Tender Document.

CLARIFICATIONS

37. The Board asked the Respondents to confirm why they changed from a consignment based agreement to a framework agreement and whether this amounted to a material alteration. Counsel for the Respondents, Mr. Mutemi indicated that this did not constitute a material alteration arguing that the case would be different if the procurement was changed to locally blended fertilizer only. He maintained that the framework agreement was meant to bring onboard local suppliers who could supply the fertilizer blends.
38. The Board asked the Respondents to comment on the allegation that they had not complied with the Act in respect of the preference schemes. Counsel for the Respondents, Mr. Mutemi argued that the Procuring Entity provided for a margin of preference of 15%, which introduction was to cater to local suppliers who had raised concerns of being left out in the procurement process.
39. The Board asked the Respondents whether the Procuring Entity had changed the procurement method to which Counsel for the Respondents, Mr. Mutemi responded in the negative. According to Counsel, use of a framework agreement was a different means to get to the same end.
40. The Board asked the Respondents why they never used the framework agreement from the outset. Counsel for the Respondents, Mr. Mutemi

indicated that its use was informed by the agitation by local manufacturers that they too wished to participate in the subject tender.

41. The Board asked the Respondents whether the Amended Tender Document met the requirement of framework agreements as a procurement method to which Counsel for the Respondents, Mr. Mutemi answered in the affirmative.
42. The Board inquired from the Applicant whether it was a candidate in the subject tender which Counsel for the Applicant, Mr. Omollo, affirmed it was a candidate.
43. The Board observed that from the Respondents' response over 30 firms had participated in the subject tender and thereafter inquired on what was unique about the Applicant's position on the subject tender. Counsel for the Applicant, Mr. Omollo argued that the Applicant is a vigilant candidate and it considered challenging the current breaches instead of waiting to bring them in the event their bid was subsequently disqualified.
44. The Board asked the Applicant to explain why he considered that the margin of preference applicable to his client was that which was provided for under Regulation 164(a) as opposed to any other way of deriving a margin of preference. Counsel for the Applicant, Mr. Omollo, argued that Regulation 164 provides for conjunctive provisions including preference for citizen contractors.
45. The Board asked the Applicant on the stage of evaluation at which the margin of preference was to be applied. Counsel for the Applicant, Mr.

Omollo pointed out that the margin of preference ought to be provided for in the Tender Document for it to be applied during the evaluation. Failure to provide for it makes it inapplicable as an evaluation criteria.

46. The Board inquired from the Applicant, the prejudice it would suffer and whether the margin of preference ought to be higher. Counsel for the Applicant Mr. Omollo argued that the margin of preference ought to be higher and that local firms stood to suffer if they were allowed to compete against international firms without the prescribed margin of preference. Further that the Amended Tender Document did not provide for a joint venture and thus it was even impossible for partnerships with international firms.
47. The Board asked the Procuring Entity on how it had provided for the local firms and 40% local content. Counsel for the Procuring Entity, Mr. Mutemi, indicated that Lot 6 gave guidance to local firms on how they would ensure that they can compete alongside the international firms.
48. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 17th September 2024 had to be determined by 8th October 2024. However, owing to the urgency of the goods forming the subject of procurement, the Board would communicate its decision before the said date of 8th October 2024 to all parties via email.

BOARD'S DECISION

49. 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 the principle of res judicata?**
- iii. **Whether the instant Request for Review is an abuse of the Board's processes?**

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

II. ***Whether the Respondents complied with the Board's Directions in Request for Review No. 81 of 2024?***

III. ***What orders should the Board issue in the circumstance?***

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

50. 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 20th September 2024. The Respondents contend that the Board lacks jurisdiction as the instant proceedings offend the principle of res judicata, the Applicant was

challenging the Procuring Entity's choice of procurement method and that the proceedings were an abuse of the Board's processes.

51. 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.

52. 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."

53. 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."

54. 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."

55. 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...."

56. 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."

57. 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."***

58. 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) ...

