

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 34/2021 OF 9TH MARCH 2021

BETWEEN

TECHNO RELIEF SERVICES LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER, KENYA MEDICAL

SUPPLIES AUTHORITY.....1ST RESPONDENT

KENYA MEDICAL SUPPLIES AUTHORITY.....2ND RESPONDENT

AND

NUFLOWER FOODS AND NUTRITION PVT.....INTERESTED PARTY

Fresh Determination of Request for Review No. 34 of 2021, Techno Relief Services Limited v. The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority & Nuflower Foods and Nutrition PVT Limited pursuant to the orders of the High Court issued on 25th May 2021 in Judicial Review Miscellaneous Application No. E049 of 2021, Republic v. Public Procurement Administrative Review Board & 3 Others ex parte Techno Relief Services Limited with respect to Tender No. GF ATM HIV NFM-20/21-01T-011 for Supply of Nutritional Supplements.

BOARD MEMBERS

- | | |
|-----------------------|---------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Qs. Hussein Were | - Member |
| 3. Mrs. Njeri Onyango | - Member |
| 4. Dr. Joseph Gitari | - Member |
| 5. Mr. Ambrose Ngare | - Member |

IN ATTENDANCE

1. Mr. Philemon Kiprop - Holding brief for the Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Medical Supplies Authority (hereinafter referred to as "the Procuring Entity") advertised Tender No. GF ATM HIV NFM-20/21-01T-011 for Supply of Nutritional Supplements (hereinafter referred to as "the subject tender") through a publication on *MyGov* pullout in the local dailies on 3rd November 2020 for the following items: -

Item No.	Item Description	Unit Pack	Quantity
1	Ready to use therapeutic food (RUTF) paste, 500 kcal/92g	92g sachet	9,494,051
2	Ready to use supplemental food (RUSF) paste, 500 kcal/92g	100g sachet	6,089,582
3	Fortified Blended Flour (FBF)	300g sachet	5,621,931

Tender Submission deadline and opening of Tenders

A total of eleven (11) tenders were received by the tender closing date of 11th November 2020 and opened on the same date at 11.00 am. Firms submitting tenders were recorded as follows: -

Bidder No.	Bidder Name
1.	Tashmi International Limited
2.	United Pharma (K) Limited
3.	Nuflower Foods And Nutrition Pvt. Ltd
4.	Equatorial Nut Processors Ltd
5.	Techno Relief Services Ltd
6.	Surgilinks Limited
7.	Soy Afric Ltd
8.	Wilkaner Power Solutions Ltd
9.	Petrel Agencies Limited
10.	Revital Pharma Ltd

Bidder No.	Bidder Name
11.	Proctor & Allan (E.A) Ltd

Evaluation of Tenders

The Procuring Entity's Evaluation Committee appointed on 10th November 2020 evaluated the tenders through three stages of Preliminary Evaluation, Technical Evaluation and Financial Evaluation.

1. Preliminary Evaluation

The Evaluation Committee evaluated tenders at this stage against the following **mandatory** requirements: -

- a) Bidding documents must be paginated/serialized. All tenderers are required to submit their documents paginated in a continuous ascending order from the first page to the last page.
- b) Copy of Certificate of Incorporation/Registration
- c) Copy of current Tax Compliance Certificate (for local tenderers only).
- d) Tender form duly completed and signed by the tenderer or his authorized agent.
- e) Original Bid Security provided and valid for 150 days from date of tender opening. Value of Bid Security should be **USD 30,000.00 or KES 3,000,000.00** or equivalent in a freely convertible currency from commercial banks valid up to **10/04/2021**.
- f) Anti-Corruption Declaration must be signed.
- g) Duly completed Business Questionnaire.

At the end of this stage of evaluation, all tenders were found responsive and thus eligible to proceed to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee evaluated tenders in two categories namely; Documentary Compliance and Product Evaluation. The outcome of evaluation was summarized as follows: -

Item	Number of Tenderers	Outcome
Item 1: Ready to use therapeutic food (RUTF)	B1 Tashmi	Fail
	B2 United Pharma	Fail
	B3 Nuflower	Pass
	B5 Techno Relief	Fail
	B6 Surgilinks	Fail
	B8 Wilkaner Power Solutions Ltd	Fail
	B9 Petrel	Fail
	B10 Revital Pharma Ltd	Fail
Item	Number of Tenderers	Outcome
Item 2: Ready to use supplementary food (RUSF)	B1 Tashmi	Fail
	B2 United Pharma	Fail
	B3 Nuflower	Pass
	B5 Techno Relief	Fail
	B6 Surgilinks	Fail
	B8 Wilkaner Power Solutions Ltd	Fail
	B 9 Petrel	Fail
	B10 Revital Pharma Ltd	Fail
B1 Tashmi	Fail	
Item	Number of Tenderers	Outcome
Item 3: Fortified Blended Flour (FBF)	B4 Equatorial Nut Processors Ltd	Pass
	B 7 Soy Afric Ltd	Fail
	B 11 Proctor & Allan (E.A)Ltd	Fail

At the end of this stage, Bidder No. 3, Nuflower Nutrition PVT (in respect of Item 1: RUTF and Item 2: RUSF) and Bidder No. 4, Equatorial Nut Processors Ltd (in respect of Item 3: Fortified Blended Flour) were found responsive, thus proceeded to the Financial Evaluation stage.

3. Financial Evaluation

Tender prices of the remaining two tenderers were recorded as follows: -

Item 1. Ready to use Therapeutic food (RUTF)

Bidder No	Bidder Name	UoM	Qty	Unit Cost USD	Total Cost USD
3	Nuflower Foods And Nutrition Pvt. Ltd	92 g sachet	9,494,051	0.264	2,506,429.46

Item 2. Ready to use Supplemental food (RUSF)

Bidder No	Bidder Name	UoM	Qty	Unit Cost USD	Total Cost USD
3	Nuflower Foods And Nutrition Pvt. Ltd	100 g sachet	6,089,582	0.2430	1,479,768.43

Item 3. Fortified Blended Flour (FBF)

Bidder No	Bidder Name	UoM	Qty	Unit Cost USD	Total Cost USD
4	Equatorial Nut Processors Ltd	300 g sachet	5,621,931	0.37	2,080,114.47

Recommendation

The Evaluation Committee recommended award of the subject tender in the respective items of the subject tender as follows: -

Item 1. Ready to Use Therapeutic Food (RUTF)

Bidder No	Bidder Name	UoM	Qty	Unit Cost USD	Total Cost USD	Remarks
3	Nuflower Foods And Nutrition Pvt. Ltd	92 g sachet	9,494,051	0.264	2,506,429.46	<i>Recommended for award being the only responsive bidder</i>

Item 2. Ready to Use Supplemental Food (RUSF)

Bidder No	Bidder Name	UoM	Qty	Unit Cost USD	Total Cost USD	Remarks
3	Nuflower Foods And Nutrition Pvt. Ltd	100 g sachet	6,089,582	0.2430	1,479,768.43	<i>Recommended for award being the</i>

						<i>only responsive bidder</i>
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Item 3. Fortified Blended Flour (FBF)

Bidder No	Bidder Name	UoM	Qty	Unit Cost USD	Total Cost USD	Remarks
4	Equatorial Nut Processors Ltd	300 g sachet	5,621,931	0.37	2,080,114.47	<i>Recommended for award being the only responsive bidder</i>

Professional Opinion

In a professional opinion dated 16th February 2021, the Procuring Entity's Acting Director, Procurement, advised the Acting Chief Executive Officer to approve award of the tender in the respective items as recommended by the Evaluation Committee which professional opinion was approved by the Acting Chief Executive Officer on 18th February 2021.

Notification to Tenderers

In letters dated 24th February 2021, the Procuring Entity informed tenderers of the outcome of their respective tenders.

