

APPLICATION NO. 94 OF 22ND AUGUST 2019

BETWEEN

TECHNO RELIEF SERVICES LIMITED.....APPLICANT
AND

**THE ACCOUNTING OFFICER,
KENYA MEDICAL SUPPLIES
AUTHORITY.....1ST RESPONDENT**

AND

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

**NUFLOWER FOODS AND
NUTRITION PVT LIMITED.....1ST INTERESTED PARTY
AND
SAI PHARMACEUTICALS LIMITED.....2ND INTERESTED PARTY**

Fresh Hearing and Determination of Request for Review No. 94 of 2019, Techno Relief Services Limited v. The Accounting Officer, Kenya Medical Supplies Authority & 3 Others pursuant to the orders of the High Court issued on 24th December 2019 in Judicial Review Miscellaneous Application No. 283 of 2019, Republic v. Public Procurement Administrative Review Board & 4 Others ex parte Techno Relief Services Limited with respect to Tender No. GF ATM HIV NFM-18/19 OIT-015 – Supply of Nutritional Supplements.

BOARD MEMBERS

1. Ms. Faith Waigwa -Chairperson

- | | |
|-------------------------|---------|
| 2. Mr. Alfred Keriolale | -Member |
| 3. Ms. Rahab Chacha | -Member |
| 4. Mr. Ambrose Ogetto | -Member |

IN ATTENDANCE

- | | |
|-------------------------|----------------------------------|
| 1. Mr. Philemon Kiprop | -Holding brief for the Secretary |
| 2. Ms. Maryanne Karanja | - Secretariat |

PRESENT BY INVITATION

APPLICANT

-TECHNO RELIEF SERVICES LIMITED

- | | |
|----------------------|---|
| 1. Mr. Wisdom Kibet | -Advocate, Kipyator Kibet & Associates
Advocates |
| 2. Mr. Katan Goswari | -Representative |

PROCURING ENTITY

-KENYA MEDICAL SUPPLIES AUTHORITY

- | | |
|-------------------------|--|
| 1. Mr. Julius M. Ogamba | -Advocate, Migos Ogamba & Company
Advocates |
| 2. Mr. Ong'anda Junior | -Advocate, Migos Ogamba & Company
Advocates |

- | | |
|--------------------------|-----------------------------------|
| 3. Ms. Majanga Wilgridah | -Advocate, Migos Ogamba & Company |
| 4. Mr. Fredrick Wanyonyi | -Director, Legal |

INTERESTED PARTIES

NUFLOWER FOODS AND NUTRITION PVT LIMITED

- | | |
|--------------------------|--|
| 1. Mr. Hiram Nyaburi | -Advocate, Iseme Kamau Maema Advocates |
| 2. Ms. Angela Wahito W. | -Pupil, Iseme Kamau Maema Advocates |
| 3. Ms. Caroline N. Githu | -Representative |

BACKGROUND TO THE DECISION

A. The Bidding Process

The Government of Kenya, Ministry of Health received a grant from Global Fund for procurement of **Nutritional Supplements (II)** under the HIV-New Funding Model (NFM) for the year one 2018/2019 and initiated a procurement process through Kenya Medical Supplies Authority (hereinafter referred to as “the Procuring Entity”).

Evaluation of Bids

The Evaluation Committee had concluded its first evaluation and submitted an Evaluation Report complete with recommendations to the Head of

Procurement. The Chief Executive Officer reviewed the Professional Opinion from the Head of Procurement and evaluation report from the Evaluation committee on 21st June, 2019 for Tender No. GF ATM HIV NFM-18/19 OIT-015 – Supply of Nutritional Supplements (hereinafter referred to as “the subject tender”) and made an award as per the Professional Opinion No. KEMSA/OIT 015/PPO NO. 244/2018-2019 and recommendations of the Evaluation Committee. Notification letters were subsequently sent to all bidders on 24th June 2019.

B. REQUEST FOR REVIEW NO. 70/2019

M/s Techno Relief Services Limited (hereinafter referred to as “the Applicant”) lodged a Request for Review on 5th July 2019 against the Procuring Entity’s decision on award of the subject tender to M/s Sai Pharmaceuticals Limited and M/s Nuflower Foods and Nutrition Pvt Limited. On 8th July 2019, the Procuring Entity received a Notification of appeal from Public Procurement Administrative Review Board, Application No. 70/2019 of 5th July 2019 informing it that M/s Techno Relief Services Limited had lodged an appeal disputing the grounds of award to Nuflower Foods and Nutrition Pvt Limited and Sai Pharmaceuticals Limited.

The Board having considered parties’ cases ordered as follows in its decision rendered on 26th July 2019:-

1. The letter of Notification of award in Tender No. GF ATM HIV NFM-18/19-OIT-015 for Supply of Nutritional Supplements

(II) for Item No.1. Ready to use Supplement Food (RUSF) 500-520 KCAL/100G addressed to M/s NuFlower Foods and Nutrition PVT Limited, be and is hereby cancelled and set aside.

2. The Letter of Notification of Award in Tender No. GF ATM HIV NFM-18/19-OIT-015 for Supply of Nutritional Supplements (II) for Item No. 1. Ready to use Therapeutic Food (RUTF) 520-550 KCAL/92G addressed to Sai Pharmaceuticals Limited, be and is hereby cancelled and set aside.

3. The Evaluation Report signed on 20th May 2019 with respect to Tender No. GF ATM HIV NFM-18/19-OIT-015 for Supply of Nutritional Supplements (II) be and is hereby cancelled and set aside.

4. The Procuring Entity is hereby directed to conduct a re-evaluation of all bids received by it in Tender No. GF ATM HIV NFM-18/19-OIT-015 for Supply of Nutritional Supplements (II) from the Preliminary Evaluation Stage in accordance with the Mandatory documents listed in Preliminary Examination of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document, including the following mandatory documents:-

- a) Minimum number of 3 (three) supply contracts of items within the past 3 years, the tenderer should provide documentary evidence in support of the experience of previous supply (Contracts, Purchase Orders, Reference letters and Contact Details of previous supply contracts (Mandatory)**
- b) Copies of the tenderer's audited financial statements for the past three fiscal years (Mandatory)**
- c) Average annual turnover in the last three years at least two times the value of the items offered (Mandatory)**
- d) Statement of manufacturers manufacturing capacity (Mandatory)**

and to proceed with the procurement process to its logical conclusion, taking into consideration the Board's findings in this case, including the making of an award within fourteen (14) days from the date of this decision.

5. The Tender Validity period for Tender No. GF ATM HIV NFM-18/19-OIT-015 for Supply of Nutritional Supplements (II) is hereby extended for a further period of forty-five (45) days from 5th July 2019.

6. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Following the above orders, the Chief Executive Officer vide a memo dated 1st August 2019 authorized the Evaluation Committee to reconvene and re-evaluate the tenders as ordered by the Board.

C. Re-evaluation of Bids

The Evaluation Committee re-convened on 7th and 8th August 2019 to conduct a re-evaluation.

1. Preliminary Examination.

The Evaluation Committee considered twelve (12) bids to assess compliance of bids to the statutory requirements.

At the end of this stage, two (2) bidders' no. 7 and 10 were disqualified while ten (10) bidders' no. 1, 2, 3, 4, 5, 6, 8, 9, 11 and 12 were recommended to proceed to Technical Evaluation.

2. Technical Evaluation

Ten (10) bidders were considered for Technical Evaluation based on the evaluation criteria set out in the Tender Document. This was carried out on an item by item basis.