59. The Board shall now consider the individual grounds of the Preliminary Objection in turn:

- **Objection on the Request for Review offending the doctrine of res judicata**

60. Counsel for the Respondents, Mr. Mutemi, argued that the present Request for Review offended the doctrine of res judicata since the parties were the same as those in Request for Review No. 81 of 2024, were also litigating under the same title and over the same issues, which were finally adjudicated upon and a decision rendered by this Board.
61. In contrast, Counsel for the Applicant, Mr. Omollo, argued that the present Request for Review was distinct from that in Request for Review No. 81 2024 as it relates to the Respondents' non-compliance with the Board's orders of 5th September 2024.
62. From the foregoing, the Board is invited to determine whether the Request for Review was res judicata.
63. Section 7 of the Civil Procedure Act underpins the doctrine of res judicata in the following terms:

7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

64. The Court of Appeal in ***Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR*** spelt out the essential ingredients of a plea of res judicata :

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

65. The import of the above provisions and case law is that the doctrine of *res judicata* ousts the jurisdiction of a court to try any suit or issue which had finally been determined by a court of competent jurisdiction in a former suit involving the same party or parties litigating under the same title. This doctrine is founded on the fundamental belief that there should be an end to litigation. The doctrine is meant to protect public interest so that a party is not endlessly dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction and also save on precious time and public resources that go into funding courts, tribunals, quasi-judicial bodies and administrative bodies that are funded by the tax payers.

66. In essence, to successfully plead the bar of *res judicata*, a party must prove that (a) the suit or issue under consideration is directly or substantially in issue in a former suit; (b) the former suit was between the same parties or parties claiming through them; (c) the parties were litigating under the same title; (d) the issue was heard and determined in a former suit; and (e) the court that determined the former suit was competent.

67. Turning to the instant Request for Review the following, the following are apparent:

- i. The parties under the present Request for Review are the same as those in Request for Review No. 81 of 2024;
- ii. The parties are also litigating under the same title;
- iii. Request for Review No 81 of 2024 was heard and determined on 5th September 2024
- iv. However, the issues under consideration in the present Request for Review are distinct from those under Request for Review No. 81 of 2024. Whereas Request for Review No. 81 of 2024 was challenging the failure to include a margin of preference for citizen contractors, the present Request for Review challenges the manner in which the Respondents appear to have implemented the Board's directions on the inclusion of a margin of preference in the subject tender.

68. The Board appreciates that for a plea of res judicata to succeed all the essential ingredients have to be present. In the present proceedings the Respondents have not satisfied the requirement on similarity of issues. Accordingly, the plea of res judicata cannot be sustained and thus this Ground of the Preliminary Objection fails.

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

69. 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.

70. The Applicant on its part maintained that it did not challenge the chosen procurement method but was in fact faulting the manner in which the chosen procurement method was being implemented.
71. This Board is mindful of Section 167 of the Act on the jurisdiction of the Board as well as matters which the said provision ousts the Board's jurisdiction over under Section 167(4).

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 within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(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) ...

(c) ...

72. From the above the Act expressly ousts the jurisdiction of the Board in respect of the subject of choice of procurement method by a Procuring Entity. It would therefore follow that where an Applicant brings forth a

Request for Review purely on the basis of the choice of a procurement method, the Board will down its tools.

73. Turning to the present case, Counsel for the Applicant was emphatic that he was not challenging the choice of procurement method. The Board has keenly studied the grounds of the Request for Review and agrees with Counsel for the Applicant that the Applicant is not challenging the Procuring Entity's choice of procurement method but the manner in which it was implemented. By that fact alone, this Ground of the Preliminary Objection must fail.

74. In any event, there was no material change in the procurement method adopted by the Respondents in the subject tender. Whereas the original Tender Document was described as an Open tender (international) using the "Consignment-based" procurement method, the Amended Tender Document uses the Open tender (international) using the framework agreement tender method. The subject tender remained an open (international) tender.

75. Clause 3 at page 2 of both the original Tender Document and the Amended Tender Document are identically worded:

3.Tendering will be conducted under Open International Competitive method using a standardized tender document. Tendering is open to all eligible, qualified and interested Tenderers.