REQUEST FOR REVIEW NO. 34 OF 2021

M/s Techno Relief Services Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated and filed on 9th March 2021, together with Statement in Support of the Request for Review through the firm of Kipyator Kibet & Associates Advocates, seeking the following orders:-

- a) An order annulling the decision by the Procuring Entity to award TENDER NO GF ATM HIV NFM-20/21-01T-011 FOR**

SUPPLY OF NUTRITIONAL Supplements to Nuflower Foods and Nutrition PVT in its entirety;

- b) In the alternative to (a) above, an order terminating the entire procurement process and commencement of a new procurement process do issue in respect to TENDER NO GF ATM HIV NFM-20/21-01T-011 FOR SUPPLY OF NUTRITIONAL Supplements to Nuflower Foods and Nutrition PVT; and**
- c) An order awarding the cost of the Review to the Applicant.**

The Board rendered a decision dated 29th March 2021 in **PPARB Application No. 34 of 2021, Techno Relief Services Limited v. The Accounting Officer, Kenya Medical Supplies Authority & 2 Others** issuing the following orders:

- 1. The Request for Review filed by the Applicant, M/s Techno Relief Services Ltd on 9th March 2021 with respect to Tender No. GF ATM HIV NFM-20/21-01T-011 for Supply of Nutritional Supplements by the Kenya Medical Supplies Authority, be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. E049 OF 2021, REPUBLIC V. PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & 3 OTHERS EX PARTE TECHNO RELIEF SERVICES LIMITED

The Applicant in Review No. 34 of 2021 was aggrieved by the decision of the Board rendered on 29th March 2021 thereby instituting Judicial Review proceedings through a Notice of Motion application dated 23rd April 2021. The High Court having heard parties' cases rendered a judgement in the above Judicial Review Application on 25th May 2021 directing as follows:-

- I. An order of Certiorari be and is hereby issued to remove into this Court for purposes of quashing, the decision of the 1st Respondent dated 29th March 2021 in PPARB Case Number 34 of 2021-Techno Relief Services Limited v. The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority & Nuflower Foods and Nutrition PVT Limited.**
- II. An order of Mandamus be and is hereby issued to compel the 1st Respondent to rehear PPARB Case Number 34 of 2021-Techno Relief Services Limited vs. The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority & Nuflower Foods and Nutrition PVT Limited and to consider all the pleadings and submissions filed therein and served by all the parties, including the ex parte Applicant's Written Submissions, List of Authorities, Further Affidavit, Replying Affidavit to the 2nd and 3rd Respondent's Grounds of Opposition and the ex parte Applicant's Written Submissions to the 2nd and 3rd Respondents Grounds of Opposition.**
- III. An order of Prohibition be and is hereby issued to prohibit the 3rd and 4th Respondent's from entering into a binding contract in respect of Tender No. GF ATM HIV NFM-20/21-**

01T-011 for Supply of Nutritional Supplements to Kenya Medical Supplies Authority pending the re-hearing and determination of the ex parte Applicant's Request for Review in PPARB Case Number 34 of 2021- Techno Relief Services Limited vs. The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority & Nuflower Foods and Nutrition PVT Limited.

- IV. The ex parte Applicant's Request for Review in PPARB Case Number 34 of 2021- Techno Relief Services Limited vs. The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority & Nuflower Foods and Nutrition PVT Limited be and is hereby remitted to the 1st Respondent for re-hearing and determination, within thirty days of the date of this judgement.**
- V. Each party shall bear its own costs of the Notice of Motion dated 23rd April 2021.**

PARTIES' PLEADINGS AND WRITTEN SUBMISSIONS

The Applicant's Request for Review dated 9th March 2021 and filed on even date was accompanied by a Supporting Affidavit sworn on 9th March 2021 and filed on even date, a Further Affidavit sworn on 25th March 2021 and filed on even date, Written Submissions dated 25th March 2021 and filed on even date together with a List of Authorities dated 25th March and filed on even date, a Replying Affidavit to the 1st and 2nd Respondents' Grounds of Opposition sworn on 25th March 2021 and filed on even date and Written Submissions to the 1st and 2nd Respondent's Grounds of

Opposition, dated 25th March 2021 and filed on even date through the firm of Kipyator Kibet & Associates Advocates.

The Respondent lodged Grounds of Opposition dated 15th March 2021 and filed on even date together with a Replying Affidavit sworn on 17th March 2021 and filed on even date and Written Submissions dated 29th March 2021 and filed on even date through the firm of Ong'anda & Associates Advocates.

The Interested Party lodged a Replying Affidavit sworn on 22nd March 2021 and filed on even date and Written Submissions dated 29th March 2021 and filed on 30th March 2021 through the firm of Iseme Kamau & Maema Advocates.

Section 27 (1) of the Act describes the Board as a central independent procurement appeals review board. Further, one of the functions of the Board as provided in section 28 (1) of the Act is reviewing, hearing and determining tendering and asset disposal disputes. In order to ensure the Board executes its mandate as required by law, the Board dispensed with physical hearings whilst directing that all matters be canvassed by way of written submissions pursuant to Circular No. 2/2020 dated 24th March 2020 as a measure to mitigate the effects of Covid 19 pandemic.

The Board is alive to several decisions of our Courts stating that affidavit evidence can be used as an alternative to viva voce evidence. In **Succession Cause No. 1411 of 2011, Gerald Macharia Njogu v Samuel Macharia Murimi [2016] eKLR**, Honourable Justice Mativo held that:

"I am fully aware that affidavits are an alternative to oral evidence and are often used particularly in applications"

Further, the Court of Appeal in **Kibos Distillers Limited & 4 Others v. Benson Ambuti Adegga & 3 Others [2020] eKLR** held as follows:

"In duplication, the three appellants further contend that their right to a fair hearing and trial were violated because no viva voce evidence was adduced before the trial court. It is a settled principle of law that a right to a hearing is not exclusively and primarily a right to be heard by way of oral evidence. The courts are unanimous on the point that oral or personal hearing is not an integral part of fair hearing unless circumstances are so exceptional that without oral hearing, a person cannot put up an effective defence or advance his/her/its case."

The Board issued Circular No. 2/2020 dated 24th March 2020, detailing an administrative and contingency plan to mitigate against Covid-19 pandemic. Having considered the shift by Government of Kenya's response to Covid-19 pandemic from being advisory to mandatory and enforceable, the Board found it necessary to give directions that would protect its officers, staff, litigants and members of the general public from the risks associated with Covid-19 pandemic.

In view of the declaration of measures restricting operations of this Board due to COVID-19 pandemic, the instant Request for Review will be determined based on all the pleadings, written submissions, list of

authorities filed by parties herein when Review No. 34/2021 was first filed by the Applicant.

In permitting this course, this Board is guided by Article 159 (2) (d) of the Constitution which requires the Board to eschew undue technicalities in delivering justice. In the Board's view, the right of access to justice guaranteed to every person under Article 48 of the Constitution imposes a duty to the Board to enhance the overriding objective which is to facilitate just, expeditious and proportionate resolution of public procurement and asset disposal disputes.

Owing to the directions given through the Board's Circular, the Acting Board Secretary in his letter dated 4th June 2021, notified parties to Review No. 34 of 2021 that the Board will deliver a decision in the Request for Review on or before 24th June 2021.

BOARD'S DECISION

The Board would like to point out that upon filing of the Request for Review on 9th March 2021 by the Applicant herein, the Acting Board Secretary addressed a letter dated 9th March 2021 to the 1st Respondent notifying him of Review No. 34 of 2021 and suspension of procurement proceedings. According to the Board's Dispatch Register, the Letter of Notification of Review dated 9th March 2021 was collected by courier services on 10th March 2021 for delivery at the Procuring Entity's Offices. According to the Board's Register, the Procuring Entity received the notification on 11th March 2021 and filed confidential documents on the procurement process on 17th March 2021. On the other hand, the

Interested Party was notified of the Request for Review on 20th March 2021 via email.

It therefore follows that the Procuring Entity had a period of 5 days from 11th March 2021 to file a Response to the Request for Review and its confidential documents. The Procuring Entity filed its Response on 15th March 2021. The Interested Party who was notified on 20th March 2021 had a period of 3 days to file its response. The Interested Party filed its Replying Affidavit on 22nd March 2021 and its Written Submissions on 29th March 2021.

The Board observes that parties served their subsequent pleadings on each other, thus the Board cannot ascertain the period when further pleadings by parties were served upon them for the period provided in the Board's Circular to be computed. That notwithstanding, pursuant to Order No. II of the judgment in **Judicial Review Application No. Misc. E049 of 2021, Republic v. Public Procurement Administrative Review Board, The Accounting Officer, Kenya Medical Supplies Authority, Kenya Medical Supplies Authority and Nuflower Foods and Nutrition PVT ex parte Techno Relief Services Limited** (hereinafter referred to as JR No. E049 of 2021), the Court compelled the Board to consider all pleadings and submissions filed in Review No. 34 of 2021 and served by all the parties including the Applicant's Written Submissions, List of Authorities, Further Affidavit, Replying Affidavit to the 1st and 2nd Respondents' Grounds of Opposition and the Applicant's Written Submissions of the 1st and 2nd Respondents' Grounds of Opposition.

The Board has considered the findings of the Court in JR No. E049 of 2021, and the directions given in the final orders thereon.

In compliance with orders of the High Court in JR No. E049 of 2021, the Board has considered the Applicant's Request for Review accompanied by a Supporting Affidavit, Applicant's Written Submissions filed together with a List of Authorities, a Replying Affidavit to the 1st and 2nd Respondents' Grounds of Opposition, Written Submissions to the 1st and 2nd Respondent's Grounds of Opposition; the Respondents' Grounds of Opposition filed together with a Replying Affidavit and Written Submissions; and the Interested Party's Replying Affidavit and Written Submissions.