- Item 1: Ten (10) bidders bid for this item, one (1) bidder no. 2 was disqualified while Nine (9) bidders' no. 1, 3, 4, 5, 6, 8, 9, 11 and 12 were found responsive and recommended to proceed to product evaluation
- Item 2: Nine (9) bidders bid for this item, one (1) bidder no. 2 was disqualified while Eight (8) bidder's no. 1, 4, 5, 6, 8, 9, 11 and 12 were found responsive and recommended to proceed to product evaluation

2.3 Technical Evaluation of Products

- Item 1: Five (5) bidders no. 3, 5, 6, 8 and 12 was disqualified, while Four (4) bidder no. 1, 4, 9 and 11 was found responsive and recommended to proceed to financial evaluation.
- Item 2: Six (6) bidders no. 1, 4, 5, 6, 9 and 12 were disqualified, while Two (2) bidders' no. 8 and 11 were found responsive and recommended to proceed to financial evaluation.

3. Financial Evaluation.

The Evaluation Committee checked the prices quoted by bidders in order to recommend award to the lowest evaluated bidders per item.

Recommendation

Based on the outcome of evaluation, the Evaluation Committee recommended award to the lowest responsive bidders as shown below:-

No.	Item Description	UOM	Qty	Unit Price (USD)	Total Price (USD)	Recommended Bidder
1.	Ready to use Therapeutic Food (RUTF)	Sachet	2,987,120	0.252	752,754.24	Sai Pharmaceuticals Limited
2.	Ready to use Supplemental food (RUSF)	Sachet	5,059,598	0.2675	1,350,767.46	Nuflower Foods and Nutrition Private Limited

Professional Opinion

In his professional opinion, the Head of Procurement function confirmed that the evaluation process was done in accordance with provisions of the Tender Document and the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). The Accounting Officer approved the said professional opinion, having reviewed the Evaluation Report as well and awarded the items according to the table indicated hereinabove.

D. Request for Review No. 94/2019

M/s Techno Relief Services Limited lodged a Request for Review dated and filed on 22nd August 2019 against the decision of the Procuring Entity awarding the subject tender to M/s Sai Pharmaceuticals Limited and M/s Nuflower Foods and Nutrition Pvt Limited. The Board having considered parties' cases ordered as follows in its decision rendered on 12th September 2019:-

- 1. The Procuring Entity's Letter of Notification of Award of Tender No. GF ATM HIV NFM-18/19-OIT-015- for Supply of Nutritional Supplements (II) dated 9th August 2019 addressed to M/s Nuflower Foods and Nutritional Pvt Limited with respect to Item 2, Ready to use Supplemental Food (RUSF) 500-520 KCAL/100G is hereby upheld.**
- 2. The Procuring Entity's Letter of Notification of Award of Tender No. GF ATM HIV NFM-18/19-OIT-015- for Supply of Nutritional Supplements (II) dated 9th August 2019 addressed to M/s Sai Pharmaceuticals Limited with respect to Item 1, Ready to use Therapeutic Food (RUTF) 520-550 KCAL/92G, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity is hereby directed to award Tender No. GF ATM HIV NFM-18/19-OIT-015- for Supply of Nutritional Supplements (II) in respect of Item 1, Ready to use Therapeutic Food (RUTF) 520-550 KCAL/92G to the next lowest evaluated bidder, taking into consideration the Board's findings in this case and to proceed with the procurement process to its logical conclusion.**
- 4. The Tender Validity Period of the subject tender is hereby extended for a further sixty (60) days from 19th August 2019.**

5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

E. Judicial Review No. 283 of 2019

The Applicant was aggrieved by the decision of the Board rendered on 12th September 2019 thereby instituting Judicial Review proceedings by a Notice of Motion application dated 1st November 2019. The Court having heard parties' cases rendered a judgement in the above Judicial Review Application on 24th December 2019 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 12th September 2019 in PPARB Case Number 94 of 2019: Techno Relief Services Limited v. The Accounting Officer, Kenya Medical Supplies Authority, Kenya Medical Supplies Authority, Nuflower Foods and Nutrition PVT Limited and Sai Pharmaceuticals Limited;**
- II. An order of prohibition be and is hereby issued prohibiting the 2nd Respondent and 3rd Respondent from implementing and/or performing the contract entered with respect to Tender No. GF ATM HIV NFM-18/19-OIT-015- for Supply of Nutritional Supplements (II) for Item No. 2, Ready to Use Supplement Foods (RUSF) 500-520KCAL/100g;**

- III. An order of prohibition be and is hereby issued prohibiting the 2nd Respondent and 3rd Respondent from implementing and/or performing the contract entered with respect to Tender No. GF ATM HIV NFM-18/19-OIT-015- for Supply of Nutritional Supplements (II) for Item No. 1, Ready to Use Therapeutic Foods (RUTF) 500-520KCAL/92g;**
- IV. The ex parte Applicant's Request for Review in PPARB Case Number 94 of 2019 be and is hereby remitted to the 1st Respondent for hearing and determination within three months of the date of this judgement, and in accordance with the provisions of the Constitution, the Public Procurement and Asset Disposal Act, the Fair Administrative Action Act and any other applicable laws, regulations or legal principles;**
- V. Each party shall bear its own costs of the Notice of Motion dated 1st November 2019.**

F. FRESH HEARING OF REQUEST FOR REVIEW NO. 94 OF 2019

a) Mention of Review No. 94/2019

The Request for Review was set down for mention on 15th January 2020 wherein the Applicant was represented by Mr. Wisdom Kibet on behalf of the firm of Kipyator Kibet & Associates Advocates, the Procuring Entity was represented by Mr. Migos Ogamba on behalf of the firm of Migos Ogamba Associates Advocates while the 1st Interested Party was represented by Ms.

Weru holding brief for Mr. Hiram Nyaburi. The 2nd Interested Party was not represented despite having been notified of the hearing.

The Board gave directions on how the fresh hearing and determination of Request for Review No. 94 of 2019 would proceed in terms of the following specific orders:-

- i. The Applicant is hereby directed to file and serve its Written Submissions by 5pm on 27th January 2020;*
- ii. The Respondents, the 1st Interested Party and the 2nd Interested Party are hereby directed to file and serve their respective Written Submissions by 5pm on 11th February 2020;*
- iii. The Respondents are hereby directed to file with the Board, the confidential documents pertaining to the subject procurement process by 5pm on 11th February 2020;*
- iv. The hearing of the Request for Review is stood over to 2.30pm on 18th February 2020 and the same shall proceed by way of highlighting of submissions.*

b) First time matter came up for hearing

The Request for Review came up for hearing for the first time on 27th February 2020 wherein the Applicant was represented by Mr. Wisdom Kibet on behalf of the firm of Kipyator Kibet & Associates Advocates, the Procuring Entity was represented by Mr. Migos Ogamba on behalf of the firm of Migos Ogamba Associates Advocates while the 1st Interested Party was represented

by Mr. Hiram Nyaburi on behalf of the firm of Iseme Kamau & Maema Advocates. The 2nd Interested Party was not present for the hearing despite having been duly notified by the Board Secretariat of the second time the Request for Review would come up for hearing.

Mr. Migos Ogamba submitted that the Procuring Entity was unable to file the confidential documents pertaining to this procurement process before the hearing date of 27th February 2020 therefore sought more time to file the same with the Board. The Board having heard parties' submissions, was inclined to grant the application for adjournment thereby issuing the following orders:-

- i. The application of adjournment by the Procuring Entity is hereby granted;*
- ii. The Procuring Entity is hereby directed to file all the confidential documents pertaining to the subject procurement process by close of business on 2nd March 2020;*
- iii. The hearing of the Request for Review is stood over to 2.30pm on 2nd March 2020 and the same shall proceed by way of highlighting of submissions;*
- iv. The Procuring Entity shall bear the adjournment fees of Kshs. 10,000/-*

c) Second time matter came up for hearing

The matter came up for hearing a second time on 3rd March 2020, after parties were notified by the Board Secretariat that the hearing of the Request

for Review could not proceed on 2nd March 2020 as the Board heard three hearings on that date.