76. From the above clause 3 in both the original and amended Tender Documents the procurement method remains open (international) tender method.

77. Section 92 of the Act prescribes the procurement methods available to Procuring Entities in the following terms:

92. Methods of procurement

(1) Subject to this Act and prescribed provisions, an accounting officer of a procuring entity shall procure goods, works or services by a method which may include any of the following—

(a) open tender;

(b) two-stage tendering;

(c) design competition;

(d) restricted tendering;

(e) direct procurement;

(f) request for quotations;

(g) electronic reverse auction;

(h) low value procurement;

(i) force account;

(j) competitive negotiations;

(k) request for proposals;

(l) framework agreements; and

(m) any other procurement method and procedure as prescribed in regulations and described in the tender documents.

78. Under Section 114(1) of the Act, a Procuring Entity can enter into a framework open tender:

114. Framework agreement

(1) A procuring entity may enter into a framework agreement open tender if—

(a) the procurement value is within the thresholds prescribed under Regulations to this Act;

(b) the required quantity of goods, works or non-consultancy services cannot be determined at the time of entering into the agreement; and

(c) a minimum of seven alternative vendors are included for each category.

79. Flowing above it would suffice that the subject tender remained an open (international) tender with application of framework agreement as provided for under Section 114 of the Act. Noting that there was no material change in the procurement method, the Respondents cannot be heard to allege that the Applicant is challenging the choice of procurement method when no such change in choice of procurement method exists. Accordingly, this challenge as presented in the Preliminary Objection must fail.

• Challenge on instant proceedings being an abuse of the Board's processes

80. The Respondents challenged the present Request for Review arguing that it constituted an abuse of the Board's processes. Counsel for the Respondents' Mr. Mutemi, argued that present proceedings were premature as the Applicant had not exhausted all available remedies before approaching the Board. Specifically, he argued that the Applicant

had not utilized Clause 6.1 of the Tender Document which made room for clarifications.

81. The Applicant faulted this Ground of the Request for Review as being unmerited as it did not constitute a pure point of law. Counsel for the Applicant, Mr. Omollo, submitted that the ground called for the adducing of evidence and ought to have been raised under an application for striking out the Request for Review as opposed to a Preliminary Objection.
82. Further, it was Counsel's contention that there was nothing under Section 167(1) of the Act that obligated the Applicant to seek a clarification from the Procuring Entity before moving the Board. That if the Applicant were to seek clarification, time for bringing the Request for Review would run out since time does not stop running at the instance of a clarification. Counsel further argued that in the event that the Procuring Entity entertained clarifications 7 days to the close of the subject tender, the same constituted an irregularity.
83. For starters, Section 167 of the Act and Regulation 203 of the Regulations 2020 offer guidance in the filing of Requests for Review. Section 167 of the Act reads:

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 within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the

procurement process, or disposal process as in such manner as may be prescribed.

(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract:

Provided that this shall not apply to tenders reserved for women, youth, persons with disabilities and other disadvantaged groups.

(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.

84. On its part Regulations 203 of the Regulations 2020 provides as follows:

203. Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

(b) be accompanied by such statements as the applicant considers necessary in support of its request;

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.

85. The above provisions speak to Requests for Review in terms of their filing, processing, hearing, form and contents. None of the above provisions makes clarification a prerequisite for invoking the Board's jurisdiction.

86. In ***Republic v Public Procurement Administrative Review Board; Iansoft Technologies Limited (Exparte Applicant); Accounting Officer National Cereals & Produce Board & another (Interested Parties) (Judicial Review Miscellaneous Application E073 of 2023) [2023] KEHC 21894 (KLR)*** the High Court affirmed that deliberations between a bidder and the Procuring Entity after the discovery of a breach of the law on the part of the Procuring Entity do not stop the running of time under Section 167(1) of the Act:

69. It is my finding that the ex parte Applicant is misleading the Honourable Court that they did not have sufficient information on the alleged breaches to enable them to make

an informed decision on whether to seek administrative review in time.

70. What the Applicant ought to have done which it failed to do as they engaged in meetings was to set a Section 167 (1) the Public Procurement and Asset Disposal Act alarm or a reminder" behind the scene that would have reminded it that: "...it had to seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process"...