The Board has also considered the confidential documents furnished to the Board by the 1st Respondent pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and finds that the following issues call for determination:

- I. Whether the Applicant satisfied the criteria provided in ITT Clause 6.3 (e) and (g) of Section II. Tender Data Sheet of the Tender Document in respect of Item 1, Ready to Use Therapeutic Food (RUTF); and**

- II. Whether the Applicant satisfied the criteria provided in Clause B (2). Product Evaluation of Section VIII. Stages of Tender and Evaluation Criteria read together with Addendum No. 1 dated 30th October 2020 and**

Addendum No. 2 dated 5th November 2020 with respect to Item 2, Ready to Use Supplemental Food (RUSF).

Before addressing the above issues, the Board would like to dispense with a preliminary aspect arising from the Respondents' Grounds of Opposition.

The Respondents stated in their Grounds of Opposition that the Applicant has offended section 167 (1) of the Act because the Request for Review is against the spirit and purpose of the Constitution and the Act. In the Respondents' view, this renders the Request for Review devoid of merit thus ought to be dismissed with costs.

At paragraph 3 and 5 of the Applicant's Replying Affidavit to the 1st and 2nd Respondents' Grounds of Opposition, the Applicant depones that the Grounds of Opposition address contentious issues with largely no convincing departure from section 167 of the Act which can only be resolved by considering the merits of the Request for Review. In its Written Submissions to the Respondent's Grounds of Opposition, the Applicant cited section 167 (1) of the Act to support its allegation that grounds 3 to 12 of the Respondents' Grounds of Opposition can only be resolved fully after resolving the merits of the Request for Review, thus the jurisdiction of the Board was rightfully invoked by the Applicant.

Section 167 (1) of the Act provides that:

"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”

The Respondents did not point out the specific elements of section 167 (1) of the Act that has not been satisfied by the Applicant. That notwithstanding, the Board notes that the Respondents did not challenge the Board’s jurisdiction in so far as the fourteen days’ statutory period available to candidates and tenderers, is concerned. Section 167 (1) of the Act allows a candidate or a tenderer to approach this Board if such candidate or tenderer has suffered or risks suffering loss or damage due to breach of a duty imposed on a procuring entity.

The Applicant’s Request for Review challenges the outcome of its bid in relation to Item 1, Ready to Use Therapeutic Food and Item 2, Ready to Use Supplemental Food. Article 227 (1) of the Constitution requires procurement and asset disposal by state organs and public entities to procure goods and services in a system that is fair equitable, transparent, cost-effective and competitive. From the above provision, a candidate or a tenderer risks suffering loss in a procurement process if it can demonstrate that a procuring entity failed in its duty to evaluate bidders in accordance with the procedures and criteria set out in the Tender Document and the Act. The Constitution places a duty upon this Board to address matters where a candidate or a tenderer who participated in a procurement process risks suffering loss due to a procuring entity’s failure to undertake a procurement process including evaluation of such bidder’s

bid in accordance with the principles set out in Article 227 (1) of the Constitution, the Act and criteria provided in the Tender Document.

In the circumstances and noting that the Respondents failed to point out the specific elements of section 167 (1) of the Act not satisfied by the Applicant, the Board finds the Applicant rightfully invoked the jurisdiction of this Board to determine an alleged breach of duty by the Respondents in evaluating its bid. The Board is therefore required to establish whether the Procuring Entity evaluated the Applicant's bid in accordance with the procedures and criteria set out in the Tender Document on the specific areas challenged by the Applicant.

In addressing the first issue framed hereinbefore, the Board observes that in JRE049 of 2021, the Court made the following findings:

“[49] It is my view that the reasoning of the 1st Respondent [Review Board] does not logically flow in terms of grounds stated by the ex parte Applicant and the issue it framed thereon and there is lack of clarity as regards its findings on the ex parte Applicant's bid in relation to the specifications and criterion required as regards the two items or RUTF and RUSF product. This is particularly so as regards the findings made on the criterion of certificates for analysis, Batch Numbers and Test Reports on the two items, that were urged by the ex parte Applicant in paragraphs 1 and 2 of the Request for Review. In

this respect the findings as regards item of RUTF are not clear in the ruling, and appear to confuse with the specifications and criterion on the RUSF.

[50] It is also evident from a reading of the entire ruling that the 1st Respondent appeared to have urged the issue before it along two limbs, which two limbs are however not clearly indicated and identified in the ruling, nor in its flow. To this extent, the 1st Respondent's findings on the ex parte Applicant's certificate of analysis and batch numbers on the RUTF and RUSF products is found to be unreasonable"

Having considered the above finding, the Board would like to point out that the first issue framed for determination in the instant Request for Review revolves around Item 1, Ready to Use Therapeutic Food in relation to the criteria provided in ITT Clause 6.3 (e) and (g) of Section II. Tender Data Sheet of the Tender Document.

The Applicant alleged at paragraph 1, 2 and 3 of its Request for Review, that the Procuring Entity failed to appreciate that the Applicant furnished a complete Analysis for Item 1, Ready to Use Therapeutic Food (RUTF) paste, 500kcal/92g at page 000093 of its original bid as per the sample provided Batch Number (K202247001), thus the Applicant's bid ought to have been declared responsive as per section 79 of the Act. The Applicant further alleges that the Certificate of Analysis from Farelabs Food Analysis and Research Laboratory found on page 000099 of its original bid matches Batch Number 421020 for RUSF-Plumpy Sup (One Sample) for Item 2,

Ready to Use Supplemental Food (RUSF) paste, 500kcal/92g. At paragraph 8 of its Supporting Affidavit, the Applicant depones that the Procuring Entity's failure to evaluate the tenders as per the requirements specified in the Tender Document defeats the purpose of supplying information to bidders in preparing their bid documents.

In its Further Affidavit, the Applicant deponed at paragraph 4 thereof that the reason for non-responsiveness provided by the Procuring Entity in the Applicant's letter of notification was not because the Batch Number in the Certificate of Analysis of the Product Plumpy Nut was 20247001 and that the sample provided had a Batch Number K 20247001. According to the Applicant, the letter "K" corresponds to the code of the Packaging line during manufacturing process and not to be considered as initial beginning number for Batch Number. To support this position, the Applicant referred the Board to Annexure "KG1" which it explains is a Manufacturer's Authorization Letter from Nutriset.

In its Written Submissions to the Request for Review, the Applicant took the view that the Request for Review revolves around the following two issues for determination: (1) whether the Respondents considered irrelevant consideration not captured in the Tender Document in declaring the ex parte Applicant's bid non-responsive and (2) whether the Applicant's bid was responsive for providing RUSF from 6 months old and above as opposed to the bid requirement of 5 years and above.

On the first issue framed by the Applicant, it is the Applicant's position that it provided a Complete Analysis for Item 1 (RUTF) paste 500kcal/92g that matches Batch Number 20247001. According to the Applicant, it provided a Test Report from FARELABS Food Analysis & Research

Laboratory, nature of the sample being Ready to Use Supplemental Food (RUSF) paste, 500kcal/92g Plumpy Sup that matches Batch Number 421020. In the Applicant's view, it fully complied with the requirement in the Tender Document because it provided a Certificate of Analysis that matches Batch Number 20247001 for RUTF paste on page 000093 of its original bid and Batch Number 421010 Test Report that matches with sample Batch Number 421010 for RUSF respectively at page 000099 of its original bid. To support its submission that it complied with the requirements in the Tender Document, the Applicant referred to the decisions in **Republic v. Public Procurement Administrative Review Board & Another (2008) eKLR**, **Republic v. Public Procurement Administrative Review Board ex parte Athi Water Services Board & 2 Others (2017)**, **Republic v. Public Procurement Administrative Review Board, Arid Contractors & General Supplies ex parte Meru University of Science & Technology (2019) eKLR** and **Republic v. Public Procurement Administrative Review Board & Another, Premier Verification Quality Services Limited ex parte Tuv Austria Turk (2020)eKLR**.

In a Replying Affidavit filed in response to the Respondents' Grounds of Opposition, the Applicant deponed at paragraph 6 and 7 thereof that its bid was responsive and compliant to the requirements specified in the Tender Document and that the 2nd Respondent considered extraneous requirements that do not form part of the criteria provided in the Tender Document. According to the Applicant, it was informed that its bid was non-responsive because in the Respondents' view, the Applicant issued a Batch Number 20247001 instead of K 20247001.

The Applicant further states that it was a requirement in the Tender Document for all bidders that sample Batch Number (K 20247001) was for Ready to Use Therapeutic Food paste, 500kcal/92g whereas sample Batch Number 421020 was for Ready to Use Supplemental Food (RUSF) paste 500kcal/92g Plumpy sup. While citing Article 227 (1) of the Constitution, the Applicant avers in its Written Submissions to the Respondents' Grounds of Opposition that the Respondents failed in their constitutional duty to act in a fair, transparent and equitable manner.