On 3rd March 2020, the Applicant was represented by Mr. Wisdom Kibet on behalf of the firm of Kipyator Kibet & Associates Advocates, the Procuring Entity was represented by Mr. Migos Ogamba on behalf of the firm of Migos Ogamba Associates Advocates while the 1st Interested Party was represented by Mr. Hiram Nyaburi on behalf of the firm of Iseme Kamau & Maema Advocates. The 2nd Interested Party was not present for the hearing despite having been duly notified by the Board Secretariat of the third time the Request for Review would come up for hearing. The hearing proceeded by way of highlighting of submissions.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Wisdom Kibet, fully relied on the Applicant's Written Submissions and List of Authorities.

Counsel submitted that the Respondents did not comply with the directions given by the Board with respect to Order 4 in Review No. 70 of 2019, specifically that, to properly re-evaluate the criterion of the Average Annual Turnover in the last three years ought to be at least two times the value offered. In his view, this requirement was mandatory as stated in Clause D

(III) at page 94 of the Tender Document. He then referred the Board to the Request for Review filed by the Applicant wherein the 1st Interested Party's Average Annual Turnover is indicated as USD964,914 and that the 1st Interested Party does not deny this assertion. Counsel then submitted that the information regarding the Average Annual Turnover of the 1st Interested Party was obtained electronically by the Applicant and further urged the Board to be guided by Regulation 86 of the Public Procurement and Disposal Regulations, 2006 which provides that the Board is not bound by the rules of evidence. According to Mr. Kibet, section 106 (B) of the Evidence Act is not binding to the Board given the provision of Regulation 86 of the Public Procurement and Disposal Regulations, 2006.

Counsel submitted that the 1st Interested Party did not deny the issues raised by the Applicant regarding the 1st Interested Party's financial statements. According to Mr. Kibet, the 1st Interested Party admits that those financial statements belong to its parent company. He therefore took the view that by evaluating the 1st Interested Party's bid and finding the same responsive on the basis of those financial statements goes against the principle of fairness under Article 227 (1) of the Constitution. Mr. Kibet submitted that the Tender Document did not provide criteria allowing a subsidiary company to provide documents for its parent company in order to satisfy the criterion of Annual Turnover.

Upon enquiry by the Board on what Counsel meant by stating that the Board should punish the Procuring Entity, Counsel submitted that the Board has

powers to award costs or order for payment of a fine for disobedience of the orders of the Board by dint of section 173 (a) of the Act.

As regards the 2nd Interested Party, Counsel submitted that the Applicant relies on the decision of the Board in **PPARB Application No. 94 of 2019, Techno Relief Services Limited v. The Accounting Officer, Kenya Medical Supplies Authority & 3 Others**, despite having been prompted by the Board that the same has been quashed by the High Court. On further enquiry, he maintained his submissions that the 1st and 2nd Interested Parties did not comply with the criteria challenged by the Applicant when the Board was entertaining the issues raised by the Applicant in Review No. 94 of 2019 for the first time.

Procuring Entity's Submissions

In his submissions, Counsel for the Procuring Entity, Mr. Migos Ogamba, fully relied on the Procuring Entity's Replying Affidavit and Written Submissions. Mr. Ogamba submitted that the Applicant appears to be challenging the award made to the 1st Interested Party based on the requirement at Clause D (III) at page 94 of the Tender Document, which required bidders to demonstrate that they had Average Annual Turnover in the last three years that is at least two times the value of the items offered. Counsel submitted that the Applicant is relying on a document that it obtained electronically from the internet and have no demonstrated that the said document was

used by the Procuring Entity during evaluation of the 1st Interested Party's bid.

Counsel submitted that the law only allows the Procuring Entity to evaluate the documents submitted before it by bidders in response to an advertisement notice and that when this was done, the Evaluation Committee established that the 1st Interested Party met the criterion in issue.

He further submitted that the Applicant wishes that the Board admits the said document without following the laid down procedure for adducing evidence as provided for in section 106 (B) of the Evidence Act. He submitted that the Attachment KG4 adduced by the Applicant is not properly before the Board and the Applicant ought not be allowed to benefit from not following the laid down procedure for adducing evidence as provided for in section 106 (B) of the Evidence Act.

Mr. Ogamba then submitted that the Procuring Entity applied uniform criteria when evaluating bids submitted to it by the tender submission deadline and reiterated that the Applicant has never challenged the outcome of its bid since the inception of proceedings before the Board regarding the subject tender.

Upon enquiry by the Board regarding the findings made by the Procuring Entity regarding the 2nd Interested Party's bid, Counsel submitted that the 2nd Interested Party was found responsive after re-evaluation on the criterion of Minimum Number of 3 Supply Contracts of items within the past 3 years.

1st Interested Party's Submissions

In his submissions, Counsel for the 1st Interested Party, Mr. Hiram Nyaburi, fully relied on the 1st Interested Party's Replying Affidavit, Written Submissions together with the List and Bundle of Authorities. Mr. Nyaburi associated himself with submissions by the Procuring Entity and further submitted on the following:-

- i. Whether the 1st Interested Party satisfied the criterion under Clause (D) (III) at page 94 of the Tender Document;*
- ii. Whether the Annexure KG4 attached to the Supporting Affidavit to the Request for Review ought to be admitted by the Board.*

On his first issue, Mr. Nyaburi referred the Board to pages 160 to 398 of the 1st Interested Party's original bid comprising of documents written on the letterhead of the 1st Interested Party together with Financial Statements of M/s Devesh Foods & Agro Products Private Limited for the years 2015 to 2018.

He therefore posed a question that the Board ought to consider, that is, whether the 1st Interested Party is permitted in law to rely on documents of its Parent Company. In that regard, he submitted that the 1st Interested Party received a Board resolution and Power of Attorney from M/s Devesh Foods & Agro Products Private Limited allowing the 1st Interested Party to

use the financial statements of the aforesaid company. In his view, the law allows a company that is wholly owned to rely on the credentials of the parent/holding company because what matters is the question of central management and control of the wholly owned company, by its parent company. Counsel relied on the Supreme Court of India decision in **New Horizons Limited v. Union of India (1995) 1SCC 478** at page 9 thereof. On enquiry by the Board on the applicability of the said decision to Kenyan courts, Counsel submitted that the same is applicable by dint of the Judicature Act, Chapter 8 of the Laws of Kenya, save that if there is any provision in the 2015 Act that contradicts the position taken in the cited authority, then the Board should vacate from following the cited decision.

While relying on the corporate veil company law principle, Mr. Nyaburi referred the Board to the decisions in **State of U.P v. Renusagar Power Co. and Others, Supreme Court of India (1998) 4 SCC 59** and **Andhra Pradesh High Court Writ Petition No. 14741, Presad Sushee Joint Venture v. The Singareni Collieries Company** and submitted that the courts in the above cases held that the corporate veil could be lifted to see the person who controls the said company. On further enquiry by the Board, Counsel submitted that the 1st Interested Party specified its relationship with its Parent Company in its original bid, and urged the Board to study the same at pages 163 to 398 thereof.

On the second issue regarding annexure KG4 attached to the Applicant's Supporting Affidavit, Counsel submitted that even though Regulation 86 of the Public Procurement and Disposal Regulations states that the Board is not bound by strict rules of evidence, that does not mean that the Board should not apply the rules of evidence at all. In his view, the import of the aforestated Regulation is to give the Board the discretion to decide whether it should consider evidence adduced before it or not, but to ensure justice is done in considering relevant evidence and the need to afford all parties a fair hearing.

