

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 59/2025 FILED ON 16<sup>TH</sup> MAY 2025**

**BETWEEN**

**TRAMEX MEDIQUIP LTD.....APPLICANT**

**AND**

**CHIEF EXECUTIVE OFFICER,**

**KENYA MEDICAL SUPPLIES AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**KENYA MEDICAL SUPPLIES AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**SUKEN INTERNATIONAL LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**QUEST PHARMACEUTICALS LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

Review against the decision of the Chief Executive Officer, Kenya Medical Supplies Authority, in relation to TENDER NO. KEMSA/GOK/MOH-OIT03/2024-2025 – Supply of Nutrition Health Products.

**BOARD MEMBERS PRESENT**

Mr. George Murugu FCIArB & IP      Chairperson

Eng. Lilian Ogombo                      Member

Hon. Joshua Kiptoo                      Member



## **IN ATTENDANCE**

Ms. Philemon Kiprop

Holding brief for Acting Board  
Secretary

Mr. Erickson Nani

Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

**TRAMEX MEDIQUIP LIMITED**

Mr. Duncan Kiprono

Advocate, CK Advocates

### **RESPONDENTS**

**CHIEF EXECUTIVE OFFICER,  
KENYA MEDICAL SUPPLIES  
AUTHORITY**

**KENYA MEDICAL SUPPLIES  
AUTHORITY**

Mr. Kimutai Bosek

Advocate, J.K. Bosek & Company Advocates

### **1<sup>ST</sup> INTERESTED PARTY SUKEN INTERNATIONAL LIMITED**

Mr. Were

Advocate, Odera Were Advocates

### **2<sup>ND</sup> INTERESTED PARTY QUEST PHARMACEUTICALS LIMITED**

Mr. Muganda Innocent

Advocate, Sagana Biriq & Muganda  
Advocates LLP



## **BACKGROUND OF THE DECISION**

### **THE TENDERING PROCESS**

1. The Kenya Medical Supplies Authority (hereinafter referred to as the "Procuring Entity") invited tenders through the open tendering method under TENDER NO. KEMSA/GOK/MOH-OIT03/2024-2025 for the Supply of Nutrition Health Products (hereinafter referred to as the "subject tender"). The tender was structured into two lots: Item No. 1 – Fortified Blended Flour, and Item No. 2 – Ready-to-Use Therapeutic Food (RUTF). In accordance with the Tender Document, bidders were required to submit their tender documents to the designated address on or before 4th February 2025 at 10:00 a.m.

### **Addenda/Clarifications**

2. According to the confidential documents submitted to the Public Procurement Administrative Review Board (hereinafter referred to as the "Board") by the Procuring Entity pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as the "Act"), the Procuring Entity issued Clarification No. 1 dated 24th January 2025, Addendum No. 1 dated 23rd January 2025, Addendum No. 2 dated 28th January 2025—which extended the tender submission deadline from 4th February 2025 to 13th February 2025—Addendum No. 3 dated 6th February 2025, and Addendum No. 4 dated 10th February 2025, which further extended the submission deadline to 20th February 2025 at 10:00 a.m.



## Submission of Bids and Tender Opening

3. According to the Evaluation Report dated 18th March 2025, which was submitted as part of the confidential documents, a total of 18 tenders were submitted in response to the subject tender. The tenders were recorded as follows:

<b>N0.</b>	<b>Tenderer</b>
1.	Reliefline (Kenya) Limited
2.	Kensel Limited
3.	Lakih Enterprises Limited
4.	Angelica Medical Supplies Kenya Ltd
5.	Quest Pharmaceuticals Limited
6.	Impact Medical Supplies Ltd
7.	Queseven Limited
8.	Riyazul Janna Regional Health & Biotechnology Co. Ltd
9.	Cloriti Pharmaceutical (E.A) Ltd
10.	Vam Health Services (K) Ltd
11.	Tramex Mediquip Ltd
12.	Caring International Ltd
13.	Thermosystems East Africa Ltd
14.	Hiyam Holdings Ltd
15.	Suken International Ltd
16.	Zakmin Investments Ltd
17.	Warrantyte Ltd
18.	Equatorial Nut Processors Ltd



## **Evaluation of Bids**

4. According to the Evaluation Report, the Tender Evaluation Committee (hereinafter referred to as the 'Evaluation Committee') convened to assess the tenders. The evaluation process was conducted in four stages, as outlined below:
  - a. Preliminary Evaluation
  - b. Technical Evaluation
  - c. Financial Evaluation

### **Preliminary Evaluation**

5. The Evaluation Committee was tasked with assessing the tenders for responsiveness based on the evaluation criteria set out on page 36 of the Tender Document under the section titled Preliminary Evaluation. Only those tenders that satisfied the requirements at this stage, as specified in the Tender Document, were deemed eligible to proceed to the Technical Evaluation stage.
6. At the conclusion of the Preliminary Evaluation stage, one tender was found to be non-responsive, while seventeen tenders, including those submitted by the Applicant, the 1st Interested Party, and the 2nd Interested Party, were found to have met the required criteria and were accordingly declared responsive. Only these responsive tenders



proceeded to the Technical Evaluation stage.

## **Technical Evaluation**

7. The Evaluation Committee proceeded to assess the tenders for technical responsiveness based on the criteria outlined on page 36 of the Tender Document under the section titled *Technical Evaluation*. This stage comprised two components: Document Evaluation and Product Evaluation. Additionally, the Evaluation Committee categorized the bidders according to the specific items they had quoted for and conducted the evaluation in accordance with that categorization.

### **Item No. 1: Fortified Blended Flour**

#### **Stage 1 - Document Evaluation**

8. The Evaluation Committee was required to assess the tenders strictly in accordance with the criteria specified on page 36 of the Tender Document.
9. Eleven bidders, specifically those assigned bid numbers 4, 5, 8, 9, 10, 12, 13, 14, 15, 16, and 18, were subjected to technical document evaluation. This category included the 1st Interested Party and the 2nd Interested Party. The Applicant did not submit a bid for this particular item.
10. At the conclusion of the Technical Document Evaluation stage, eight



bidders, including the 1st Interested Party, were found to be non-responsive, while three bidders, including the 2nd Interested Party, were found to be responsive and therefore proceeded to the Product Evaluation stage.

## **Stage 2: Product Evaluation**

11. The Evaluation Committee was required to assess the tenders based on the criteria outlined under the section titled Product Evaluation on page 37 of the Tender Document.
12. At the conclusion of the Product Evaluation stage, two bidders, including the 2nd Interested Party, were found to be responsive and accordingly proceeded to the Financial Evaluation stage. One bidder was found to be non-responsive and was therefore disqualified from further evaluation.