In its Replying Affidavit, the Respondents provided a background to the subject procurement process and explained the manner in which evaluation of bids was conducted. At paragraph 15 thereof, the Respondents depone that the Applicant's bid was non-responsive because the Batch Number in the Certificate of Analysis for Item 1 (RUTF) paste, 500kcal/92g did not match the Batch Number on the sample provided. At paragraph 21 of their Replying Affidavit, the Respondents depone that ITT Clause 6.3 of the Tender Data Sheet required bidders to provide a sample for evaluation under separate cover at or before the tender closing date and time. According to the Respondents, bidders were instructed to label the sample with the tenderer's name, tender reference and identification of the product. According to the Respondents, ITT Clause 6.3 of the Tender Data Sheet further provided that if the sample is not consistent with the required technical specifications, then the offer for the particular item would be rejected. The Respondents further allege that the said provision provided that for each sample, a Certificate of Analysis of a product test conducted by a laboratory of the manufacturer had to be provided from the same batch of production in case of award of contract. It is the Respondents' position that it was extremely critical for

the batch used in testing the product as provided in the Certificate of Analysis to be the same batch provided to the Respondents for evaluation. The Respondents state that in respect of the Applicant, the Batch Number in the Certificate of Analysis differs from the Batch Number on the product thus casting doubt on whether the product test was conducted on the sample provided and fails to satisfy the requirement in the Tender Document. The Respondents further allege that the Batch Number in the Certificate of Analysis for the product Plumpy Nut is 20247001 whereas the sample provided had the number k20247001. According to the Respondents, these are nutritional supplements to be consumed by Kenyan people thus it is highly integral for the Batch Number of the tested product matches the sample provided by bidders.

At paragraph 4 of their Grounds of Opposition, the Respondents reiterate that the Applicant provided a sample of the RUTF paste, 500kcal/92g that did not match the Batch Number in the Certificate of Analysis thus did not comply with a specific mandatory requirement in the Tender Document.

On its part, the Interested Party deponed at paragraph 13 of its Replying Affidavit that having perused the Respondents' Grounds of Opposition, the Interested Party notes that the Applicant provided a sample for the RUTF which does not match the Batch Number in the Certificate of Analysis. The Interested Party referred to Clause 6.3, Clause 29.1 and 29.3 of the Tender Document to support its view on how a responsive tender would be evaluated by the Procuring Entity. The Interested Party further states that if the sample provided by bidders is not consistent with the technical specifications required, a bid would be rejected by the Procuring Entity. At paragraph 24 of its Replying Affidavit, the Interested Party depones that the Applicant's failure to provide a product that

conforms to the technical specifications of the Tender Document amounts to a material deviation from the terms, conditions and specifications of the tender Document. In the Interested Party's view, if the Applicant provided an RUTF sample which does not match the batch number in the Certificate of Analysis, then the Applicant failed to satisfy the criteria under Clause 6.3 of the Tender Document. At paragraph 12 of its Written Submissions, the Interested Party took the view that the issues for determination arising from the Request for Review in relation to the Item 1, RUTF are; (i) whether the Batch Number in the Certificate of Analysis from Farelabs (421020) provided by the Applicant matched the Batch Number on the sample provided (K20247001), (ii) if the answer to the first issue is in the affirmative, whether the Applicant's bid would be responsive. On the above two issue, the Interested Party relied on the Respondents' position on the Batch Number for Certificate of Analysis from Farelab as 421020, which was different from the Batch Number K20247001. According to the Interested Party, if the Respondents' position is correct, then the Applicant violated requirements of the Tender Document. The Interested Party referred to section 79 (1) of the Act and the decision of **Justice Mativo in Republic v. Public Procurement Administrative Review Board ex parte Emcure Pharmaceuticals Limited (2019) eKLR** to support its view that a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid documents. In conclusion, the Interested Party states that the letter of notification dated 24th February 2021 issued to the Applicant cannot be faulted, thus ought to be upheld.

Having considered all parties' pleadings and written submissions on the first limb of the issue framed for determination, the Board now proceeds to make the following findings:

The Applicant received a letter of notification of unsuccessful bid dated 24th February 2021 with the following details:

"RE: NOTIFICATION FOR TENDER NO. GF ATM HIV NFM-20/21-OIT-011 FOR SUPPLY OF NUTRITIONAL SUPPLEMENTS

Reference is made to the above tender and advise that your bids was unsuccessful due to the following reason (s);

	<i>Item Description</i>	<i>Reason for non-responsiveness</i>
<i>1</i>	<i>Ready to use therapeutic food (RUTF) paste, 500kcal/92g</i>	<i>Batch No. in the certificate of analysis from farelabs (421020) does not match Batch No. on the sample provided (k20247001)</i>
<i>2</i>	<i>Ready to use supplemental food (RUSF) paste, 500kcal/92g</i>	<i>You provided a wrong product made for children of 6 months and older instead of age 5 years and above</i>

Further be advised that the above tender was awarded as per attached schedule.

Please plan to collect your bid security from the procurement office after 14 days from the date of this letter.

Thank you for your interest and participation in the tender”

From the foregoing, the Applicant was notified that it was unsuccessful because the Batch Number in the Certificate of Analysis from farelabs (421020) did not match the Batch Number on the sample provided (K 20247001) with respect to Item 1 (RUTF).

The Board studied the Tender Document and notes that Clause 6 of Section I - Instructions to Tenderers provides as follows: -

6.1. Pursuant to ITT Clause 14, the Tenderer shall furnish, as part of its tender, documents establishing, to the Purchaser’s satisfaction, the eligibility of the Health Sector Goods and services to be supplied under the contract.

6.2. The documentary evidence of the eligibility of the Goods and services shall consist of a statement in the Price Schedule of the country of origin of the goods and services offered that shall be confirmed by a Certificate of Origin, issued shortly before the time of shipment.

6.3. The documentary evidence of conformity of the Goods and services to the Tender Documents may be in the form of literature, drawings and data and shall consist of:

(a) A detailed description of the essential technical and performance characteristics of the goods;

- (b) An item-by-item commentary on the Purchaser's Technical Specifications demonstrating substantial responsiveness of the goods and services to those specifications, or a statement of (even allegedly minor) deviations and exceptions to the provisions of the Technical Specifications;**
- (c) Any other procurement-specific documentation required as stated in the TDS.**

According to ITT Clause 6.3 (a), (e) and (g) of Section II - Tender Data Sheet of the Tender Document, tenderers were instructed on the following: -

"In addition to the documents stated in Clause 6.2 and 6.3 (a) and (b), the following shall be included with the Tender:

- (a) Certifications: ALL laboratory analysis certificates MUST be from Kenya Accreditation Services (KENAS) accredited laboratories and/or have ISO 17025:2005 certification**
- (b)**
- (c)**
- (d) The relevant certificate/letter bearing the name of any of the above bodies must be submitted for scrutiny**
- (e) The tenderer is requested to provide in support of their technical offer, a sample for evaluation**

under separate cover at or before the tender closing date and time. The sample to be clearly labelled with the tenderer's name, tender reference and identification of the product. The sample requested is to be submitted as per technical specification offered by the tenderer and shall represent exactly the product that is intended to be supplied in case of contract award;

(f)

(g) For quality assurance reasons, for each sample provided, a protocol (certificate of analysis) of a product test conducted by the laboratory of the manufacturer has to be provided from the same batch of production in case of award of contract.

ITT Clause 6.3 (e) of Section II - Tender Data Sheet of the Tender Document directed bidders to provide a sample for evaluation under separate cover on or before the tender submission deadline. Further, the sample provided should be clearly labelled with the tenderer's name, tender reference, identification of the product and submitted as per the technical specifications offered by the tenderer. It was mandatory for the sample to represent the product that is intended to be supplied in case of award of the subject tender. This requirement is also stated in Clause 15. Tender Sample of the General Technical Specifications on page 89 of the Tender Document as follows;

- “15.1. A properly labeled non-refundable sample of each item quoted must be delivered to Kenya Medical Supplies Authority on or before 4th November 2020 at 10.00 am. The sample must be of the required pack size as indicated in the schedule of requirements**
- 15.2. The sample including literature should be submitted in their normal or usual commercial packing as registered and retained by the Kenya Pharmacy and Poisons Board and should be labeled in English. The sample must be a true representative of the product tendered for.**
- 15.3. Bidders who submit two different samples for any given item will have their samples disqualified.”**

Pursuant to section 67 (3) (e) of the Act, the 1st Respondent submitted all the samples provided by bidders by the tender submission deadline in the subject tender for both **Item 1: RUTF** and **Item 2: RUSF**, as part of the confidential file furnished to the Board. Consequently, the Board had the benefit of studying the sample provided by the Applicant in respect of Item 1: RUTF which we note, is in a sachet and contains some of the following details:

“plumpy nut [nutriset]

RUTF

Ready-to-Use Therapeutic Food

1 sachet/1 sobre =500 kcal

15/06 03:54

K 20247001

BB 06/2022"

The Board observes that the Batch Number appearing on the sample that was provided by the Applicant is "**K 20247001**".