...

74. The Ex Applicant cannot argue that it had a legitimate expectation in the circumstances. Indolence are the biggest enemy of the doctrine of legitimate expectation. The fourteen days' window is cast on stone and no amount of deliberations or discussions in can generate reasons for the enlargement of time or create a legitimate expectation for an aggrieved party. The Exparte Applicants' issues were raised before a public body which had no mandate to make a promise which goes against the express letter of the law. To allow the Applicants argument would water down the doctrine of legitimate expectation and render Section 167 (1) the Public Procurement and Asset Disposal Regulations Act otiose. This court will not countenance that.

87. Drawing from the above it is apparent that upon the discovery of a breach on the part of a Procuring Entity, an Applicant should file a Request for Review within 14 days noting that time spent on any deliberations subsequent to the discovery of the breach forms part of the 14 day's

timeline. It therefore suffices to state that the Applicant in the present Request for Review was not bound to seek any clarification from the Procuring Entity as alleged by Counsel for the Respondents. It would therefore follow that this Ground of the Preliminary Objection equally fails.

88. In view of the foregoing the Board finds that it has jurisdiction over the present Request for Review, which shall then be considered on its merits.

Whether the Respondent complied with the Board's Directions in Request for Review No. 81 of 2024?

89. Central to the present Request for Review is the Applicant's complaint that the Respondents have failed to comply with this Board's Decision in Request for Review No. 81 of 2024. Counsel for the Applicant, Mr. Omollo contended that this Board in Request for Review No. 81 of 2024 directed the Respondents to issue an addendum providing for a margin of preference on a graduated scale to citizen contractors. He argued that whereas under the Act, a margin of preference has 2 elements i.e. goods manufactured or assembled locally and companies whose shareholding consists of local citizens, the Respondents only made provision for a margin of preference with respect of locally sourced goods while ignoring the other component of local shareholding of companies. Further, that matters were compounded by the fact that the Respondents had admitted in their pleadings before the Board that the goods forming the subject of procurement were not manufactured locally and thus the provision of a margin of preference on locally sourced material was inconsequential.

90. Counsel further argued that whereas the Board directed the Procuring Entity not to issue an addendum that materially altered the Tender Document, the Procuring Entity in fact issued an Amended Tender Document that significantly increased the quantities of the fertilizer being procured from 1 Million bags to 4.9 Million bags. Further that instead of providing for a margin of preference, it introduced a reservation scheme for international bidders and that the reservation scheme did not comply with the requirements of the Act in terms of spelling out the criteria to be met by bidders.
91. The Respondents contended that they had complied with the Board's Decision in Request for Review No. 81 of 2024. Counsel for the Respondents Mr. Mutemi, argued that there were no material changes made to the tender noting that it was still on procurement of fertilizer. It was his contention that blended fertilizer was added as procurement item in addition to chemically compounded fertilizer so as to give local manufacturers an opportunity to compete in the subject tender.
92. Counsel for the Respondents argued that pursuant to Regulation 164(b), the Respondents introduced a 15% margin of preference at ITT 32.3 at page 116 of the Amended Tender Document in compliance with the Board's Decision in Request for Review 81 of 2024. Counsel argued that this Board did not provide that the margin of preference had to be 40% as argued by the Applicant at Ground 7 of the Request for Review.
93. It was Counsel's contention that the use of a framework agreement in place of consignment based agreement was not a material alteration as they both meet a common end. He indicated that under a consignment



based agreement the successful bidder is issued with a contract with specified quantities to supply together with the specific distribution centers. Further, under a framework agreement the Procuring Entity and the successful bidder agree on a supply for a specified period where the quantities and delivery schedules are not determined from the outset. That in either case, upon contracting, the successful bidder is given the quantities to supply.

94. Mr. Mutemi argued that the Applicant had confirmed that they are registered under the Persons With Disability Category of AGPO and thus they did not stand to be prejudiced.

95. Drawing from the above rival positions, the Board is invited to make an inquiry in to whether the Respondents complied with the Board's Decision in Request for Review No. 81 of 2024.