## **Item No. 2: RUTF**

### **Stage 1 - Document Evaluation**

13. The Evaluation Committee was required to assess the tenders based on the criteria set out on page 36 of the Tender Document.
14. Eleven bidders, specifically those assigned bid numbers 2, 3, 5, 6, 7, 8, 11, 13, 15, 16, and 17, were subjected to technical document evaluation. This group included the Applicant, the 1st Interested Party,



and the 2nd Interested Party.

15. At the conclusion of this evaluation stage, seven bidders, including the Applicant, were found to be non-responsive, while four bidders, including the 1st Interested Party and the 2nd Interested Party, were found to be responsive and therefore proceeded to the Product Evaluation stage.

## **Stage 2: Product Evaluation**

16. The Evaluation Committee was required to assess the tenders in accordance with the criteria outlined under the section titled Product Evaluation on page 37 of the Tender Document.
17. At the conclusion of this stage, all four bidders, including the 1st Interested Party and the 2nd Interested Party, were found to be responsive and therefore proceeded to the Financial Evaluation stage.

## **Financial Evaluation**

### **Item No. 1: Fortified Blended Flour**

18. The Evaluation Committee was tasked with assessing the tenders based on the Financial Evaluation criteria outlined in the Tender Document, focusing specifically on comparing the unit prices submitted by the tenderers.





19. At the conclusion of the Financial Evaluation stage, the Evaluation Committee recommended awarding the contract to the 2nd Interested Party, who submitted the lowest evaluated responsive bid with a unit price of KES 68.25 and a total cost of KES 102,375,136.50.

### **Item No. 2: RUTF**

20. The Evaluation Committee was tasked with assessing the tenders based on the Financial Evaluation criteria outlined in the Tender Document, focusing specifically on comparing the unit prices submitted by the tenderers.
21. At the conclusion of this stage, the Evaluation Committee recommended awarding the contract to the 1st Interested Party, who submitted the lowest evaluated responsive bid with a unit price of KES 47.90 and a total cost of KES 110,170,000.00.

### **Due diligence/Post Qualification**

22. The Evaluation Committee conducted due diligence and prepared a report, which was incorporated into the overall Evaluation Report. The Committee's findings and recommendations were that the tender for Item 1 be awarded to the 2nd Interested Party as the lowest evaluated bidder, and the tender for Item 2 be awarded to the 1st Interested Party as the lowest evaluated bidder.



## **Evaluation Committee's Recommendation**

23. The Evaluation Committee recommended awarding the subject tender to the 1st Interested Party for Item 2 and to the 2nd Interested Party for Item 1, respectively.

## **Professional Opinion**

24. In a Professional Opinion dated 30th April 2025 (hereinafter referred to as the 'Professional Opinion'), the Procurement Director of the Procuring Entity, Mr. Moses Sudi, reviewed the procurement process, including the tender evaluation, and concurred with the Evaluation Committee's recommendations to award the subject tender to the 1st and 2nd Interested Parties.

## **Notification to Tenderers**

25. Tenderers were notified of the evaluation outcome of the subject tender by letters dated 2<sup>nd</sup> May 2025.

## **REQUEST FOR REVIEW**

26. On 16th May 2025, the Applicant, through the firm of CK Advocates, filed a Request for Review dated 15th May 2025. The application was accompanied by an Applicant's Statement/Affidavit in Support of the Review for Review by Evalyne Chepkirui, the Director of the Applicant, sworn on 15th May 2025. The Applicant sought the following orders:



- a) The Respondents 'decision in the tender as communicated to the Applicant in the Notification of Intention to Award letter dated 2nd May 2025 in the matter of Tender for Supply of Nutrition Health Products, Tender No. KEMSA/GOK-MOH-OIT03/2024-2025(hereinafter referred to as the "Tender") be annulled.***
- b) The procurement proceedings leading to the decision by the Respondents to award the Interested Parties the tender in the matter of Tender for Supply of Nutrition Health Products, Tender No. KEMSA/GOK-MOH-OIT03/2024-2025 (hereinafter referred to as the "Tender") be reviewed and this Honourable Board be pleased to direct the Respondents to re-admit and re-evaluate the Applicants' bid in the financial stage and proceed to make an award in a manner that strictly complies with the provisions of the law.***
- c) The Respondents be ordered to pay the costs of and incidental to these proceedings.***
- d) Any other relief that the Honourable Board deems fit to grant, having regard to the circumstances of this case in order to give effect to the Board's orders.***



27. In a Notification of Appeal and a letter dated 16th May 2025, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Procuring Entity 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 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 16th May 2025.
28. On 22nd May 2025, the 1st and 2nd Respondents, through the firm of J.K. Bosek & Company Advocates, filed a Notice of Appointment of Advocates dated 22nd May 2025.
29. On 23rd May 2025, the Acting Board Secretary issued a Hearing Notice to the parties, informing them that the hearing of the Request for Review would be held virtually on 28th May 2025 at 11:00 AM via the provided link.
30. On 27th May 2025, the Applicant filed its Written Submissions along with a List and Digest of Authorities, both dated 27th May 2025.
31. On 27th May 2025, the Respondents filed Grounds of Opposition dated 26th May 2025, accompanied by a Replying Affidavit sworn on the same date by Mr. Moses Sudi, the Procuring Entity's Procurement Director.



Additionally, on that day, the Respondents submitted the Confidential Documents to the Board in accordance with Section 67(3) of the Act.

32. On 28th May 2025, the 2nd Interested Party filed a Notice of Appointment of Advocates dated 27th May 2025 through the firm of Sagana Biriq & Muganda Advocates LLP, along with a Replying Affidavit sworn on the same date by Krunal Navinbhai Patel, the Managing Director of the 2nd Respondent.
33. When the Board convened for the hearing on 28th May 2025 at 2:00 PM, the Applicant was represented by Mr. Kiprono, the Respondents were jointly represented by Mr. Bosek, and the 2nd Interested Party by Mr. Muganda. The 1st Interested Party did not appear or was not represented.
34. The Board reviewed the pleadings filed by the parties, after which the Applicant's Counsel made an application to strike out the Respondents' documents on the grounds of late filing. Additionally, Counsel contended that the 2nd Interested Party's Counsel had not served him with a Notice of Appointment and therefore was improperly recorded on the proceedings.
35. Regarding the application to strike out the Respondents' documents, the Board inquired why the Applicant's Counsel had not filed a Notice of Preliminary Objection. The Applicant's Counsel explained that this was due to receiving the Respondents' documents only the day before the hearing.