He urged the Board to consider the prejudicial position it would be setting if it were to admit any documentation brought before the Board by a party to influence the Board's decision in a matter, without adhering to evidentiary rules based on relevance of the evidence against the need to uphold justice and fairness to all parties. He therefore urged the Board to disregard the information set out in KG4 attached to the Applicant's Supporting Affidavit.

Applicant's Rejoinder

In a rejoinder, Mr. Kibet took the view that the submissions made by the 1st Interested Party's Counsel demonstrate that the financial statements submitted do not belong to the 1st Interested Party. He further submitted that the Parent Company of the 1st Interested Party did not submit a bid in the subject tender and was therefore not a tenderer within the meaning of section 2 of the Act.

On the issue of admissibility of KG4, Mr. Kibet referred the Board to the decision in **Goerge Anyona Ochier v. Teachers Service Commission (2017) eKLR** and submitted that it is only when there are statutory rules and regulations binding on the Board on the procedure to be followed in adducing evidence, then the Board is bound by such procedure. On enquiry by the Board regarding the question whether the decisions of the Supreme Court of India are applicable, Counsel submitted that they are merely persuasive and not binding and that the procurement needs in India are not similar to those of Kenya.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documentation filed before it including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and the oral submissions made by parties on the hearing date.

The issues for determination are as follows:-

- 1. Whether the Procuring Entity fully complied with the orders of the Board issued on 26th July 2019 in Request for Review No. 70/2019 in respect of the subject tender; and***

II. Whether the Procuring Entity rightfully evaluated the 1st Interested Party's bid at the Preliminary Evaluation Stage in respect of the criterion outlined in Clause (D) (3) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document.

The Board now proceeds to address the above issues as follows:-

To address the first issue, the Board observes that, in its decision rendered on 26th July 2019 in Review No. 70 of 2019, it directed as follows, specifically in terms of Order No. 4 thereof:-

"The Procuring Entity is hereby directed to conduct a re-evaluation of all bids received by it in Tender No. GF ATM HIV NFM-18/19-OIT-015 for Supply of Nutritional Supplements (II) from the Preliminary Evaluation Stage in accordance with the Mandatory documents listed in Preliminary Examination of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document, including the following mandatory documents:-

- a. Minimum number of 3 (three) supply contracts of items within the past 3 years, the tenderer should provide documentary evidence in support of the experience of previous supply (Contracts, Purchase***

Orders, Reference letters and Contact Details of previous supply contracts (Mandatory)

b. Copies of the tenderer's audited financial statements for the past three fiscal years (Mandatory)

c. Average annual turnover in the last three years at least two times the value of the items offered (Mandatory)

d. Statement of manufacturers manufacturing capacity (Mandatory)

and to proceed with the procurement process to its logical conclusion, taking into consideration the Board's findings in this case, including the making of an award within fourteen (14) days from the date of this decision. "

According to page 4 of the Evaluation Report dated 8th August 2019, the Evaluation Committee re-convened on 7th August 2019 to re-evaluate bids submitted to it from the Preliminary Evaluation Stage including a re-evaluation of the mandatory documents listed under Order 4 above as outlined in Clause (D) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document.

At the end of Preliminary Evaluation, the Procuring Entity found ten (10) bidders responsive and therefore proceeded with the said bidders to

Technical Evaluation. Thereafter, Technical Evaluation was conducted in two limbs namely; Documentary Compliance and Product Evaluation. At the end of Technical Evaluation, the Evaluation Committee found four (4) bidders substantially responsive as indicated at page 22 of the Evaluation Report and proceeded with the said bidders to Financial Evaluation. Upon concluding Financial Evaluation on the bidders who proceeded to that stage, the Evaluation Committee recommended award of the subject tender as follows:-

- Item 1, Ready to Use Therapeutic Food (RUTF) to M/s Sai Pharmaceuticals Limited, the 2nd Interested Party herein;
- Item 2, Ready to Use Supplemental Food (RUSF) to M/s Nuflower Foods and Nutrition Pvt Limited, the 1st Interested Party herein.

From the foregoing, the Board observes that the Procuring Entity conducted a re-evaluation from the Preliminary Evaluation Stage including a re-evaluation of the mandatory documents listed in Clause (D) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document. Further to this, a Professional Opinion dated 8th August 2019 was issued by the Head of Procurement function expressing his views of the procurement process. The Accounting Officer of the Procuring Entity also notified all bidders of the outcome of their bids after the re-evaluation process in letters dated 9th August 2019.

In conducting a re-evaluation, this Board has the obligation to ascertain whether or not the Procuring Entity took into account, the Board's finding in Review No. 70/2019, that the documents submitted by the 2nd Interested Party in response to the criterion outlined in Clause (D) (1) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document failed to demonstrate that the 2nd Interested Party would be supplying the Nutritional Supplements required by the Procuring Entity specifically, Ready to Use Therapeutic Food (RUTF) and Ready to Use Supplemental Food (RUSF).

This criterion required as follows:-

"Minimum number of three (3) supply contracts of items within the past 3 years." Tenderers should provide "documentary evidence in support of the experience of previous supply (Contracts, Purchase Orders, Reference Letters and supply Contracts" as a mandatory requirement."

In its decision rendered on 26th July 2019, the Board observed that the 2nd Interested Party had submitted 6 previous supply contracts found at pages 168 to 173 and pages 180 to 182 of its original bid and a purchase order found at pages 191 to 192 of its original bid with respect to supply of pharmaceutical drugs. The same are outlined hereinbelow:-

i. A Contract executed on 11th October 2010 between the 2nd Interested Party and the 2nd Respondent for the Supply of Pharmaceutical drugs;

- ii. A Contract executed on 9th February 2012 between the 2nd Interested Party and the 2nd Respondent for the Supply of Pharmaceutical drugs;***
- iii. A Contract executed on 1st October 2010 between the 2nd Interested Party and the 2nd Respondent for the Supply of Pharmaceutical drugs;***
- iv. A Contract executed on 16th April 2013 between the 2nd Interested Party and the 2nd Respondent for the Supply of Pharmaceutical drugs;***
- v. A Contract executed on 14th August 2013 between the 2nd Interested Party and the 2nd Respondent for the Supply of Pharmaceutical drugs;***
- vi. Another Contract executed on 1st October 2010 between the 2nd Interested Party and the 2nd Respondent for the Supply of Pharmaceutical drugs of different specifications;***
- vii. A Purchase Order dated 23rd April 2018 to Supply Pharmaceutical drugs to Mission for Essential Drugs.***

The Board in Review No. 70/2019, having studied the above documentation, held that the contracts relating to pharmaceutical drugs supplied to the Procuring Entity, a Purchase order to supply pharmaceutical drugs to Mission for Essential Drugs, and letters of notification of award attached to the 2nd Interested Party's original bid, failed to demonstrate the 2nd Interested Party

had supplied the Nutritional Supplements that it bidded for i.e. RUTF and RUSF.

The Board notes that its decision in Review No. 70/2019 has not been challenged to date, therefore the said decision is final and binding to the Procuring Entity.

At pages 6 and 7 of the Evaluation Report, the Evaluation Committee noted the following during its re-evaluation of the 2nd Interested Party's bid on the criterion under consideration:-

Bidder No.	Bidder Name	<i><u>Minimum number of 3 (three) supply contracts of items within the past 3 years. The tenderer should provide documentary evidence in support of the experience of previous supply (Contracts, Purchase Orders, Reference letters and Contact details of previous supply)</u></i>	Verdict (Pass/Fail)
4	Sai Pharmaceuticals Limited	Attached more than three copies of contracts from KEMSA and Purchase Order from MEDS, and also several notification of awards	Pass

The Board notes, the Procuring Entity merely noted that the 2nd Interested Party attached more than three copies of contracts awarded to it by the Procuring Entity, a Purchase Order and several notification of awards, therefore concluded that the 2nd Interested Party satisfied this criterion.