96. This Board on 5th September 2024 delivered a Decision in Request for Review No. 81 of 2024 with the following final orders:

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/FERT/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/FERT/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.

97. From the above, Orders 2 and 3 of the Decision, called for positive acts on the part of the 1st Respondent. Specifically, Order 2 required the 1st Respondent to issue an Addendum in respect of the subject tender offering clarity on and a margin of preference for citizen contractors. On its part, Order 3 required the 1st Respondent to extend the tender submission deadline for 7 days. The Board shall therefore analyze the Addenda issued by the Procuring Entity to establish the Respondents' compliance with the Board's orders in Request for Review No. 81 of 2024.

Addendum II.

98. On 6th September 2024 the Respondents issued Addendum II communicating the issuance of an Amended Tender Document making provision for a margin of preference of 15% to be applied to local manufacturers or dealers. The tender submission deadline under the Amended Tender Document was indicated as 13th September 2024.



Addendum III

99. On 12th September 2024 the Respondents issued Addendum III extended the tender submission deadline to 19th September 2024.

Addendum IV

100. On 13th September 2024 the Respondents issued Addendum IV offering clarity on various parts of the Amended Tender Document including the estimated quantities of the different fertilizers to be procured as well as the categories of bidders who were eligible to participate in the different fertilizer line items.
101. Clause 2 under the Invitation to Tender at page 2 of the Amended Tender Document projected that the Procuring Entity intended to procure 4,900,000 bags of both planting and top dressing fertilizer. This amount of bags was an increase from the previous projection of 1,000,000 bags under the original Tender Document.
102. Even though the Applicant herein took issue with an addendum introducing the increase in number of projected bags of fertilizer projected to be procured as being a material alteration to the tender document which ought not to be introduced by way of an addendum, no evidence was led to demonstrate the prejudice that this increase in the number of bags would visit upon the Applicant. The Procuring Entity as the body spearheading the procurement of the fertilizer in the subject tender is best placed to understand the quantities of fertilizer that shall be adequate to meet its needs. The Board cannot therefore fault the Respondents increase in the number of bags it intends to procure.



103. The Applicant equally complained that in issuing the Amended Tender Document, the Respondents materially changed the procurement method applied in the original Tender Document. The Board has keenly studied the original Tender Document alongside the Amended Tender Document and noted that whereas the original Tender Document was an open international tender applying a consignment based agreement, the Amended Tender Document still remains an open international tender only that it applies framework agreements.
104. In the Board's view the Amended Tender Document does not materially change the procurement method as alleged by the Applicant. The tender still remains an open international tender. Equally, the Amended Tender Document does not restrict the eligible bidders to participate in the subject tender as the tender remains an open tender available for participation of all bidders who are interested in participating in the same. The case would have been different if for instance the Respondents had opted to go for a restricted tender that would limit the number of eligible bidders to place their respective bids. If that was the case then the Applicant would have a legitimate claim in the event they were locked out from participating in the subject tender as a consequence of the amendment.
105. Additionally, the Applicant faulted the Amended Tender Document for failing to provide for a margin of preference in compliance with the Act and as per the orders of the Board.

106. In analysing this issue, the first port of call is Article 227 (2) (a) and (b) of the Constitution which provides that: -

"227 (1);

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

(a) categories of preference in the allocation of contracts...

(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination"

107. The law contemplated under Article 227 (2) (a) and (b) is the Public Procurement and Asset Disposal Act, 2015, which outlines several preference and reservation schemes under Part XII thereof. Section 155 which falls under Part XII of the Act provides that: -

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 realization 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.

108. Further, the subject being an international tender, Section 89 of the Act finds application. The said Section 89 provides as follows:

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.

109. From Section 89 (f) above, where citizen or local contractors participate in an international tender they are entitled to preferences set out under Section 155 of the Act. Section 155 of the Act identifies a number of categories/schemes of preferences that are applicable to citizen contractors. It is worth noting that section 89 (f) of the Act expressly states that the provisions of section 155 of the Act will apply in the case of international tendering and competition in order to afford local and citizen contractors the preferences and reservations set out in section 155 of the Act.