36. On the issue of the 2nd Interested Party's representation, the Board allowed their Counsel to respond. The Counsel confirmed that the Notice of Appointment had been filed and served on all parties. The Board then directed the 2nd Interested Party's Counsel to immediately serve the Notice of Appointment on the Applicant's Counsel.
37. Regarding the application to strike out the Respondents' documents, the Board directed that the matter be addressed during the parties' oral submissions on the Request for Review. The Board further stated that the application would be determined concurrently with the Request for Review.
38. The Respondents' Counsel requested additional time to file written submissions in response to those submitted by the Applicant prior to the hearing. Counsel contended that the Applicant did not seek leave to file the submissions and that the submissions were served on the hearing day.
39. In response to the Respondents' application, the Applicant's Counsel stated that they did not require leave to file their written submissions.
40. In response to the Respondents' application, the 2nd Interested Party's Counsel indicated readiness to proceed with the hearing, noting that the entire Request for Review primarily concerns an issue of fact.
41. Counsel for the 2nd Interested Party further applied to be excused from

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the proceedings, submitting that the Request for Review does not challenge the award made to the 2nd Interested Party.

42. In response to the 2nd Interested Party's application, the Applicant's Counsel opposed the request, arguing that the 2nd Interested Party was properly joined as a party under Section 170 of the Act, given that they were one of the successful tenderers.
43. The Board directed the 2nd Interested Party's Counsel to incorporate the application to be excused from the proceedings within their response to the Request for Review, allowing the Board to consider and make substantive findings on all the issues in dispute.
44. In light of the applications made, the Board granted the Respondents and the 2nd Interested Party leave to file and serve their Written Submissions in response to the Applicant's Written Submissions by 29th May 2025 at 10:00 A.M. The Applicant was also granted leave to file a rejoinder by 29th May 2025 at 2:00 P.M. The Board further scheduled the matter for hearing on 30th May 2025 at 8:00 A.M. for the parties to present their oral submissions.
45. On 29th May 2025, the 1st Interested Party, through the firm of Odera Were Advocates, filed a Notice of Appointment of Advocates dated 29th May 2025, along with a Replying Affidavit sworn on the same date by Paul Otieno, the 1st Interested Party's Director, and Written Submissions dated 29th May 2025.



46. On 29th May 2025, the 2nd Interested Party filed its Written Submissions dated 29th May 2025, accompanied by a List and Bundle of Authorities dated the same day.
47. On 29th May 2025, the Respondents filed their Written Submissions dated the same day.
48. On 29th May 2025, the Applicant filed Supplementary Written Submissions dated the same day, accompanied by a Further List and Digest of Authorities also dated 29th May 2025.
49. When the Board convened for the hearing on 30th May 2025 at 8:00 AM, the Applicant was represented by Mr. Kiprono, the Respondents were jointly represented by Mr. Bosek, the 1st Interested Party by Mr. Were, and the 2nd Interested Party by Mr. Muganda. The Board read aloud the pleadings filed by the parties, who confirmed that all documents had been duly filed and exchanged. The Board then allocated time for each party to present their respective submissions.

## **PARTIES SUBMISSIONS**

### **Applicant's Submissions**

50. The Applicant submitted that the Notification of Intention to Award letter dated 2nd May 2025 did not comply with Section 87(1) and (3) of the Public Procurement and Asset Disposal Act, which requires the Accounting Officer of the procuring entity to notify the successful





tenderer in writing and also inform unsuccessful tenderers accordingly. They emphasized that this statutory duty is exclusive to the Accounting Officer.

51. The Applicant argued that the letter was issued by the Procurement Director, who is not the Accounting Officer, and this amounted to an unlawful delegation or usurpation of the Accounting Officer's powers. They further noted that the Respondents failed to provide any evidence of lawful delegation to justify the Procurement Director's issuance of the notification, rendering it irregular and legally defective.
52. In support of their position, the Applicant referred to the High Court decision in ***Republic v Public Procurement Administrative Review Board Ex parte Internet Solutions Ltd [2021] eKLR***, where the Court upheld the cancellation of letters signed by unauthorized officers. They submitted that this precedent confirms that the notification signed by the Procurement Director in the present matter was invalid.
53. Further, the Applicant argued that the 2nd Respondent's Evaluation Committee was legally required, under Article 227 of the Constitution and the Public Procurement and Asset Disposal Act, to evaluate the tender strictly according to the criteria and procedures set out in the Tender Document. Clause 1.1 of Section III of the Tender Document prohibits the use of any evaluation criteria beyond those specified, ensuring fairness, transparency, and equal treatment of all bidders.



54. The Applicant challenged their disqualification on the basis that the Notification of Intention to Award cited their failure to be listed as a distributor by the Pharmacy and Poisons Board (PPB), a requirement not found anywhere in the tender document. Instead, the tender required that the product be listed by PPB or KEBS and that non-manufacturer bidders submit valid Manufacturer's Authorization and relevant certificates, which the Applicant had fully complied with.
55. The Applicant submitted that the Evaluation Committee's reliance on this extraneous criterion was unlawful and contrary to both the Act and the tender terms. This introduced unfairness and violated the principles of equal competition, as bidders are entitled to expect that only the stipulated criteria will be used in evaluation.
56. The Applicant contended that the Respondents' Grounds of Opposition and Replying Affidavit, both dated 26th May 2025, were filed outside the prescribed timelines and should be expunged from the record. Counsel argued that the Request for Review was filed on 16th May 2025 and properly served on the Respondents. Procedural guidelines under Procurement Administrative Review Circular No. 2 of 2020 and the Public Procurement and Asset Disposal Regulations, 2020 require Respondents to file their response within five days of service. The Respondents filed their documents late on 27th May 2025 without offering any justifiable explanation, thereby violating mandatory procedural rules and infringing the Applicant's right to a fair hearing as guaranteed by the Constitution.



57. The Applicant further argued that the Respondents' reliance on procedural technicalities and their selective interpretation of the Regulations to justify late filing is misplaced. Counsel contended that the Respondents' invocation of Article 159(2)(d) of the Constitution, which mandates justice be administered without undue regard to procedural technicalities, does not excuse non-compliance with clear legal timelines.

### **Respondents' Submissions**

58. The Respondents argued that the Applicant had improperly raised a Preliminary Objection during the hearing on 28th May 2025, despite having been duly served with the Replying Affidavit. They contended that the Applicant deliberately ignored the averments contained therein and falsely claimed that the Application for Review was unopposed, contrary to the existence of the Replying Affidavit and Grounds of Opposition.

59. They further submitted that the Applicant had failed to demonstrate any prejudice resulting from the alleged late filing of the Respondents' documents. In their view, the Applicant sought to rely on procedural technicalities rather than engage with the substantive merits of the case. They urged the Review Board to uphold the principles of substantive justice over technical objections.