According to ITT Clause 6.3 (g) and (e) of Section II. Tender Data Sheet of the Tender Document, bidders were instructed to provide laboratory analysis certificates from Kenya Accreditation Services (KENAS) accredited laboratories and/or have ISO 17025:2005 certification. In addition to this, bidders were required to provide a certificate of analysis of a product test conducted by the laboratory of the manufacturer from the same batch of production.

The Board studied the Applicant's original bid and notes that:

- At page 56 of its original bid, the Applicant indicated that it has bid for Item 1 (RUTF) and Item 2 (RUSF);
- At page 53 of its original bid, the Applicant attached a Manufacturer's Authorization letter dated 29th October 2020 showing it is authorized by Nutriset to submit a tender and negotiate a contract with the Procuring Entity in respect of the RUTF and RUSF product manufactured by Nutriset;
- **At page 93 of its original bid, the Applicant provided a Certificate of Analysis of a product known as Plumpy Nut, a**

Ready to Use Therapeutic Food manufactured by Nutriset with Batch No. 20247001;

- **At page 125 of its original bid, the Applicant provided a Test Report dated 31st October 2020 from Farelabs (Food Analysis & Research Laboratory) for an RUTF-Plumpy Nut Sample with Batch No. 421020.**

From the foregoing, the Board notes that the Batch Number appearing on the sample provided by the Applicant for Item 1, RUTF is "**K 20247001**". Further, the Batch Number appearing on the Certificate of Analysis for the RUTF sample is **20247001** without letter "**k**". On the other hand, the Test Report from Farelab shows the report is for RUTF Plumpy Nut with **Batch No. 421020**, a figure that is totally different from the Batch Number on the sample provided by the Applicant (**K 20247001**) and is also different from the Batch Number on the Certificate of Analysis of the RUTF sample (**20247001**).

The Board studied the Evaluation Report executed on 10th December 2020 and notes that at page 7 thereof, the Evaluation Committee noted the following when evaluating the Applicant's bid under Item 1, RUTF:

Parameter	Bidder 5 Techno Relief Services
Certificate of analysis from KENAS or ISO 17025:2005	Batch No. on COA from farelab (421020) does not match B. No on sample

From the foregoing, the Board notes that the Evaluation Committee observed that the Batch Number **421020** on COA from Farelab does not match the Batch Number on the sample.

The Board observes that it is common ground from the pleadings of the Procuring Entity and those of the Applicant that the Batch Number on the sample provided by the Applicant with respect to Item 1, RUTF is "**K 20247001**". The Board has also confirmed from the sample furnished to it which is in a sachet that the Batch Number indicated therein is "**K 20247001**".

The observation by the Evaluation Committee in its Evaluation Report appears to be similar to the reason provided in the Applicant's letter of notification of unsuccessful bid as: "**Batch Number in the Certificate of Analysis from Farelabs (421020) does not match the Batch Number on the sample provided (k20247001).**"

With that in mind, the Board would like to indicate that page 93 of the Applicant's original bid contains a Certificate of Analysis for RUTF from **Nutriset** with **Batch No. 20247001**. On the other hand, page 125 of the Applicant's original bid shows that the document obtained from Farelabs is a Test Report and not a Certificate of Analysis. This Test Report is for Item 1, RUTF. However, the Batch Number indicated in this Test Report is **421020**.

In essence, the Applicant provided; (i) a Sample for Item 1, RUTF with **Batch No. "K 20247001"**, (ii) a Certificate of Analysis at page 93 of its original bid from **Nutriset** with **Batch No. "20247001"**, (iii) a **Test Report dated 31st October 2020 from Farelabs for Item 1, RUTF-** with the sample of **Batch No. "421020"**.

We note that in the Applicant's Written Submissions to the Respondents' Grounds of Opposition, the Applicant admits that Batch Number **421020** was for **Item 2, RUSF**.

It is evident that the Sample provided by the Applicant for Item 1, RUTF has a Batch No. **K 20247001** while the Certificate of Analysis from Nutriset for Item 1, RUTF has a Batch No. **20247001** without letter "k". The Board studied the Applicant's original bid in its entirety but did not find any document therein explaining why the Batch Number on the sample for Item 1, RUTF (**K 20247001**) has a letter "k" while the Batch Number in the Certificate of Analysis from Nutriset for Item 1 does not have the letter "k".

The Applicant deponed at paragraph 5 of its Further Affidavit that letter "k" corresponds to the code of the Packaging line during manufacturing process and should not be considered as the initial beginning number for the Batch Number. To support this allegation, the Applicant referred the Board to a letter dated 22nd March 2021 written by Nutriset and addressed to the Procuring Entity stating as follows:

"Dear Sir/Madam

**We refer to Plumpy Nut (Ready to Use Therapeutic Food)
COA & Sample provided Batch Number 20247001**

This is to clarify that the letter k printed on the sachet is not part of batch number, the letter corresponds to the code of the packaging line during the manufacturing process and

therefore, it is not to be considered as the beginning of the batch number.

Our batch number is only numerical number which is mentioned on sachet as well as on COA & COC hence the batch number is 20247001

Should you require any further clarification/information, please do not hesitate to contact the undersigned..."

The Board observes that the Applicant obtained a letter dated 22nd March 2021 from its manufacturer, Nutriset explaining why letter "K" appears just before figure **20247001** on the sample it submitted by the tender submission deadline.

Section 79 (1) of the Act describes a responsive tender as a tender that meets all the eligibility and mandatory requirements specified in the Tender Document. Further, section 80 (2) of the Act provides in part as follows:

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents..."

It therefore follows that when evaluating bids, an evaluation committee confines itself to the procedure and criteria set out in the Tender Document. In doing so, the evaluation committee evaluates bids in terms of the documents and information provided in the original bids that were received before the tender submission deadline. This therefore raises the question whether the information provided in the letter dated 22nd March

2021 was provided in the Applicant's original bid to enable the Evaluation Committee consider the same when evaluating the Applicant's original bid.

The Applicant's letter was obtained from Nutriset (the Applicant's manufacturer of Item 1, RUTF) long after the Applicant submitted its original bid by the tender submission deadline of 11th November 2020 and after evaluation of bids were completed on 10th December 2020. The Applicant obtained this information on 9th March 2021 and attached the same in its Further Affidavit. In essence, since this information was not provided in the Applicant's original bid, the Evaluation Committee cannot be faulted for finding the Applicant's bid non-responsive because the documents and information provided by bidders in their original bid are subjected to the procedures and criteria for evaluation provided in the Tender Document. ITT Clause 6.3 (g) of Section II. Tender Data Sheet of the Tender Document expressly stated that for quality assurance reasons, for each sample provided, a protocol (certificate of analysis) of a product test conducted by the laboratory of the manufacturer has to be provided from the same batch of production.

This was a mandatory requirement that goes to the heart of technical specifications of Item 1, RUTF product to be supplied in the subject tender.

The Applicant cited the decision of Justice Nyamu in **Republic v. Public Procurement Administrative Review Board & Kenya Revenue Case (2008) eKLR** (hereinafter referred to as "KRA Case") where the Court was dealing with issues of margin of preference and period of evaluation of bids which are not subject of the instant Request for Review. That notwithstanding, the Applicant referred the Board to page 10 of the

decision where the Court discussed the objectives of procurement law when it held as follows:

“Adherence to applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by the decision maker to comply with positive law. Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudice contrary to the argument put forward by the Respondent”

The finding of the Court in the KRA Case applies only to the extent of determining whether the Procuring Entity herein complied with the applicable criteria during evaluation of the Applicant’s bid and the law governed by section 79 (1) and 80 (2) of the Act. We note that the Interested Party referred the Board to the decision in **Judicial Review Miscellaneous Application No. 118 of 2019, Republic v. Public Procurement Administrative Review Board, Kenya Medical Supplies Authority ex parte Emcure Pharmaceuticals Limited (2019) eKLR** where the High Court discussed the import of section 79 (1) of the Act when it held as follows:

“A proper construction of section 79 (1) of the Act shows that the requirement of responsiveness operates in the following manner: a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid

documents. There is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The Evaluation Committee has a duty to act fairly. However, fairness must be decided on the circumstances of each case. To be considered for award, a bid must comply in all material respects with the invitation for bids"

Further at paragraph 122 of the judgment in **Miscellaneous Application No. 235 of 2016, Republic v. Public Procurement Administrative Review Board ex parte Athi Water Services Board and Machiri Limited (2017) eKLR**, the Court discussed the overriding principles of public procurement under section 3 of the Act to support its finding that:

"a procurement must, before any consideration is taken into account, whether in the parent legislation or the rules and regulations made thereunder, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness...Therefore, apart from the lowest tender, the procuring entity is under an obligation to consider all other aspects of the tender as provided for in the tender document and where a bid does not comply with the conditions stipulated therein it would be unlawful for the procuring entity to award a tender simply on the basis that the tender is the lowest."