The Evaluation Committee failed to ascertain whether or not the information contained in the contracts, the purchase order and letters of notification of awards issued to the 2nd Interested Party from previous supply of pharmaceutical drugs correspond to Supply of Nutritional Supplements, i.e. RUTF and RUSF, that the 2nd Interested Party had bid for.

Section VI. Technical Specifications running through pages 59 to 75 of the Tender Document clearly describes the technical specifications of Item 1. RUTF and Item 2. RUSF thereby illustrating that the evidence required under Clause (D) (1) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document is with respect to RUTF and RUSF. In essence, a bidder could not supply any type of pharmaceuticals drugs save for Nutritional Supplements that meet the technical specifications of the RUTF and RUSF.

This Board observes that the Government of Kenya received a grant from the Global Fund to fight AIDS, Tuberculosis and Malaria. It is through this grant that the Procuring Entity sought to implement the subject tender to supply RUTF and RUSF products to HIV positive patients. Clause 1 of Section I. Invitation to Tender indicates that:-

"The Government of Kenya has received a grant from the Global Fund to fight AIDS, Tuberculosis and Malaria under

New Funding Model (NFM) which is intends to use part of the proceeds to fund payments under the contract (s) for the Supply of Nutritional Supplements (II)

The Kenya Medical Supplies Authority, on behalf of the Government of Kenya, Ministry of Health and Global Fund herewith invites sealed tenders for Supply of Nutritional Supplements”

Therefore, a bidder cannot supply any other pharmaceutical drugs, save for Nutritional Supplements that meet the technical specifications of the RUTF and RUSF suitable for HIV positive patients. This Board is not persuaded that the Procuring Entity, in its re-evaluation took into account the Board’s finding that, the 2nd Interested Party’s evidence of previous supply of pharmaceutical drugs failed to demonstrate that the 2nd Interested Party had supplied the Nutritional Supplements required in the subject tender.

During the hearing, Counsel for the Procuring Entity confirmed that the Board in Review No. 70/2019 found that the documentation submitted by the 2nd Interested Party in its original bid, did not demonstrate that the pharmaceutical drugs from its previous supply correspond to the Nutritional Supplements required by the Procuring Entity.

In conducting a re-evaluation, the Procuring Entity failed to take into consideration the findings of the Board in Review No. 70/2019, that the 2nd Interested Party did not demonstrate that the evidence it provided in its bid, satisfied the mandatory requirement under Clause (D) (1) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document. This therefore means, the 2nd Interested Party could not qualify for award of the subject tender [specifically, Item 1, Ready to Use Therapeutic Food (RUTF)] having failed to meet a mandatory requirement at the Preliminary Evaluation Stage.

Accordingly, the Board finds that the Procuring Entity failed to comply with the orders of the Board issued on 26th July 2019 in Request for Review No. 70/2019 in so far as its re-evaluation of the 2nd Interested Party's bid on the criterion under Clause (D) (1) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document, is concerned.

On the second issue for determination, the Board observes that the Applicant referred the Board to a document marked as Annexure KG4, attached to the Applicant's Supporting Affidavit. The Applicant submitted that it obtained the Financial Statements of the 1st Interested Party electronically from the Ministry of Corporate Affairs in India upon paying the requisite fee.

The Applicant therefore relied on the said Statements to support its view that the 1st Interested Party failed to satisfy the criterion of Average Annual

Turnover as specified in Clause (D) (3) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document.

During the hearing, Counsel for the Applicant urged the Board to refrain from applying the procedure outlined in section 106 (B) of the Evidence Act, Chapter 80, Laws of Kenya (hereinafter referred to as "the Evidence Act") in determining the admissibility of documents adduced before this Board, since the Board is not bound by strict rules of evidence. In that regard, Counsel relied on Regulation 86 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") which states as follows:-

"The Review Board shall not be bound to observe the rules of evidence in the hearing of a request under these Regulations."

On the other hand, Counsel for the 1st Interested Party took the view that Regulation 86 of the 2006 Regulations does not require this Board to ignore evidentiary rules, but that in applying such rules, the Board is not bound to follow them. Having considered parties' submissions on the question whether the Board should rely on the Financial Statements adduced by the Applicant, this Board proceeds to find as follows:-

It is a well-established principle that ***"he who alleges must prove"***. In **Civil Appeal No. 80 of 2015, Kipkebe Limited v Peterson Ondieki Tai [2016] eKLR**, the court while considering the question of burden of proof held as follows:-

"It is trite law in evidence that he who asserts must prove his case. No evidence was adduced by the plaintiff. In such cases, the burden of proof lies with whoever would want the court to find in his favour in support of what he claims."

It is evident that a party who wishes a court (or any other decision making body) to make a determination in his favour in support of what he claims, the burden of proof lies on such a party. To discharge this burden, such a party adduces evidence that may persuade a decision making body to make a determination in its favour.

The Board is alive to the provisions of section 106 (B) of the Evidence Act which provides that:-

"(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in

relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during

that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.”

From the foregoing, section 106 (B) of the Evidence Act gives a procedure for adducing evidence contained in an electronic record for the same to be deemed admissible before a court or any other decision making body. It is however not lost to the Board that in determining whether or not to admit evidence before it, this Board is not bound by strict rules of evidence as stated in Regulation 86 of the 2006 Regulations, that was outlined hereinbefore.

Therefore, in adducing evidence before a decision making body, the answer to the question whether or not a decision making body should consider such evidence lies in the manner in which the evidence was obtained vis-à-vis the question whether the right to a fair hearing to the other party against whom such evidence is used, will be prejudiced.

At this point, this Board deems it fit to consider the authorities adduced by the Applicant to support its position that the Board should rely on the

evidence the Applicant alleges to be the Financial Statements of the 1st Interested Party.

The Applicant referred the Board to the decision of the **Supreme Court of India, Special Leave Petition (CRL) No. 2302 of 2017, Shafhi Mohammad v. The State of Himachal Pradesh** (hereinafter referred to as "Shafhi Mohammad Case") where it was held as follows:-

[11] The applicability of procedural requirement of section 65B (4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device

We clarify the legal position on the subject of admissibility of the electronic evidence, especially by a party who is not in possession of the device from which the document is produced. Such party cannot be required to produce certificate under Section 65B (4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies

Before addressing our minds on the above finding, the Board observes that during the hearing, the question whether decisions of the Supreme Court of India are binding to this Board was addressed by parties. Counsel for the 1st Interested Party took the view that the authorities he adduced before this Board (in support of his submissions with respect of the second issue for determination herein) are binding to our courts, and by extension, this Board, by dint of section 3 of the Judicature Act, Chapter 8, Laws of Kenya (hereinafter referred to as "the Judicature Act"). However, Counsel for the Applicant took the view that those decisions are merely persuasive.

Section 3 of the Judicature Act states as follows:-

"Mode of exercise of jurisdiction

(1) The jurisdiction of the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and of all subordinate courts shall be exercised in conformity with—

(a) the Constitution;

(b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;

(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common

law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date:

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”

From the foregoing, it is worth noting that, the jurisdiction of the superior courts in Kenya, subordinate courts (and other decision making bodies) is exercised in accordance with the 2010 Constitution. Secondly, that jurisdiction is exercised in accordance with all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to the Judicature Act modified in accordance with Part II of that Schedule.

Thirdly, that jurisdiction is exercised in accordance with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England as at that date. However, this applies only in so far as the written laws mentioned in section 3 (b) of the Judicature Act do not extend or apply.