60. The Respondents contended that the Applicant relied on a circular issued by the Review Board in March 2020, during the COVID-19



pandemic, rather than citing gazetted procedural rules as required under Section 59 of the Evidence Act. They argued that the circular was issued to manage an exceptional public health crisis and should not be treated as binding legal authority on procedural matters.

61. On the legal question of Preliminary Objection, the Respondents submitted that Regulation 209(1) of the Public Procurement and Asset Disposal Regulations allows a party to file a Preliminary Objection within three days of notification. They noted that the Applicant did not file any such objection within the stipulated timeframe, and instead raised the matter for the first time in its written submissions. They submitted that this amounted to an afterthought and urged the Board to dismiss it.
62. With respect to the substantive issues, the Respondents framed two key questions: whether the officer who signed the notification of award had legal authority, and whether the Applicant was required to obtain input from the Kenya Pharmacy and Poisons Board (KPPB) and/or the Kenya Bureau of Standards (KEBS). On the first issue, they submitted that the CEO of the Procuring Entity had lawfully delegated authority to the Procurement Director, Moses Sudi, under Section 69(4) of the Act. They referred to a delegation letter attached to the Replying Affidavit to support this position.
63. On the second issue, the Respondents asserted that the inputs of KPPB and KEBS were mandatory due to the nature of the procurement, which involved food and medicine. They contended that statutory oversight by these bodies is essential to ensure public safety and compliance with



legal thresholds. The Respondents rejected the Applicant's claim that it was exempt from these requirements by sourcing from a compliant manufacturer, arguing that the Applicant itself had to demonstrate compliance.

64. To reinforce their arguments, the Respondents cited precedents, including ***Nomads Construction Co. Ltd v Kenya National Highways Authority, Review No. 01 of 2017***, where the Board held that failure to meet a mandatory requirement rendered a bid non-responsive. They also referred to ***Ex Parte Kingways Systems Ltd v National Government Constituencies Fund Board [2024]***, where the High Court emphasized that a bidder cannot challenge procurement decisions if it failed to comply with mandatory tender requirements.

### **1<sup>st</sup> Interested Party's Submissions**

65. Counsel submitted that the Applicant had failed to demonstrate any prejudice that would result if the parties were allowed to file their responses in the interest of justice. Further, Counsel noted that no legal authority was cited to prohibit a party from filing a Replying Affidavit before the hearing date.
66. Counsel contended that a Preliminary Objection must be filed within three days from the date of the notice for hearing of the review application, and its purpose is to bar the hearing of the Request for Review.



67. Counsel argued that the involvement of the Kenya Public Procurement Board (KPPB) and the Kenya Bureau of Standards (KEBS) was mandatory given the nature of the procurement, which concerned food and medicine. They contended that statutory oversight by these bodies is essential to ensure public safety and compliance with the applicable legal standards.
68. Counsel argued that it was incumbent upon the Applicant to demonstrate compliance with the requirements of KPPB and KEBS, the two statutory bodies whose approvals were condition precedents. They emphasized that no person is permitted to handle food and medicine supplied to the public without authorization from these relevant regulatory authorities.

## **2<sup>nd</sup> Interested Party's Submissions**

69. The 2nd Interested Party submitted that the Applicant's bid failed to comply with the mandatory requirements of the tender and the Pharmacy and Poisons Act. It argued that the Manufacturer's Authorization and certificate presented by the Applicant were issued by Nuflower Foods & Nutrition Private Ltd, a company incorporated in India, contrary to Section 4(2)(b) of the Act, which requires foreign manufacturers to appoint a local representative incorporated in Kenya.
70. It was the 2nd Interested Party's position that the appointment of a foreign company as the local representative constituted a material non-compliance with both the tender requirements and statutory



obligations. The Applicant also failed to provide a quality certificate in its name and did not furnish proof of meeting the mandatory requirements under the tender.

71. The 2nd Interested Party maintained that these deficiencies justified the Applicant's disqualification, emphasizing that compliance with procurement laws and tender specifications is mandatory. It cited the decision in ***Republic v PPARB ex parte Meru University [2019] eKLR***, which held that deviations from legal procedures materially affecting the contract cannot be excused and render the procurement process unlawful.
72. On the issue of prejudice, the 2nd Interested Party argued that the Applicant did not submit a bid for the item that was awarded to it, RUTF, a fact the Applicant admitted. As such, the Applicant lacked any legitimate interest in the item and could not claim to be aggrieved by its award.
73. The 2nd Interested Party further argued that under Section 167(1) of the Public Procurement and Asset Disposal Act, an applicant must demonstrate actual or potential loss due to a procurement breach to have standing. Since the Applicant did not bid for the Fortified Blended Flour lot, it neither suffered nor risked suffering any loss, and therefore lacked the capacity to challenge the award.
74. Finally, the 2nd Interested Party addressed the issue of late filing of documents, urging the Board to uphold the principles of fairness and



substantive justice under Article 159 of the Constitution. It argued that no prejudice had been shown and therefore the documents already on record should be considered.

### **Applicant's Rejoinder**

75. Applicant's Counsel argued that Section 2 of Circular No. 2 of 2020 and Regulation 205(3) of the Public Procurement and Asset Disposal Regulations, 2020, (Regulations 2020) require responses to be filed within five days. He further contended that the preliminary objection was filed within three days, calculated in accordance with Section 57 of the Interpretation and General Provisions Act.
76. Counsel contended that neither the Respondents' nor the Interested Parties' Counsel pinpointed any specific provision within the tender document that justifies the disqualification of the Applicant.
77. Counsel argued that the purpose of a manufacturer's authorization form is to grant a bidder the authority to supply products manufactured by another company.

### **CLARIFICATIONS**

78. The Board sought clarification from the Respondents' Counsel on whether all the specified requirements were to be fulfilled by the manufacturer.





79. In response, Counsel for the Respondent clarified that it was incorrect to assert that all requirements had to be fulfilled by the manufacturer. He explained that the manufacturer does not have a contract with the Procuring Entity and that its role was limited to submitting a letter. Counsel further stated that tenderers were required to be listed by the Kenya Pharmaceutical and Poisons Board, and it was at this point that the Applicant faced a technical knockout. There were distinct mandatory roles assigned to the manufacturer and separate mandatory roles assigned to the supplier. Counsel argued that the Applicant was improperly conflating these roles, thereby attempting to confuse the Board.
80. The Board sought clarification from Counsel for the 2nd Interested Party on whether, if the Board were to agree with the Applicant, the award to the 2nd Interested Party should nevertheless be upheld.
81. In response, Counsel for the 2nd Interested Party stated that the Request for Review filed by the Applicant does not challenge the 2nd Interested Party's tender bid in any way; therefore, regardless of the Board's findings, they do not contest the award made to the 2nd Interested Party.
82. The Board sought clarification from the Applicant's Counsel regarding the Applicant's relationship to the tender, to which Counsel responded that the Applicant was a bidder. The Board further inquired whether the Applicant had any relationship with the Kenya Pharmaceutical and Poison Board, and Counsel confirmed that there was none. Counsel



further explained that the only connection was that the document used by the Applicant was issued by the Kenya Pharmaceutical and Poison Board.