Having considered the findings of the Court in the above cases, the Board notes that courts are consistent on the Procuring Entity's obligation of ensuring a procurement process meets the threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. Further, courts are in agreement that a procuring entity must consider all other aspects of a tender as provided for in the Tender Document.

In the instant Request for Review, the criteria that was considered at the Technical Evaluation Stage expressly stated that the certificate of analysis of a product test conducted by the laboratory of the manufacturer must be provided from the same batch of production. The Applicant failed this test because it provided a Sample for Item 1, RUTF with **Batch No. "K 20247001"**, which is different from **Batch No. "20247001"** indicated on the Certificate of Analysis at page 93 of its original bid from **Nutriset**. Further, the Test Report dated 31st October 2020 from Farelabs found on page 125 of the Applicant's original bid makes reference to **Item 1, RUTF** with **Batch No. "421020"** that is totally different from the Batch Number in the RUTF sample and the Batch Number in the Certificate of Analysis from Nutriset.

Fairness and competitiveness in this case would mean that bidders demonstrate that they have provided the required documentation as they compete on an equal footing for award of the subject tender. On this criterion, there is no evidence before this Board to demonstrate that the Procuring Entity failed to satisfy the constitutional threshold of Article 227(1) of the Constitution whilst evaluating the Applicant's bid on Item 1, RUTF.

Accordingly, the Board finds that the Applicant failed to satisfy the criterion provided in ITT Clause 6.3 (a), (c) and (g) of Section II. Tender Data Sheet of the Tender Document. This is because, the Applicant provided a Sample for Item 1, RUTF with **Batch No. "K 20247001"**, which is different from **Batch No. "20247001"** indicated on the Certificate of Analysis for item 1, RUTF at page 93 of its original bid from **Nutriset**. Further, the Test Report dated 31st October 2020 from Farelabs found on page 125 of the Applicant's original bid makes reference to **Item 1, RUTF** with a **Batch No. "421020"** that is totally different from the Batch Number in the RUTF sample and the Batch Number in the Certificate of Analysis for Item 1, RUTF from Nutriset.

On the second issue framed for determination, the Applicant averred at paragraphs 4, 5, 6, and 7 of its Request for Review that the Procuring Entity failed and/or refused to appreciate that the Applicant provided the right product that is, Plumpy sup which meets the definition of RUSF for Item 2 of the subject tender. According to the Applicant, the Tender Document directed bidders to provide Ready to Use Supplemental Food with the target population being, age 5 years and above. The Applicant further states that it provided RUSF product for persons aged from 6 months old and above as opposed to the bid requirement of 5 years and above. The Applicant further avers that if the Applicant's RUSF product materially departed from the requirement in the Tender Document, such a non-conformity can be cured by section 79 (2) (a) of the Act. In its Supporting Affidavit, the Applicant deponed at paragraph 6.3 thereof that the Procuring Entity's decision in declaring the Applicant's bid non-responsive for providing RUSF for persons aged from 6 months old as

opposed to the bid requirement of 5 years and above, is unreasonable and irrational. In its Written Submissions to the Request for Review, the Applicant framed a second issue for determination as: **“whether the Applicant’s bid was responsive for providing RUSF from 6 months old and above as opposed to the bid requirement of 5 years and above”**

The Applicant made reference to section 79 (2) (a) of the Act to support its view that providing RUSF product for children of 6 months and above is also available to children aged 5 years and above and that in any event, the Applicant did not in any way materially deviate from the requirement in the Tender Document. In the Applicant’s view, it provided the right product only that the Applicant’s product caters for children from Six Months old and above including 5 years and above. The Applicant thus terms its product as a minor deviation that should not be a reason for finding its bid non-responsive. The Applicant did not address this limb in its Further Affidavit, Replying Affidavit to the Respondents’ Grounds of Opposition and its Written Submissions to the Respondents’ Grounds of Opposition.

In response, the Respondents depone at paragraph 8 of their Replying Affidavit that the Procuring Entity issued Addendum No. 1 dated 30th October 2020 in response to clarifications sought by bidders including the Applicant. According to the Respondents, the Applicant had sought clarification on the question whether it could submit a product for RUSF which covers persons aged 6 months and above as opposed to persons aged 5 years and above. The Respondents state that the Applicant was informed through Addendum No. 1 that the Procuring Entity required a product for persons aged 5 years and above. It is the Respondents’

position that the Applicant sought another clarification on the same question whether it could submit a product for RUSF which covered persons aged 6 months and above as opposed to persons aged 5 years and above. Through Addendum No. 2 dated 5th November 2020, the Respondents allege that they informed the Applicant that the product should cover persons aged 5 years and above. According to paragraph 38 of the Respondents' Replying Affidavit, the Applicant's failure to comply with the requirement of RUSF product for children aged 5 years and above and is praying for such failure to be excused as a minor deviation amounts to rewriting the Tender Document.

In their Written Submissions, the Respondents reiterate that the Applicant sought clarifications on the criterion in issue and that addenda were issued by the Procuring Entity expressly stating that the product of RUSF should cover persons aged 5 years and above. At paragraph 21 of their Written Submissions, the Respondents state that a Procuring Entity has the sole responsibility of determining the criteria applicable in a procurement process. It is therefore the Respondents' position that it would be a travesty of the entire procurement process to accept the Applicant's proposition that bidders can determine the criteria applicable in a procurement process.

Having perused the Respondents' pleadings, the Interested Party deponed at paragraph 13 of its Replying Affidavit that the Applicant provided a wrong product for the RUSF. At paragraphs 21 to 23 of its Replying Affidavit, the Interested Party depones that if the Applicant submitted a tender or even a sample product for a target population of six (6) months and above as opposed to five (5) years and above, then the Applicant would be in breach of the Tender Document. According to

the Interested Party, the alleged submission of a RUSF product whose target population is six (6) months and above as opposed to five (5) years and above is not a minor conformity or irregularity. The Interested Party depones that the RUSF product should address the nutritional needs of sensitive members of the population with unique and specific needs. According to the Interested Party, the nutritional requirements of a 6-month old person and above is much higher (in specific circumstances, lesser) than that of a 5-year-old person. Consequently, a 5-year-old person may suffer from under-nutrition if he or she consumes RUSF product with less nutritional composition than required, thereby endangering his or her life.

At paragraph 12 of its Written Submissions, the Interested Party framed two issues as to **whether the Applicant provided a wrong product made for children of 6 months and older instead of age 5 years and above** and **whether the failure to provide a product for age five years and above was a minor informality**. To support these issues, the Interested Party reiterated that the Applicant's failure to provide RUSF product for children aged 5 years and above is not excusable thus cannot amount to a minor non-conformity.

Having considered parties' pleadings and written submissions, it is worth mentioning that Justice Nyamweya in JR No E049 of 2021 found no fault in the Board's finding on the question whether the Applicant satisfied the criterion of providing Item 2, RUSF product for children aged 5 years and above. At paragraph 51, 53 and 54 of the judgement, the Honourable Judge held as follows:

“[51] On the second limb of the issue as to whether the 1st Respondent’s [Review Board] decision is unreasonable on account of the deviation in the required specifications for the RUSF for children of 5 years and above not being material, the 1st Respondent’s decision and reasoning in this respect was at pages 21 to 27 of its ruling...

[53] A consideration of whether the 1st Respondent’s finding was unreasonable requires qualitative examination of evidence and arguments that were before the 1st Respondent as regards the specifications of the RUSF products provided by the ex parte Applicant, that is beyond the remit of this Court’s judicial review jurisdiction as explained in the foregoing.

[54] Therefore, the 1st Respondent’s finding that the specifications of the RUSF products in the subject tender were mandatory and material cannot be faulted as being unreasonable, as the legal basis and evidence supporting the finding was explained in the ruling and the 1st Respondent had jurisdiction to examine its nature and application of the specification. The option available to the ex parte Applicant is appeal the said finding, if it is of the view that it was a wrong decision.”

The Board has an obligation to address its mind on evaluation of the Applicant in respect of Item 2, RUSF even though the High Court in JR No. E049 of 2021 found no fault in the Board's findings because this matter has been remitted back to the Board following the quashing of the Board's decision dated 29th March 2021. Accordingly, we proceed to make the following findings on the second issue for determination in so far as evaluation of the Applicant's bid with respect to Item 2, Ready to Use Supplemental Food, is concerned.