In **Civil Appeal No. 31 of 1987, Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another [1987] eKLR**, the Court of Appeal when explaining the import of section 3 of the Judicature Act held as follows:-

"The formal situation is that, the common law and doctrines of equity as well as the statutes of general application which are relevant and the procedure and practice observed in courts of justice in England are to be applied to fill up what is not provided for in the written laws in conformity with the aims of the Constitution. But although the common law is a source of law by which the High Court and this court 'shall' exercise their jurisdiction, there is the proviso that they must be applied with care, first of all not at all if the circumstances of Kenya and its inhabitants do not permit, and secondly, subject to such qualifications as those circumstances may render necessary. This is to state the proviso in negative terms so as to bring out the real meaning of the words that the application of the common law applies 'so far only as the circumstances' permit."

From the foregoing case, it is the Board's considered view that the common law and doctrines of equity as well as the statutes of general application in England as at 12th August 1987 are relevant to this Board. Further, the procedure and practice observed in courts of justice in England are to be applied to fill up what is not provided for in our written laws in conformity

with the aims of the Constitution, only if the circumstances of Kenya and its inhabitants permit.

This therefore means, the substance of common law (that is, judicial precedent derived from judicial decisions of courts and similar tribunals in England) are persuasive depending on the circumstances of Kenya and its inhabitants. The Judicature Act clarifies the position with respect of common law in England and since India forms part of the commonwealth, its decisions may be persuasive depending on the circumstances of Kenya and its inhabitants.

Turning to the finding in the “Shafhi Mohammad Case” that was adduced by the Applicant, the Board notes that the Supreme Court of India took the view that the requirement of production of a certificate to support the admissibility of electronic evidence can be ignored by a Court wherever the interest of justice so justifies. In essence, the Supreme Court of India was of the view that the interest of justice must be first considered, to determine whether such interest will be achieved if the strict requirement to produce a certificate to support the admissibility of electronic evidence is to be ignored.

The Applicant also referred this Board to **Civil Suit No. 4 of 2017, Aharub Ebrahim Katri v. Nelson Marwa (2019) eKLR** (hereinafter referred to as “the Nelson Marwa Case”) where it was held as follows:-

"In any case, the modern evidential rule as provided for under Article 159 (2) (d) of the Constitution and Sections 1A, 1B and 3 of the Civil Procedure Act, is aimed at achieving substantive justice. It therefore frowns, on, among others, the exclusion of evidence by either party on the ground of technicalities. The main interest lies in according all parties a fair trial and the argument would be on the question of the weight of the evidence which should be tested in cross examination of the witnesses"

The Board notes, just like the Supreme Court in the Shafhi Mohammad Case, the High Court in the Nelson Marwa Case considered that the main interest in determining whether evidence should be admitted without following strict rules of procedure for adducing such evidence, is for a court or other decision making body to address its mind on the question whether a fair hearing (or trial) will be afforded to all parties.

The Board also considered the finding of the Supreme Court in **Petition No. 15 "B" of 2016, Joseph Mbalu Mutava v Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya [2019] eKLR** where it was held as follows:-

"[93] Section 13 of the Second Schedule of the Judicial Service Act provides that the Tribunal shall not be bound by strict rules of evidence but shall be guided

by the rules of natural justice and relevancy. This means that Tribunal proceedings being quasi-judicial in nature are not exempt from the constitutional safeguards of a fair hearing. In this case, on appraisal of the evidence on record and especially from the highlighted examples, we find that the Tribunal made deliberate efforts to ensure that the Petitioner's right to fair hearing was protected. For example, the Tribunal recognised that it was unfair to bring a witness without notice and in that particular case, gave the Petitioner's Counsel the right to decide when to cross-examine the witness. The Tribunal also consistently reminded Assisting Counsel to always ensure that all the documents that the witnesses would produce before the Tribunal were given to the Petitioner in advance. We cannot fault such conscientious action on the part of the Tribunal.

Having considered the above three cases, this Board is of the view that it should consider the circumstances of each case, in determining whether or not it should follow the procedure for adducing electronic evidence provided in section 106 (B) of the Evidence Act. In making such a determination, the Board must also consider the need to uphold each parties' right to a fair hearing.

Therefore, whereas the Board is not bound by strict rules of evidence, this does not mean that it will admit any and every information relied upon by a party, even if such information may prejudice another party.

The Applicant took the view that the 1st Interested Party's Average Annual Turnover as outlined in the Applicant's Annexure KG4 is as follows:-

Year	Annual Turnover		Mean Exchange Rate in India	Turnovers in US DOLLARS
2016	INR 10,827,660.00	2016	66.17	163633.97
2017	INR 5,043,631.00	2017	64.86	77,761.81
2018	INR 172,838,981.00	2018	65.14	2,653,346.35
	INR 188,710,272.00		AVERAGE	964,914.04

Having considered the above information as outlined in the Applicant's Annexure KG4, the Board observes that "a bidder's Average Annual Turnover for the last 3 years, to be at least two times of the value of the items offered by such bidder" was a requirement in the Tender Document. Accordingly, bidders would provide documentation to the Procuring Entity to support their qualification under this criterion.

This information would be contained in the original bids submitted by bidders by the tender submission deadline and it is expected that the Evaluation

Committee would confine itself to the documents and information contained in each bidder's bid during evaluation. In essence, the information contained in Annexure KG4 was not before the Evaluation Committee when evaluating the 1st Interested Party's bid. It would therefore serve no purpose for bidders to supply information to a procuring entity, if such a procuring entity would look for other information that was not supplied to it when carrying out evaluation.

This Board further notes that, if the Evaluation Committee needed to confirm and verify the documents supplied to it by the 1st Interested Party in relation to the criterion of Average Annual Turnover, a due diligence exercise conducted after tender evaluation but prior to award of the tender, would have settled any doubt regarding the 1st Interested Party's Average Annual Turnover, assuming the 1st Interested Party was found to be the lowest evaluated responsive bidder. Section 83 (1) of the Act states that:-

"An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act"

When the Applicant lodged this Request for Review, the Procuring Entity had the obligation to furnish this Board with all original bids by virtue of section

67 (3) (e) of the Act, as forming part of the Procuring Entity's confidential file. This Board is of the considered view that, if it were to admit any and every information obtained electronically to determine whether or not bidders satisfied a criterion, it would therefore serve no purpose for original bids to be supplied to this Board as confidential documents by dint of section 67 (3) (e) of the Act.

Given that the original bid of the 1st Interested Party is before this Board, the Board can verify whether or not the 1st Interested Party satisfied the criterion under Clause (D) (3) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document. This is the same manner that the Board would have treated all other bidders, including the Applicant herein, assuming the Applicant's Average Annual Turnover was in dispute before this Board.

This falls within the function of the Board as provided in section 28 (1) (a) of the Act which states that:-

"(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes"

In the circumstances, the Board finds that it would amount to a grave injustice to rely on Annexure KG4 as a true reflection of the 1st Interested

Party's Average Annual Turnover. If upon studying the 1st Interested Party's bid, the Board is persuaded that it did not satisfy this criterion, this Board may exercise its powers under section 173 (b) of the Act to *give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings.*

Accordingly, the Board shall refrain from relying on the information contained in Annexure KG4 and now turns to establish whether the 1st Interested Party satisfied the criterion under Clause (D) (3) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document, by studying its original bid.

Clause (D) (3) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document provides as follows:-

"Average Annual Turnover in the last three (3) years at least two times the value of the items offered (Mandatory)"

During oral submissions, Counsel for the 1st Interested Party submitted that the 1st Interested Party is wholly owned and controlled by M/s Devesh Foods & Agro Products Private Limited (hereinafter referred to as "M/s Devesh"). Counsel further submitted that, a Board Resolution was passed by M/s Devesh allowing the 1st Interested Party to use the Financial Statements of M/s Devesh to demonstrate the 1st Interested Party's Average Annual Turnover in response to the criterion in issue.