83. The Board sought clarification from the Applicant's Counsel on whether, apart from the Mandatory Authorization, the Applicant had submitted any other relationship documents. In response, Counsel stated that they had produced a current Quality Certificate and a valid Product Listing from Nuflower Foods & Nutrition Private Limited.
84. The Board sought clarification from the Counsels present by reading aloud the Technical Evaluation criteria as specified on page 36 of the Tender document, and invited interpretations of the criteria from all Counsels in attendance.
85. Firstly, the Board read out requirement (a), and all Counsel agreed that it applies to bidders who are not manufacturers, requiring them to provide a Manufacturer's Authorization.
86. Secondly, the Board read out requirement (b) and stated that it is not the manufacturer but the bidders who are required to submit a current Quality Certificate. The Board specifically inquired from the Applicant's Counsel whether this interpretation was correct and whether the Applicant had submitted a current Quality Certificate.
87. In response, the Applicant's Counsel confirmed that the Board's reading was correct and stated that the Applicant had submitted a current



Quality Certificate issued to another company, namely the manufacturer.

88. All other Counsels present were given an opportunity to comment, and they unanimously agreed that the Board's reading of the requirement was correct.
89. Thirdly, the Board read requirement (c) and sought confirmation from all Counsels present as to whether the reading requiring a bidder and not manufacturers submission was correct. The Board specifically inquired from the Applicant's Counsel whether the Applicant had submitted a current and valid product listing.
90. All Counsels confirmed that the reading was correct, and the Applicant's Counsel specifically stated that the Applicant supplied a valid product listing with QR codes from the Kenya Pharmacy and Poisons Board, belonging to Nuflower Foods and Nutrition Private Limited.
91. The Board sought clarification from the Applicant's Counsel regarding the severance of the two lots. In response, Counsel noted that the 2nd Interested Party was included as a party pursuant to Section 170 of the Act, given that the 2nd Interested Party was one of the successful tenderers.
92. Counsel for the 2nd Interested Party, in response to the issue of severability, pointed out that the two lots are RUTF and Fortified Blended Flour.



## **BOARD'S DECISION**

93. The Board has considered all documents, submissions, and pleadings, including the confidential documents submitted pursuant to Section 67(3)(e) of the Act. Accordingly, the following issues arise for determination:

- A. Whether the Respondents' documents in response to the Request for Review should be expunged from the record.**
- B. Whether the Notification of Intention to Award letter dated 2nd May 2025 as issued by the Procurement Director, who is not the Accounting Officer of the Procuring Entity, is in contravention of the provisions of Section 87 of the Act.**
- C. Whether the subject tender can be severed into distinct components, namely Item 1: Fortified Blended Flour and Item 2: Ready-to-Use Therapeutic Food (RUTF).**
- D. Whether the Procuring Entity properly evaluated the Applicant's tender submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document.**
- E. What orders the Board should issue in the circumstance.**



**Whether the Respondents' documents in response to the Request for Review should be expunged from the record.**

94. The Applicant argued that the Respondents' Grounds of Opposition and Replying Affidavit, both dated 26th May 2025, were filed outside the prescribed timelines and should be expunged from the record. Counsel argued that the Request for Review was filed on 16th May 2025 and properly served on the Respondents.
95. The Applicant's Counsel contended that procedural guidelines under Procurement Administrative Review Circular No. 2 of 2020 and the Public Procurement and Asset Disposal Regulations, 2020 require Respondents to file their response within five days of service. The Respondents filed their documents late on 27th May 2025 without offering any justifiable explanation, thereby violating mandatory procedural rules and infringing the Applicant's right to a fair hearing as guaranteed by the Constitution.
96. In response, Counsel for the Respondents submitted that the Applicant had failed to demonstrate any prejudice resulting from the alleged late filing of the Respondents' documents. In their view, the Applicant sought to rely on procedural technicalities rather than engage with the substantive merits of the case. They urged the Board to uphold the principles of substantive justice over technical objections.
97. The Respondents contended that the Applicant relied on a circular



issued by the Review Board in March 2020, during the COVID-19 pandemic, rather than citing gazetted procedural rules as required under Section 59 of the Evidence Act. They argued that the circular was issued to manage an exceptional public health crisis and should not be treated as binding legal authority on procedural matters.

98. Counsel for the 1st Interested Party, together with Counsel for the 2nd Interested Party, argued that the Applicant had not demonstrated any prejudice it would suffer if the parties were allowed to file their responses, asserting that permitting such filings would serve the interest of justice.
99. The appropriate starting point in addressing this issue is Article 25(c) of the Constitution, which provides that:

***25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—***

***(a)...***

***(b)...***

***(c) the right to a fair trial; and***

100. The Board understands the above to mean that Article 25(c) of the Constitution protects the right to a fair trial as one of the rights and



fundamental freedoms that shall not be limited under any circumstances. This provision underscores the constitutional imperative that all parties in legal proceedings be accorded equal and adequate opportunity to present their case in accordance with due process. While the right to a fair trial is sacrosanct, it must be exercised within the framework of established procedural rules, which ensure order, predictability, and fairness in adjudication.

101. Article 50 (1) of the Constitution provides that:

***50 (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

102. The Board interprets the above law to mean that it guarantees every person the right to have any legal dispute resolved in a fair and public hearing before a court or, where appropriate, an independent and impartial tribunal or body. This provision enshrines the principles of transparency, equality before the law, and impartial adjudication. However, the right to a fair and public hearing does not operate in a vacuum; it is actualized through adherence to procedural rules that safeguard the integrity of the judicial process.

103. Regulation 205 (3) of the Regulations 2020 provides as follows:

***(3) Upon being served with a notice of a request for review,***



***the accounting officer of a procuring entity shall, within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.***

104. The above provision obligates the Accounting Officer of a Procuring Entity, upon being served with a notice of a request for review, to submit to the Secretary a written memorandum of response together with specified documents within five days, or within such shorter period as the Secretary may stipulate in a given case. This provision underscores the importance of prompt and efficient responses in procurement disputes to avoid unnecessary delays and to enable the Review Board to determine matters within the strict statutory timelines.