The Applicant expressly admitted at paragraph 5 of the Request for Review that it is aware the Tender Document directed bidders to provide Ready to Use Supplemental Food with the target population being, age 5 years and above. The Applicant also admitted that it provided RUSF product for persons aged from 6 months old as opposed to the bid requirement of 5 years and above. In essence, the Applicant acknowledges that it submitted RUSF product for persons aged from 6 months old as opposed to the requirement of submitting RUSF product for persons aged 5 years and above. In the Applicant's view, RUSF product for persons aged from 6 months old can also apply to persons aged 5 years and above. Therefore, the Applicant's RUSF product does not materially depart from the requirements of the Tender Document, thus should be considered to be a minor deviation.

The Tender Document described Item 2, RUSF as:

“READY TO USE SUPPLEMENTAL FOOD (RUSF) 500-560KCAL/100GM (100G SACHET)-FOR AGES 5 YEARS AND ABOVE”.

The technical specifications for RUSF product run through pages 63 to 68 of the Tender Document. Specifically, Clause A (ii) at page 63 states that:

"Ready to use Supplementary Food (RUSF) for persons (5 years and above)

A. Introduction

i. Formulation: Ready to use powder or paste

ii. Target Population:

- ***Individuals with moderate acute malnutrition***
- ***Age: From age 5 years and above"***

This requirement is repeated on the **"Price Schedule for Goods Offered within the Country"** provided at page 56 of the Tender Document where the three items in the subject tender are listed. Tenderers were specifically informed that the RUSF product required is for children from 5 years and above. In addition to this, one of the product specifications of the RUSF product described at page 66 of the Tender Document is as follows: -

"RUSF shall be homogeneous, uniform, with small particle size which does not require and does not encourage chewing before being swallowed. The product shall be free of lumps and of large coarse particles and suitable for consumption by children above 5 years and adults with moderate acute malnutrition"

The Board has studied the confidential file submitted to it and observes that the Procuring Entity responded to several questions raised by

prospective tenderers through Addendum No. 1 dated 30th October 2020 which reads in part as follows: -

"...Question 5

As per the tender document, page 63 Ready to Use Supplementary Food (RUSF) for persons (5 years and above), ii. Target Population, Age; From age 5 years and above

Please clarify if we can supply product which covers wide range i.e. from 6 months and above which also includes and covers 5 years and above as required by GF/KEMSA? Large population group. Kindly clarify is it acceptable by GF/KEMSA?

Response:

❖ Target population is 5 years and above as specified in the technical specifications"

Through Addendum No. 2 dated 5th November 2020, the Respondents further stated that: -

"...Question 2

As per the tender document, page 63 Ready to Use Supplemental Food (RUSF) for persons (5 years and above), ii. Target Population, Age; From age 5 years and above

Please clarify if we can supply product which covers wide range i.e. from 6 months and above which also includes and covers 5 years and above as required by GF/KEMSA? Large

population group. Kindly clarify is it acceptable by GF/KEMSA?

Response: Target population is 5 years and above as specified in the technical specifications"

Please note your response doesn't clarify whether we can offer product for the population 6 months & above which also cover 5 years and above.

Response:

The population should cover older children above 5 years, adolescents and adults"

The Respondents allege that the questions regarding the target population for Item 2, RUSF were raised by the Applicant thus prompting the responses that were issued by the Procuring Entity through Addendum No. 1 dated 30th October 2020 and Addendum No. 2 dated 5th November 2020. This assertion was not controverted by the Applicant.

The Board is cognizant of the manner in which addenda issued by a procuring entity ought to be treated. Section 75 (1) and (4) of the Act which guide on this aspect provides that: -

"(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)

(3)

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

It therefore follows that addenda issued by a procuring entity are part of the Tender Document. The effect of this is that tenderers have an obligation of examining any further instructions provided through addenda issued by a procuring entity and take them into account in preparing their bids.

The Board recognizes that the Applicant attached Addenda 1 and 2 at pages 15 to 24 of its original bid which demonstrates that the Applicant was well aware of the addenda issued by the Procuring Entity indicating the target population for the RUSF product as children above 5 years, adolescents and adults. The Board also takes cognizance of page 666 of the Applicant's bid where it stated, through handwritten comments while appending its signature and company stamp, as follows: -

"Note: - we confirm all the above specifications will be complied"

With full knowledge of the requirements of the Tender Document and Addenda issued by the Procuring Entity, the Applicant provided a Product Technical Data Sheet for a product known as **"Plumpy' Sup"** at page 75 of its bid with the following description: -

"Plumpy' Sup is a Ready to Use Supplemental Food made from peanuts, milk and soy. It was designed for the treatment of moderate acute malnutrition

.....

Target Population

Plumpy' Sup has been designed for the treatment of moderate acute malnutrition (from 6 months old) in Supplementary Feeding Programs."

From the foregoing, the Board observes that the Applicant proposed an RUSF product known as "**Plumpy' Sup**" for children aged from 6 months, and not for children 5 years and above, adolescents and adults.

The Board has perused the last Addendum issued on 5th November 2020 and is satisfied that the Procuring Entity required RUSF products for children aged 5 years and above, adolescents and adults and not products for children below 5 years.

The Board is mindful of the Applicant's assertion that failure to provide RUSF product for children aged 5 years and above was a minor deviation that ought to have been cured by section 79 (2) (a) of the Act. The said provision states as follows: -

"(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

(2) A responsive tender shall not be affected by—

(a) minor deviations that do not materially depart from the requirements set out in the tender documents"

One of the technical specifications of the RUSF at page 66 of the Tender Document, provided in mandatory terms that **“the product shall be free of lumps and of large coarse particles and suitable for consumption by children above 5 years and adults”**. One of the definitions provided in the Black’s Law Dictionary, 9th Edition at page 1527 thereof to the word “shall” is as follows:

“Has a duty to; more broadly, is required to. This is the mandatory sense that drafters typically intend and that courts typically uphold.”

It is therefore the Board’s considered finding that the use of the word “shall” in the technical specifications of the RUSF product denotes that it was mandatory (and not optional) for bidders to provide RUSF product for children aged 5 years and above, adolescents and adults.

Courts have previously stated the importance of mandatory requirements in procurement processes in that eligibility and mandatory requirements (including technical specifications) determine the responsiveness of a tender. In **Republic v Public Procurement Administrative Review Board & 2 others Ex-parte BABS Security Services Limited [2018] eKLR** the Court held that: -

“a bid only qualifies as a responsive bid if it meets all mandatory requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.”

[Emphasis by the Board]

The Applicant's allegation that providing RUSF product for children aged from 6 months old should be treated as a minor deviation raises the question whether a mandatory requirement can be classified as a minor deviation.

The Applicant and the Interested Party cited the decision of Justice Mativo in **Republic v. Public Procurement Administrative Review Board & Another, Premier Verification Quality Services (PVQS) Limited ex parte Tuv Austria Turk (2020) eKLR** where the court considered responsiveness of tenders vis-à-vis minor deviations when it held as follows:

[41] Under section 79 (2) (a) (b) of the act, the procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender

[43] The decision as to whether or not a particular non-conformity constitutes a minor deviation or informality under procurement law has sometimes been characterized as a discretionary one. However, major focus must be on the prejudice to other bidders

rather than on the degree of non-conformity in determining if a bid is non-responsive.

[44] In essence, a conforming/compliant/responsive tender is defined as a tender that complies with all the material or substantial aspects of the tender invitation.

Further, the Applicant referred the Board to the decision in **Republic v. Public Procurement Administrative Review Board, Arid Contractors & General Supplies ex parte Meru University & Technology (2019) eKLR** where the Court took a further step in settling the question whether “mandatory conditions/requirements can be waived” when it held as follows:

“75. Under section 79 (2) (a) (b) of the act, the procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender

[79] For there to be fairness in the public procurement process as required under Article 227, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

[81] A Procuring Entity is bound by its Bid Documents. Mandatory conditions cannot be waived. No argument was advanced before me to the effect that such deviations do not prejudice the other bidders or confer a benefit to the Interested Party."

The Board observes that the court in the Tuv Austria Turk Case and the Meru University Case took cognizance of section 79 (2) (a) and (b) of the Act when they held that there are some minor deviations/informalities that a procuring entity may take into account when considering whether or not a bid is non-responsive. However, in both cases, the Courts are alive to the fact that mandatory requirements should not be waived because all bidders must comply with mandatory conditions of a tender. In the Courts' view, the decision as to whether or not a particular non-conformity constitutes a minor deviation or informality under procurement law has sometimes been characterized as a discretionary one. However, major focus must be on the prejudice to other bidders rather than on the degree of non-conformity in determining if a bid is non-responsive.