110. Additionally, Section 157 of the Act is 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.

111. Regulation 164 of the Regulations 2020 is specific in the application of margin of preference under Section 157(8)(b) in the following terms:

164. Margin of preference for international tendering and competition

For purposes of section 157(8) (b) of the Act, the margin of preference for international tendering and competition pursuant to section 89 of the Act shall be—

(a) twenty percent (20%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya and the percentage of shareholding

of Kenyan citizens is more than fifty percent (50%);

(b) fifteen percent (15%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya;

(c) ten percent (10%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);

(d) eight percent (8%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is less than fifty percent (50%) but above twenty percent (20%); and

(e) six percent (6%) margin of preference of the evaluated price of the tender, where percentage of shareholding of Kenyan citizens is above five percent (5%) and less than twenty percent (20%).

112. Further, section 86 (2) of the Act states that:-

"For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score"

113. From above, the Act and Regulation's make provision for several preference and reservation schemes where a procuring entity applies international competitive bidding procedures, to give effect to the guiding principles under section 3 (i) and (j) of the Act. We note that the Applicant

in Application No. 81 of 2024 was concerned with citizen contractors, in this current Application the concern is with respect to the graduating scale to be applied under Regulation 164 based on shareholding of the eligible bidders. The applicant has also raised concern with the preference scheme that the Tender documents has made provision for with respect to disadvantaged persons.

114. The Board has had an opportunity to render itself on the issues similar to those raised by the applicant in this request for review as follows:

115. In **Board in Application No. 7/2016 Of 11th February, 2016 China Overseas Engineering Group Company Limited =Vs= Kenya Rural Roads Authority** it held as follows: -

The Board has finally considered the Applicant's contention that the tender document was vague on the manner in which the procuring entity was to apply the Provisions relating to preference.

The Board however wishes to state that the requirement that a procuring entity considers whether a particular bidder is entitled to preference is a matter provided for by statute and the Regulations and it is therefore irrelevant whether or not there is a provision in the tender document providing that a margin of preference shall be applied since the procuring entity is bound to consider the issue by operation of law.

116. In another similar decision that is to say, **Application No. 63/2017 Of 13th December 2018 Between** Transcend Media Group Limited

=Vs= Independent Electoral Boundaries Commission the Board also held as follows

“ Even though clause 2.8.4 of Section II. Information to Consultants of the Tender Document and section 157 (8) (b) (ii) of the Act recommend a margin of preference of 10%, the Board finds that the margin of preference of 20% under section 86 (2) of the Act has more advantage to the Applicant in this case, noting further that it is more beneficial when a Request for Proposal tender is used.

The Tender Document further states that no preferential treatment would be applied at the technical stage. The Board finds that the margin of preference applicable in the subject tender and for which the Applicant was entitled to, is the one provided for under section 86 (2) of the Act, which is applied at the technical stage and that the provisions of the Tender Document cannot supersede those of the Act. ”

117. Ideally from the two decisions this board has held that (1) it is irrelevant whether or not there is a provision in the tender document providing that a margin of preference shall be applied since the procuring entity is bound to consider the issue by operation of law and (2) when a provision is made in the tender document that is contrary to the provisions of the Act, the provisions of the Tender document cannot supersede those in the Act.

118. Turning to the present case ITT 32.3 under Section II-Tender Data Sheet at page 24 of the Amended Tender Document reads:

| | |
|-----------------|---|
| ITT 32.3 | <i>A margin of preference and/or reservation ["shall"] apply to Local Manufacturers/dealers at 15%</i> |
|-----------------|---|

119. Further clause 3 under Section III-Evaluation and Qualification Criteria at page 29 of the Amended Tender Document provides:

If the TDS so specifies, the Procuring Entity will grant a margin of preference of 15% (fifteen perecent) 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%...