105. The Board observes that it is not in dispute that the Respondents filed their Replying Affidavit together with the Grounds of Opposition on 27th May 2025, despite having been notified of the Request for Review on 16th May 2025.

106. The Board further observes that the issue of whether the Respondents were aware of the proceedings is not in contention, given that they filed a Notice of Appointment of Advocates on 22nd May 2025, thereby acknowledging their participation in the matter.

107. In view of the foregoing, the Board notes that the Respondents indeed filed their Grounds of Opposition and Replying Affidavit belatedly,





having done so only a day prior to the scheduled hearing.

108. The Board specifically addresses the conduct of the Accounting Officer in delaying the filing of the response to the Request for Review. The Board finds such conduct unprocedural and irregular, given that the Respondents were duly notified of the Request for Review in good time. The Board expresses its disappointment and emphasizes that procedural timelines are not merely cosmetic; they are integral to the fair and orderly administration of justice and must be strictly observed.

109. Having made the foregoing observations regarding the late filing of documents by the Respondents, the Board must now determine whether the said documents ought to be expunged from the record. In addressing this question, the Board notes that the Respondents' delay not only contravened procedural timelines but also resulted in the late notification of other bidders about the proceedings. This is particularly concerning, as the contact information of the other bidders was solely in the custody of the Respondents and had not been availed to the Board.

110. The delayed notification regarding the existence of the Request for Review proceedings resulted in a scenario where the 2nd Interested Party filed its documents on 28th May 2025, which was the scheduled hearing date, while the 1st Interested Party filed its documents after the said hearing date. This sequence of events illustrates the ripple effect caused by the Respondents' failure to act within the stipulated timelines.

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111. In light of the foregoing, and in a bid to uphold substantive justice so that the Respondents' procedural delays do not prejudice the rights of the other bidders, the Board directed that the parties file their Written Submissions and subsequently rescheduled the hearing to a later date to allow for the highlighting of those submissions.

112. The Board notes that it was only after the directions issued on the hearing day, 28th May 2025, that the 1st Interested Party filed its documents in response to the Request for Review.

113. The Board notes that the delay and procedural irregularities were caused by the actions and/or omissions of the Respondents, a circumstance which jeopardized the right to a fair hearing.

114. Considering the foregoing, the Board returns to its earlier question of whether the Respondents' documents should be expunged from the record. In addressing this, the Board notes that the Applicant was afforded an opportunity to respond to all documents that were filed late.

115. Further, the Board emphasizes that the nature of procurement disputes necessitates a substantive determination, provided that the Board remains within the statutory 21-day period prescribed by the Act.

116. Accordingly, the Board is of the view that substantive justice should prevail, and that the present matter ought to be determined on its

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merits to ensure that all issues are fully ventilated and addressed. This finding is informed by the fact that, despite the Respondents' unjustifiable late filing, as previously noted by the Boar, the Board nonetheless proceeded to afford all parties an opportunity to be heard.

117. Therefore, the Board is satisfied that the threshold of the right to a fair hearing was met and accorded to all parties, justifying that the matter be heard on its merits. Furthermore, given that the Board ensured all parties were heard, it follows that no prejudice was suffered that would warrant expunging the Respondents' documents from the record and in any event no such prejudice was demonstrated by any party.

**Whether the Notification of Intention to Award letters dated 2nd May 2025 as issued by the Procurement Director, who is not the Accounting Officer of the Procuring Entity, is in contravention of the provisions of Section 87 of the Act.**

118. The Applicant submitted that the Notification of Intention to Award letter dated 2nd May 2025 did not comply with Section 87(1) and (3) of the Public Procurement and Asset Disposal Act, which requires the Accounting Officer of the procuring entity to notify the successful tenderer in writing and also inform unsuccessful tenderers accordingly. They emphasized that this statutory duty is exclusive to the Accounting Officer.

119. The Applicant argued that the letter was issued by the Procurement



Director, who is not the Accounting Officer, and this amounted to an unlawful delegation or usurpation of the Accounting Officer's powers. They further noted that the Respondents failed to provide any evidence of lawful delegation to justify the Procurement Director's issuance of the notification, rendering it irregular and legally defective.

120. In response, the Respondents submitted that the CEO of the Procuring Entity had lawfully delegated authority to the Procurement Director, Moses Sudi, under Section 69(4) of the Act. They referred to a delegation letter attached to the Replying Affidavit to support this position.

121. Section 87(1) and (3) of the Act provides as follows:

***(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.***

...

***(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.***



122. Section 87(1) and (3) of the Public Procurement and Asset Disposal Act, 2015 places a clear and mandatory obligation on the accounting officer of a procuring entity to communicate the outcome of a tendering process. Under subsection (1), the accounting officer must, before the expiry of the tender validity period, notify in writing the person who submitted the successful tender that their bid has been accepted. Subsection (3) extends this obligation by requiring the accounting officer to also notify, in writing, all other tenderers that their bids were unsuccessful, while disclosing the name of the successful tenderer and the reasons for the decision. These provisions emphasize transparency, accountability, and fairness in the procurement process and affirm that it is the accounting officer, rather than any other officer or committee, who bears the statutory responsibility for issuing such notifications.

123. Section 69 (4) of the Act provides as follows:

***No procurement approval shall be made by a person exercising delegated authority as an accounting officer or head of the procurement function unless such delegation has been approved in writing by the accounting officer or the head of the procurement unit, respectively.***

124. Section 69(4) of the Act establishes a safeguard to ensure accountability and proper delegation of authority within a procuring entity. It provides that no procurement approval shall be made by a person acting under delegated authority, whether in the capacity of an



accounting officer or head of the procurement function, unless such delegation has been expressly approved in writing by the accounting officer or the head of the procurement unit, respectively. This provision ensures that critical procurement decisions are not taken arbitrarily or by unauthorized persons and that any delegation of authority is both deliberate and traceable. It reinforces the principle that accountability in procurement must rest with duly authorized officers, and that written approval is a prerequisite to validate any such delegation. Failure to comply renders any procurement approval made under unauthorized delegation irregular and potentially void.

125. The Board observes that, in responding to the above allegations, the Respondents did not contest that the Notices of Intention to Award were signed by the Procurement Director rather than the Accounting Officer. Instead, the Respondents redirected the issue toward the matter of delegation, asserting that the Procurement Director acted under duly delegated authority.