All the authorities cited by parties confirm that mandatory requirements cannot be treated as minor deviations. The underlying principle behind this is that such an action would give a particular bidder an unfair advantage over other bidders who complied with the mandatory requirements specified in the Tender Document. The Applicant in the instant Request for Review was well aware of the technical specifications

of the RUSF product as stated in the Tender Document and as clarified through Addendum No. 2 issued on 5th November 2020.

As already observed by the Board, the Applicant clearly indicated in its bid document that it would comply with all technical specifications provided in the Tender Document and went on to attach all addenda issued by the Procuring Entity thereby demonstrating its knowledge of all criteria and procedures stated therein. Despite having participated in the subject procurement process, it is only after its bid has been found non-responsive, that the Applicant is now stating that its RUSF product for children aged from 6 months and above would satisfy the needs of the Procuring Entity. This allegation, in the Board's view has not been substantiated.

It is the Board's considered view that the Applicant, having sought clarification from the Procuring Entity, was well aware that it was mandatory to provide RUSF products for children aged 5 years and above, adolescents and adults. The Applicant, having opted to participate in the subject procurement process with full knowledge of the mandatory criterion is the author of its own misfortune because the Applicant knew that after two clarifications issued through Addendum 1 and 2, the Procuring Entity did not direct bidders of any deviation from the requirement of providing RUSF product specifically for children aged 5 years and above, adolescents and adults. Section 80 (2) of the Act states that: -

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents"

Further, Clause 10.2 of Section I. Instructions to Tenderers of the Tender Document, cautioned tenderers on the following:

"The Tenderer is expected to examine all instructions, forms, terms, and specifications in the tender documents. Failure to furnish all information required by the tender documents or to submit a tender not substantially responsive to the tender documents in every respect will be at the tenderers risk and may result in the rejection of its tender"

While tenderers were expected to examine all instructions, forms, terms, and specifications in the Tender Document so as to meet all eligibility and mandatory requirements, the Procuring Entity was required to stick to the procedures and criteria in the Tender Document as spelt out under the provisions of Section 80 (2) of the Act.

The Applicant's proposed product had a target population of children aged from 6 months and above as opposed to children aged 5 years and above, adolescents and adults as required by the Procuring Entity and specified in Clause A (ii) at page 63 of the Tender Document read together with Response to Question 2 of Addendum No. 2 dated 5th November 2020.

Given the nature of the products being procured by the Procuring Entity, there was no discretion on tenderers to pick and choose the mandatory requirements to comply with while ignoring others. The RUSF products will be supplied to children with moderately acute malnutrition in the age

group above 5 years, in adolescents and in adults. The Board's hands are tied especially because it is bound by decisions of the High Court which have consistently held that mandatory requirements cannot be waived. The Board is persuaded that the Applicant wants to be given undue advantage to the detriment of other bidders who complied with this requirement. Such action goes against the principle of fairness, so cherished by Article 227 (1) of the Constitution which provides as follows:

"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective"

The Board has found that Tender Document read together with Addenda issued by the Procuring Entity required bidders to provide RUSF product for children aged 5 years and above, adolescents and adults. This was a mandatory requirement that could not be waived as we have established hereinbefore. The Board has also established that the Applicant admitted that its RUSF product has a target population of children aged from 6 months old. This admission is supported by the documents in the Applicant's original bid which clearly show the Applicant proposed to supply RUSF product for children aged from 6 months old despite being aware of the requirement as specified in the Tender Document and addenda issued by the Procuring Entity.

In the circumstances, the Board has no choice but to find that the Applicant failed to comply with the requirement specified in the Tender

Document having proposed to provide RUSF products for children aged from 6 months instead of children aged 5 years and above.

At paragraph 5 of their Grounds of Opposition, the Respondents reiterate that the Applicant failed to provide the composition of the nutritional value of its product. Having perused the Respondent's pleadings, the Interested Party deponed at paragraph 13 of its Replying Affidavit that having perused the Respondents' Grounds of Opposition, the Interested Party notes that the Applicant failed to provide the composition of the nutritional value of their product. At paragraph 6 of its Replying Affidavit to the Respondents' Grounds of Opposition and at page 2 of its Written Submissions to the Respondents' Grounds of Opposition, the Applicant took the view that the Procuring Entity considered extraneous requirements that were not captured in the Tender Document in finding the Applicant's bid non-responsive.

In addressing this issue, the Board notes that the Applicant's letter of notification of unsuccessful bid did not mention that the Applicant failed to provide the composition of the nutritional value of its product. The Board further studied the Evaluation Report executed on 10th December 2020 and notes that the Evaluation Committee did not highlight **"failure to provide the composition of the nutritional value of the product"** as part of the reasons for finding the Applicant's bid non-responsive in respect of Item 2, RUSF. This reason emerged from the Respondents' pleadings.

Further, the issue of composition of a product was a criterion to be considered at the Product Evaluation Stage which was based on YES/NO basis as stated in Clause B (2) Product Evaluation of Section VIII. Stages

of Tender and Evaluation Criteria of the Tender Document. Failure to comply with any of the requirements at the Product Evaluation stage meant that a bid would not be evaluated any further. For example, since the Applicant did not provide RUSF product for children aged 5 years and above, its bid was disqualified thus not evaluated any further. This explains why at page 14 of the Evaluation Report, other parameters of Product Evaluation (that is, Product Stability, Generic Requirement, Nutrient Profile, Nutritional Composition of RUSF, Packaging and Labelling Specifications) were not considered in relation to the Applicant's RUSF product after the Applicant was found non-responsive to Item 2, RUSF for its failure to provide RUSF product for children aged 5 years and above.

The Board is mindful of the import of section 87 (3) of the Act which requires the accounting officer of a procuring entity to notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof. Regulation 82 (2) of the Public Procurement and Asset Disposal Regulations 2020 states that:

“(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids”

Since an evaluation committee is the one that carries out evaluation of bids, the specific reasons why a tender is non-responsive should emanate from the outcome of evaluation of a tender. Assuming the lowest evaluated bidder is disqualified after a due diligence exercise, then reasons for such non-responsiveness should emanate from the outcome of the due diligence exercise.

It is therefore the Board's considered finding that the Respondents' allegation that the Applicant failed to provide the composition of the nutritional value of its product did not form part of the reasons why the Applicant's bid was found non-responsive and cannot be relied upon by the Respondents at this stage in alleging that the Applicant's bid was non-responsive. That notwithstanding, it is clear from the Board's finding on evaluation of the Applicant with respect to Item 1, RUTF and Item 2, RUSF that the Applicant's bid was non-responsive in both items thus could not proceed any further in the evaluation stage.

It is worth pointing out that the Procuring Entity's Invitation to Tender Notice dated 13th October 2020 expressly states that the Government of Kenya received a grant from **the Global Fund to Fight AIDS, Tuberculosis and Malaria**. As we conclude this matter, we note that more than 6 months have lapsed since the tender was advertised thus resulting in unnecessary delay in Supply of Nutritional Supplements to the target population identified by the Procuring Entity. Whereas it is important for bidders to comply with tender conditions in any procurement process, this is an example of a procurement process whereby all bidders including the Applicant are called upon to treat all the requirements specified in the Tender Document with the seriousness that is required. In particular, it would be prudent for example for bidders to provide the Ready to Use Therapeutic Food in accordance with the technical specifications required and the Ready to Use Supplemental Food for the specific age group identified by the Procuring Entity without treating the requirements in any casual way.

Public procurement and asset disposal procedures have a constitutional underpinning specifically Article 10 (2) (c) of the Constitution which lists national values and principles of governance such as good governance, integrity, transparency and accountability. These principles are recognized in section 3 (a) of the Act. Further, Article 227 (1) of the Constitution provides that procurement processes should be undertaken in a system that is fair, equitable, transparent, competitive and cost-effective. Procuring Entities and Bidders alike are bound by provisions of the Constitution and the Act thus each party must perform their obligation as required in law. In essence, a procuring entity should ensure that a procurement process it has initiated satisfies the constitutional and statutory requirements while on the other hand, bidders must comply with all eligibility and mandatory requirements (including technical specifications) as directed in the Tender Document. It is the Board's finding that the subject procurement process is not delayed any further.

Having considered all the pleadings and written submissions filed by the Applicant, the Respondents and the Interested Party together with parties' respective authorities as directed by the High Court in JR E049 of 2021, there is no doubt in our mind that the Request for Review lacks merit.

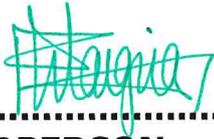
In totality, the Board finds that the Request for Review fails, thus proceeds to grant the following orders:

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review:

- 1. The Request for Review filed by the Applicant, M/s Techno Relief Services Ltd on 9th March 2021 with respect to Tender No. GF ATM HIV NFM-20/21-01T-011 for Supply of Nutritional Supplements by the Kenya Medical Supplies Authority, be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 24th day of June 2021



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CHAIRPERSON

PPARB



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SECRETARY

PPARB