120. From the above, whereas ITT 32.3 of the Amended Tender introduced a margin of preference, the same was only in respect of the source of the materials. That notwithstanding, the position the board has taken regarding preference and reservation schemes which we hereby adopt is that it is irrelevant whether or not there is a provision in the Amended tender document providing that a margin of preference shall be applied since the procuring entity is bound to consider the issue by operation of law and further that whereas the inclusion of the 15% margin of preference might be contrary to the provisions of the Act, the provisions of the Act hereinbefore analysed, that is to say, Sections 86 (2), 89, 155 and 157 of the Act as well as Regulation 164 of the Regulations 2020 supersede ITT 32.3 and any other clause of the Tender document making provision for the said schemes. Consequently, preference and reservation

schemes applicable under the Act are therefore equally applicable to the amended tender by operation of the Act. The evaluation Committee of the Procuring entity will only have to determine during evaluation of the eligible bids which scheme would entitle an eligible bidder the highest advantage by operation of law and apply it so as to give effect to the provisions of the Act and Regulations 2020.

Addendum on Extension of the tender submission deadline

121. Order 3 of this Board's Decision in Request for Review No. 81 of 2024 required the 1st Respondent herein to issue a 7 days extension on the deadline of the subject tender subsequent to the issuance of an addendum on margin of preference.

122. On 6th September 2024 the Procuring Entity issued an Amended Tender Document containing ITT 232.3 making provision for a margin of preference in the subject tender. The Amended Tender Document indicated 13th September 2024 as the tender closing date. Subsequently, on 12th September 2024, the 1st Respondent issued Addendum III which further extended the tender submission deadline to 19th September 2024. Essentially, there was compliance with respect to the extension of the tender submission deadline.

123. In view of the foregoing analysis, the Board finds that the Respondents complied with its Decision in Request for Review No. 81 of 2024.

What orders should the Board grant in the circumstances?

124. The Board has found that it has jurisdiction over the instant Request for Review.

125. The Board has equally found that the Respondents complied with the Board's directions and orders in Request for Review No. 81 of 2024.
126. No extension of time was sought herein by any party in respect to Amended Tender No. NCPB/FERTILIZER/01/2024-2025 for Supply and Delivery of Various Types of Fertilizer on Consignment Based Framework Contractual Agreement Renewable every Season for a Period of Two Years Under Fertilizer Subsidy Program.
127. This being a tender related to the food security of this nation, it is befitting, noting that the request for review herein lacks merit, to direct and order the respondents to urgently and lawfully conclude the pertinent tender process from where it stopped.
128. The upshot of our finding is that the Request for Review dated 16th September 2024 in respect of Tender No. NCPB/FERTILIZER/01/2024-2025 for Supply and Delivery of Various Types of Fertilizer on Consignment Based Framework Contractual Agreement Under Fertilizer Subsidy Program AND Amended Tender No. NCPB/FERTILIZER/01/2024-2025 for Supply and Delivery of Various Types of Fertilizer on Consignment Based Framework Contractual Agreement Renewable every Season for a Period of Two Years Under Fertilizer Subsidy Program fails in the following specific terms:

FINAL ORDERS

129. 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 16th September 2024:

- 1. The Respondent's Notice of Preliminary Objection dated 20th September 2024 be and is hereby dismissed.**
- 2. The Request for Review dated 16th September 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 AND Amended Tender No. NCPB/FERTILIZER/01/2024-2025 for Supply and Delivery of Various Types of Fertilizer on Consignment Based Framework Contractual Agreement Renewable Every Season for a Period of Two Years Under Fertilizer Subsidy Program be and is hereby dismissed as lacking in merit.**
- 3. The 1st Respondent be and is hereby directed to urgently Proceed with Amended Tender No. NCPB/FERTILIZER/01/2024-2025 for Supply and Delivery of Various Types of Fertilizer on Consignment Based Framework Contractual Agreement Renewable every Season for a Period of Two Years Under Fertilizer Subsidy Program to its lawful and logical conclusion noting the Board's findings herein and ensure compliance with the Act**




and Regulations, 2020 in the consideration and application of preference and reservation schemes therein. .

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

Dated at NAIROBI, this 2nd Day of October 2024.


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CHAIRPERSON
PPARB


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SECRETARY
PPARB