Having noted the above submissions by Counsel for the 1st Interested Party, the Board deems it fit to address the following:-

- i. Who submitted a bid as a tenderer in this procurement process as defined by section 2 of the Act*
- ii. What is the nature of the relationship between the 1st Interested Party and M/s Devesh;*
- iii. Whether a wholly-owned subsidiary company is permitted in law to use the financial statements of its Parent Company;*
- iv. If the answer to sub-issue (iii) above is in the affirmative; whether the 1st Interested Party's Parent Company expressly allowed the 1st Interested Party to rely on its Financial Statements; and*
- v. Whether the Financial Statements relied upon by the 1st Interested Party satisfy the criterion under Clause (D) (3) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document*

In addressing the first sub-issue, the Board notes that section 2 of the Act defines a tenderer as:-

"a person who submitted a tender pursuant to an invitation by a public entity"

From the Procuring Entity's Tender Opening Register of 5th April 2019, the Board notes that the 1st Interested Party was among the 12 bidders who submitted a tender pursuant to the Invitation Notice dated 24th July 2019 by the Procuring Entity.

Following the decision in **Salomon v Salomon & Co Limited [1897] AC 22, UKHL 1**, (hereinafter referred to as “the Salmon Case”) it has been a well-established principle that a company has its own legal personality that is separate from its shareholders and directors. In that case, it was held as follows:-

"A company is a different person altogether from its subscribers, directors and shareholders. Although it is a creation of the law, it is as important for all purposes and intents in any proceedings where a company is involved"
[Emphasis by the Board]

Similarly, in his book, ***Principles of Commercial Law (LawAfrica Publishers, Second Edition)***, Kibaya Laibuta discusses the legal personality of a company at page 47 thereof as follows:-

"A company's legal standing has extensive consequences; It is nonetheless recognised in law as a distinct persona from its subscribers, directors, shareholders parent and subsidiary companies and exists as a separate entity with a legal personality from the moment of its registration. As a body corporate, the company is capable of holding its own property apart from that of its members. Its business is conducted by the company, through its directors, servants and agents whom it employs"

It is therefore clear from the foregoing that a company is a separate legal entity from its members, directors, shareholders, parent and subsidiary companies. Courts and other decision making bodies are usually unwilling to look beyond that separate personality to hold the shareholders or directors responsible for the company's liability unless there are exceptional circumstances to justify the departure from the general rule established in the Salmon Case.

In departing from the general rule established in the Salmon Case, this Board ought to consider whether the circumstances call upon it to lift the corporate veil of a company. The conditions for lifting the corporate veil of a company have been set out in **Halsbury's Laws of England, 4th Edition Volume 7 at paragraph 90** as follows:-

"Piercing the corporate veil notwithstanding the effect of a company's incorporation, in some cases the court will pierce the corporate veil in order to enable it to do justice by treating a particular company for purposes of litigation before it as identical with a person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company or the nature of the person who controls it is a relevant feature. In such a case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders and will consider who are the persons as

shareholders or even agents, directors and controlling the activities of the company.”

In this instance, the 1st Interested Party alleges that it is a wholly-owned subsidiary of M/s Devesh, which passed a Board Resolution allowing the 1st Interested Party to use the Financial Statements of M/s Devesh. It therefore follows that, upon establishing the corporate status of the two companies in accordance with the rule in Salmon Case, this Board ought to pierce the corporate veil of the 1st Interested Party to further establish its relationship with M/s Devesh.

The documents that support the Board’s view that the 1st Interested Party is a separate legal entity from M/s Devesh include the following:-

As relates the 1st Interested Party:-

- At page 139 of its original bid, a Certificate of Incorporation issued to the 1st Interested Party, formally incorporated as Beverly Hills Herbal Private Limited on 8th December 2003 by the Registrar of Companies in New Delhi, India; and
- At page 138 of its original bid, a Certificate of Incorporation pursuant to change of name from Beverly Hills Herbal Private Limited to Nuflower Foods and Nutrition Private Limited with effect from 26th May 2014 issued by the Registrar of Companies of New Delhi, India.

As relates M/s Devesh:-

- ✓ At page 163, a Certificate of Incorporation issued to M/s Devesh Foods & Agro Products Limited on 14th October 2005 by the Assistant Registrar of Companies in New Delhi, India

Accordingly, in answering the first sub-issue, the Board finds that, the 1st Interested Party is a separate legal entity from M/s Devesh and the 1st Interested Party is the one that submitted a bid as a tenderer in this procurement process.

Given that the 1st Interested Party is the one that submitted a bid as a tenderer in this procurement process and that the 1st Interested Party alleges it is a wholly owned-subsidiary of M/s Devesh, it would be necessary to establish the nature of the relationship of the two companies, by piercing the corporate veil of the 1st Interested Party.

This therefore brings us to the second sub-issue, that is; **What is the nature of the relationship between the 1st Interested Party and M/s Devesh?**

To address this question, the Board studied the original bid submitted by the 1st Interested Party to establish whether or not the nature of the relationship of the two companies is explained and we proceed to note the following:-

At page 178 of its original bid a **"List of Shareholder as on 25th March 2019"** is tabulated as follows:-

No.	Name of Shareholder/Promoter	Address of Shareholder/Promoter	No. of Shares held		Nature of Relationship
1	M/s Devesh Foods and Agro Products Private Limited	Equity Shares 2,000,000	Preference Shares 12,000,000	Holding Company
		Total	14,000,000 Shares		

For and on behalf of the Board of Directors

Abhinav Khandelwal

Further to this, at pages 164 to 177, the 1st Interested Party attached its Annual Return obtained from the Registrar of Companies in India which contains the following details:-

I. Registration and Other Details

(i)	
(ii) (a) Name of Company	Nuflower Foods and Nutrition Private Limited
(b)	

(c)	
-----------	--

II.

**III. Particulars of Holding, Subsidiary and Associate Companies
(including Joint Ventures)**

S. No	Name of Company	CIN/FCRN	Holding/Subsidiary/Associate/Joint Venture	% shares held
1	Devesh Foods and Agro Products Private Limited	Holding	100

The Board observes that M/s Devesh is the Holding company of the 1st Interested Party and owns 100% of the shares in the 1st Interested Party therefore making the 1st Interested Party, a wholly-owned subsidiary company. Section 3 of the Companies Act, No. 17 of 2015 (hereinafter referred to as "the Companies Act") states that:-

"wholly-owned subsidiary company" (of another company) means a company that has no members other than that other company and that other company's wholly owned subsidiaries (or persons acting on behalf of that other company or its wholly-owned subsidiaries)"

The definition provided by section 2 of the Companies Act, prompted the Board to compare the persons who own and control the 1st Interested Party to those that own and control M/s Devesh. At page 179 of its original bid, the 1st Interested Party attached a document known as “**Company Master Data**” which contains details of the 1st Interested Party’s Directors as follows:-

DIN/PAN	Name	Begin Date	End Date
	Naveen Khandelwal	5/04/2014	
	Abhinav Khandelwal	28/08/2014	
	Akshat Khandelwal	05/04/2014	
	Akshat Khandelwal	05/04/2016	
	Raja Raminder Singh	25/03/2019	

Further, at page 347 of the 1st Interested Party’s original bid, the Directors of M/s Devesh are listed as follows in the latter’s Annual Report of 2016-2017:-

Directors: **Naveen Khandelwal**
 Praveen Khandelwal
 Abhinav Khandelwal
 Kishore Kumar

The above entries show that two of the persons who are directors of the 1st Interested Party are also directors of M/s Devesh in addition to the fact that the shares of the 1st Interested Party are 100% owned by M/s Devesh.