126. The Board has examined the Replying Affidavit sworn by Moses Sudi on 26th May 2025 and observes that one of the annexed documents is titled 'Memo' from the Chief Executive Officer to the Procurement Director, dated 28th April 2025. Upon reviewing the said Memo, the Board notes that the final paragraph reads as follows:

***'In exercise of the authority conferred upon me as the accounting officer and in exercise of the power to delegate the approval of procurements pursuant to section 69(4) of***



***the Public Procurement and Asset Disposal Act 2015 (Revised 2022) as cited above, I delegate to you and authorize you to sign the letter communicating intention to award to above referenced tender together with the subsequent letter of award of the said tender.'***

127. The Board understands the above that to mean that that the accounting officer, using the legal authority granted under Section 69(4) of the Public Procurement and Asset Disposal Act, is formally giving the Procurement Director the power to sign both the letter indicating the intention to award a tender and the final letter of award for the specified tender.

128. In light of the foregoing, the Board is satisfied that the 1st Respondent delegated its authority to the Procurement Director. What remains to be determined is whether it was, in fact, the Procurement Director who signed the Notices of Intention to Award dated 2nd May 2024.

129. The Board has reviewed all the Notices of Intention to Award dated 2nd May 2025 as submitted and notes that they were signed by one Moses Sudi. Additionally, the Board observes that Moses Sudi is the same individual who swore the Replying Affidavit on behalf of the Respondents, wherein he identifies himself as the Procurement Director of the Procuring Entity.

130. Furthermore, the Board has examined other documents submitted to it on a confidential basis, including the Professional Opinion, and confirms

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that Moses Sudi is consistently identified therein as the Procurement Director.

131. In view of the foregoing, the Board finds that the 1st Respondent lawfully delegated its authority to the Procurement Director, and that the said authority was duly exercised by him.

132. Accordingly, the Board finds that the Notices of Intention to Award dated 2nd May 2025 were executed in compliance with the provisions of the Act.

**Whether the subject tender can be severed into distinct components, namely Item 1: Fortified Blended Flour and Item 2: Ready-to-Use Therapeutic Food (RUTF).**

133. This issue arose from the 2nd Interested Party's application to be excused from the proceedings, on the basis that the Applicant was not challenging the award made to it.

134. In response, the Applicant's Counsel submitted that the 2nd Interested Party was included pursuant to Section 170 of the Act. Counsel further argued that the Notices of Intention to Award identified the Interested Parties as the successful bidders, thereby necessitating their inclusion as parties to the proceedings.

135. The Board has reviewed the Tender document and notes that the tender indeed comprised two lots: Item 1 – Fortified Blended Flour





(Product code: PM14FBF013); and Item 2 – Ready-to-Use Therapeutic Food (RUTF) (Product code: PM14RTF001).

136. The Board notes that while the two lots originated from the same tender, they remain distinct and separate. This conclusion is drawn from a holistic consideration of all documents before the Board. First, some bidders submitted bids solely for Item 1, others for Item 2 only, and some for both items. Second, the bids were evaluated independently according to the specific items for which each bid was submitted. In light of the foregoing, the Board finds no difficulty in concluding that the two lots are severable.

137. Accordingly, the subject tender is severable into two lots, Item 1 and Item 2, as the lots are independent of each other; a decision affecting the award of one lot does not necessarily impact the award of the other.

**Whether the Procuring Entity properly evaluated the Applicant's tender submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document.**

138. The Board finds that this issue lies at the core of the Request for Review. In determining it, the Board emphasizes that a procuring entity must strictly adhere to the evaluation criteria set out in the tender documents and the law; to do otherwise is to shift the goalposts mid-game, thereby undermining the principles of transparency, fairness, and equal treatment that lie at the heart of public procurement. The



introduction of extraneous criteria, however well-intentioned, risks distorting the competitive process and invites legitimate concern over arbitrariness. It is for this reason that the law demands predictability and accountability in evaluation, and any deviation therefrom must be carefully scrutinized.

139. The Applicant argued that the 2nd Respondent's Evaluation Committee was legally required, under Article 227 of the Constitution and the Act, to evaluate the tender strictly according to the criteria and procedures set out in the Tender Document. Clause 1.1 of Section III of the Tender Document prohibits the use of any evaluation criteria beyond those specified, ensuring fairness, transparency, and equal treatment of all bidders.

140. The Applicant challenged their disqualification on the basis that the Notification of Intention to Award cited their failure to be listed as a distributor by the Pharmacy and Poisons Board (PPB), a requirement not found anywhere in the tender document. Instead, the tender required that the product be listed by PPB or KEBS and that non-manufacturer bidders submit valid Manufacturer's Authorization and relevant certificates, which the Applicant had fully complied with.

141. The Applicant submitted that the Evaluation Committee's reliance on this extraneous criterion was unlawful and contrary to both the Act and the tender terms. This introduced unfairness and violated the principles of equal competition, as bidders are entitled to expect that only the stipulated criteria will be used in evaluation.



142. In response, the Respondents asserted that the inputs of KPPB and KEBS were mandatory due to the nature of the procurement, which involved food and medicine. They contended that statutory oversight by these bodies is essential to ensure public safety and compliance with legal thresholds. The Respondents rejected the Applicant's claim that it was exempt from these requirements by sourcing from a compliant manufacturer, arguing that the Applicant itself had to demonstrate compliance.

143. The 1st Interested Party argued that it was incumbent upon the Applicant to demonstrate compliance with KPPB and KEBS, the two statutory bodies whose approvals were set as conditions precedent. Counsel contended that not everyone is permitted to handle food and medicine intended for public consumption without proper authorization from the relevant regulatory bodies.

144. The 2<sup>nd</sup> Interested Party argued that the Applicant's bid failed to comply with the mandatory requirements of the tender and the Pharmacy and Poisons Act. It argued that the Manufacturer's Authorization and certificate presented by the Applicant were issued by Nuflower Foods & Nutrition Private Ltd, a company incorporated in India, contrary to Section 4(2)(b) of the Act, which requires foreign manufacturers to appoint a local representative incorporated in Kenya.

145. In rejoinder, the Applicant's Counsel argued that neither the Respondents' nor the Interested Parties' Counsel identified any specific



provision in the tender documents that justified the disqualification of the Applicant's bid.

146. The starting point in determining this issue is Article 227 of the Constitution, which outlines the objective of public procurement—ensuring the provision of quality goods and services within a framework that upholds the principles enshrined therein. Article 227 states as follows:

***227. Procurement of public goods and services***

***(1) 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.***

***(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...***

***b...***

***c...***



***d...***

147. The above section of the law provides that, *inter alia*, when a State organ or public entity procures goods or services, the process must adhere to specific standards, one of which is competitive fairness. Competitive fairness in this context means that the procurement process must give all qualified suppliers an equal opportunity to compete for the contract without bias or favoritism. It ensures that no bidder is unfairly advantaged or disadvantaged and that selection is based on objective criteria. This promotes integrity, value for money, and public trust in the procurement system.

148. The Board observes that the legislation referred to in Article 227(2) of the Constitution is the Act. Section 80 of the Act provides guidance on the evaluation and comparison of tenders by a Procuring Entity as follows:

***80. Evaluation of Tender***

***(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of the Act shall evaluate and compare the responsive tenders other than tenders rejected.***

***(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and...***



***(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-***

***(a) The criteria shall, to the extent possible, be objective and quantifiable;***


***(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and***

***(4) .....***

149. Section 80(2) of the Act mandates the Evaluation Committee to evaluate and compare tenders fairly, using the procedures and criteria outlined in the Tender Document. The Board interprets a fair evaluation system as one that ensures equal treatment of all tenders based on transparently defined criteria in the Tender Document.

150. The Board perused the Tender Document and notes that Clause 1.1 of Section III – Evaluation and Qualification Criteria provides as follows:

***This section contains the criteria that the Procuring Entity shall use to evaluate tender and qualify tenderers. No other factors, methods or criteria shall be used other than specified in this tender document. The tenderer shall provide all the information requested in the forms included in Section IV, Tendering Forms. The Procuring Entity should***



***use the Standard Tender Evaluation Report for Health products for evaluating Tenders.***

151. The above clause makes it clear that the Procuring Entity is bound to evaluate tenders strictly based on the criteria expressly stated in the tender document, and must not introduce or apply any additional factors, methods, or criteria beyond what is specified. It emphasizes procedural fairness and legal compliance by requiring that all tenderers be assessed on the same, pre-declared standards.

152. Having stated the foregoing, we now turn to what we consider the crux of the Request for Review. The Applicant's case is understood to be that its disqualification was based on criteria not specified in the Tender document.

153. The Board has reviewed the Notification of Intention to Award letter dated 2nd May 2025 issued to the Applicant and notes that the Applicant was disqualified for the reason set out below:

***3. Reason why your Bid was unsuccessful***

- ***You were not listed as a distributor by the Pharmacy and Poisons Board (PPB) as required. The PPB / KEBS you provided was for the manufacturer (Nuflower Foods and Nutrition Private Ltd).***

154. During the hearing, the Applicant's Counsel strongly submitted that the



reason for the Applicant's disqualification was not among the requirements set out in the Tender document. Conversely, the Respondents' Counsel argued that the Applicant was disqualified due to its failure to provide a valid product listing with QR codes from the Pharmacy and Poisons Board, as well as approval confirming safety for human consumption from the Kenya Bureau of Standards.

155. Given the nature of the dispute, the Board observes that it centers on a factual disagreement concerning the requirements for product submission. The Board notes that the Tender document, at page 36, specifies the Technical Evaluation criteria as follows:

***Bidders are required to submit the following documents:***

- a. Manufacturers Authorization which must be on a manufacturer's letterhead and addressed to KEMSA that is both tender and item specific and signed by an authorized signatory (Applicable to bidders who are not manufacturers) (MANDATORY).***
- b. Current quality certificate as specified in the technical specifications (MANDATORY).***
- c. Current and valid product listing with QR codes from the Kenya Pharmacy and Poisons Board or Approved as safe for human consumption by Kenya Bureau of Standards (MANDATORY).***





156. During the hearing, the Board reviewed the above requirements step-by-step, inviting Counsels to provide their interpretations before focusing on the Applicant's Counsel to confirm whether the document in question had been produced.
157. The Board noted that all Counsels present agreed that, for requirement (a), the document to be provided must originate from the manufacturer, and that this requirement applied equally to bidders who were not manufacturers.
158. The Board further noted that, regarding the documents required under (b) and (c), Counsel for the Applicant stated that the Applicant submitted documents belonging to the manufacturer, Nuflower Foods & Nutrition Private Ltd.
159. Having made the above observations, the Board notes that, while the document for requirement (a) was to be provided by the manufacturer, the documents for requirements (b) and (c) were to be submitted by the bidder.
160. The question before the Board is whether the Applicant complied with the requirement to produce a current and valid product listing with QR codes from the Kenya Pharmacy and Poisons Board, or approval as safe for human consumption by the Kenya Bureau of Standards. Upon reviewing the Applicant's bid documents, the Board confirmed that the document submitted belonged to Nuflower Foods & Nutrition Private



Ltd. This clearly demonstrates that the Applicant did not meet this mandatory requirement.

161. In reaching the above conclusion, the Board notes that the Applicant did not submit its bid as a joint venture with Nuflower Foods & Nutrition Private Ltd. Upon reviewing the Tender Opening Register and Tender Opening Minutes, the Board observes that the Applicant was registered as an individual entity, and its bid was not made jointly with any other party, including Nuflower Foods & Nutrition Private Ltd.

162. Having stated the foregoing, the Board considers whether the reason given for the Applicant's disqualification corresponds to the mandatory requirement that the Applicant failed to meet. The Board finds the answer to be a clear yes, as the disqualification reason directly relates to requirement (c) discussed above.

163. Therefore, the Board finds that the Respondents properly evaluated the Applicant's bid in accordance with section 80(2) of the Act and the criteria specified in the tender document. The Board further finds that no additional criteria were applied in disqualifying the Applicant's bid.

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

164. The Board finds that the threshold for the right to a fair hearing was met, and in the interest of substantive justice, the Respondents' documents shall not be expunged from the record.



165.The Board also finds that the Notification of Intention to Award letters dated 2nd May 2024 were not in contravention of Section 87 of the Act, as the Procurement Director acted within the scope of a written delegated authority in accordance with Section 69(4) of the Act.

166.The Board further finds that the subject tender is severable into two lots, Item 1 and Item 2, as the lots are independent of each other; a decision affecting the award of one lot does not necessarily impact the award of the other.

167.Lastly, the Board finds that the evaluation of the Applicant's bid was conducted in accordance with the Act and the evaluation criteria specified in the tender document.

168.Consequently, the Request for Review dated 15th May 2025, concerning TENDER NO. KEMSA/GOK/MOH-OIT03/2024-2025 – Supply of Nutrition Health Products, is hereby dismissed on the following specific grounds:

## **FINAL ORDERS**


169.In the exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review dated 15th May 2025:


- 1. The Request for Review dated 15<sup>th</sup> May 2025 is hereby dismissed;**



2. **The Accounting Officer of the Kenya Medical Supplies Authority is hereby directed to oversee the tender proceedings for TENDER NO. KEMSA/GOK/MOH-OIT03/2024-2025 – Supply of Nutrition Health Products to their logical and lawful conclusion; and**
3. **Each party shall bear its own costs of the proceedings.**

**Dated at NAIROBI, this        4th        day of June 2025.**

  
.....  
**CHAIRPERSON**  
**PPARB**

  
.....  
**SECRETARY**  
**PPARB**