Therefore, to answer the second sub-issue, the Board finds that the nature of the relationship between the 1st Interested Party and M/s Devesh is that

the 1st Interested Party is a wholly-owned subsidiary company of M/s Devesh (the Parent/Holding Company).

On the third sub-issue; that is: **Whether a wholly-owned subsidiary company is permitted in law to rely on the financial statements of its Parent Company**, the Board proceeds to make the following findings:-

The Board studied the cases that were cited by Counsel for the 1st Interested Party and we note that Counsel relied on decisions of the courts of India to support its submission that a wholly-owned subsidiary may rely on the Financial Statements of its Parent/Holding Company.

When addressing the first issue for determination, this Board already established that the substance of common law including judicial decisions rendered by courts in India are not always binding but may be persuasive depending on the circumstances of Kenya and its inhabitants.

The 1st Interested Party referred the Board to the decision of the Supreme Court of India, **Civil Appeal No. 7230-32 of 1994, New Horizons Limited and Others v. Union of India and Others** where it was held as follows:-

"[23] Even if it be assumed that the requirement regarding experience as set out in the tender advertisement

dated April 22, 1993 inviting tenders is a condition about eligibility for consideration of the tender, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only, especially where it is possible to visualize a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name

[38] In State of U.P v. Renusagar Power Co. MANU/SC/0505/1988, this Court lifted the veil to hold that Hindalco, the holding company and Renusagar Power Co, its subsidiary, should be treated as one concern and the power plant of Renusagar Power C. must be treated as the own source of generation of Hindalco and Hindalco would be liable to payment of electricity duty on that basis

[39] There are cases where the court has looked behind the façade of the company and its place of registration in order to determine its residence and for this purpose the test laid down is the place of the central management and control”

From the foregoing, the Supreme Court of India addressed the following:-

- ✓ It was appropriate in the circumstances of the case before it, to lift the corporate veil of the tenderer to determine the persons behind the company;
- ✓ That upon lifting the corporate veil, the Court found that the persons behind the tenderer company were other companies and those other companies had entered into a Joint Venture with the tenderer company in submitting a bid;
- ✓ That the past experience of the other companies in Joint Venture with the tenderer company (Lead Joint Venture Company) could be used as the experience of the tenderer company (Lead Joint Venture) to satisfy requirements of the tender

The Supreme Court of India also cited with approval, the decision of the Supreme Court of India in **State of U.P v. Renusagar Power Co. MANU/SC/0505/1988**, (hereinafter referred to as "the State of U.P Case") which we note was also relied upon by Counsel for the 1st Interested Party.

In the State of U.P Case, the Supreme Court of India held as follows:-

"[64] It is high time to reiterate that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible..."

Here, we are of the opinion that it is correct that Renusagar was brought into existence by Hindalco in order to fulfil the

conditions of industrial licence of Hindalco through production of aluminium. As the facts are abundantly clear that all the steps for establishing and expanding the power station were taken by Hindalco, Renusagar is wholly-owned subsidiary of Hindalco and is completely controlled by Hindalco. Even the day to day affairs of Renusagar are controlled by Hindalco.

[65] In the aforesaid view of the matter we are of the opinion that the corporate veil should be lifted and Hindalco and Renusagar be treated as one concern and Renusagar's power plant must be treated as the own source of generation of Hindalco'

The finding of the Supreme Court of India in the State of U.P Case closely relates to the circumstances of the case before this Board in the sense that, in the State of U.P Case, Renusagar was a wholly-owned subsidiary of Hindalco, just like the 1st Interested Party herein, which is a wholly-owned subsidiary of M/s Devesh. Secondly, the court was of the opinion that the corporate veil of the wholly-owned subsidiary ought to be lifted in order to treat the wholly-owned subsidiary and the Parent Company as one concern, for purposes of establishing that the Power Plant of the wholly-owned subsidiary belongs to the Parent Company.

Further, the High Court of India in **Writ Petition No. 14741 of 2015, Prasad Sushee v. The Singareni Collieries Company**, held as follows:-

"The legal relationship between a holding company and a wholly-owned subsidiary company is that they are two distinct legal persons...Holding company, of course if the subsidiary is a wholly owned subsidiary, may appoint or remove any Director if it so desires by a resolution in the general body meeting of the subsidiary. Holding companies and subsidiaries can be considered as single economic entity and consolidated balance sheet is the accounting relationship between the holding company and subsidiary company, which shows the status of the entire business enterprises. Shares of stock in the subsidiary company are held as assets on the books of the parent company and can be issued as collateral for additional debt financing. Holding company and subsidiary company are, however, considered as separate legal entities and subsidiary is allowed decentralized management."

The finding in the above case demonstrates that even though a holding company and a wholly-owned subsidiary company are separate legal entities, the two can be considered as a single economic entity and their consolidated balance sheet demonstrates the accounting relationship between the holding company and subsidiary company, by reflecting the status of the entire business enterprises.

Lord Denning in the Court of Appeal of England in **DHN Food Distributors Ltd and Others v. London Borough of Tower Hamlets (1967) 3 ALL ER 462** (hereinafter referred to as "the DHN Case") held that:-

"We all know in many respects that a group of companies is treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: "there is evidence of general tendency to ignore the separate legal entities of various companies within a group" This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says.

This group in my view is virtually a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point."

The findings made by Justice Denning in the DHN Case illustrates that where a Parent Company (such as M/s Devesh) owns all of the shares of a subsidiary (the 1st Interested Party herein), these two companies can be treated as one concern for the purpose of general accounts, balance sheet and profit and loss account. This finding supports the view that a Consolidated Balance Sheet of the two companies would demonstrate the

accounting relationship between the holding company and subsidiary company, by reflecting the status of the entire business enterprises.

This therefore brings us to the provisions of the Companies Act on preparation of Financial Statements. Sections 635 and 638 of the Companies Act states that:-

Section 635: (1) The directors of every company shall prepare a financial statement for the company for each of financial year of the company.

(2) Such a financial statement is referred to in this Part as the company's individual financial statement.

Section 638 Requirements for individual financial statements

(1) In preparing an individual financial statement for a financial year, the directors of a company shall ensure that the statement complies with the requirements of this section.

(2) The requirements are that—

(a) the statement comprises—

(i) a balance sheet as at the last day of the financial year;

- (ii) a profit and loss account;*
- (iii) a statement of cash flow; and*
- (iv) a statement of change in equity*

Further, section 640 of the Companies Act provides as follows:-

"640. Exemption for company included in group financial statement of larger group

(1) A company that is itself a subsidiary undertaking is exempt from the requirement to prepare a group financial statement in the following cases—

(a) if the company is a wholly-owned subsidiary of that parent undertaking;

(b) if that parent undertaking holds more than fifty percent of the allotted shares of the company and notice requesting the preparation of a group financial statement has not been served on the company by shareholders holding in total—

(i) more than half of the remaining allotted shares in the company; or

(ii) five percent or more of the total allotted shares in the company"

Sections 635 and 638 of the Companies Act demonstrate that a company has the obligation to prepare its own Financial Statements. However, according to section 640 of the Companies Act, a wholly-owned subsidiary is exempt from preparing Financial Statements of the group. This is because, it is a Parent Company that prepares the Consolidated Financial Statements of the Group at the end of a Financial Year and further specifies the component of the businesses undertaken by the subsidiaries in order to demonstrate the Annual Returns made with respect to the components of the business undertaken by such subsidiaries.

Having studied the 1st Interested Party's original bid, the Board notes that M/s Devesh is a company that undertakes the business of Manufacturing and Supply of MicroNutrient fortified Energy Dense Food Products as stated in page 261 of the 1st Interested Party's bid. On the other hand, the 1st Interested Party handles the component of Manufacturing and Supply of Nutri-FEEDO brand of Ready to Use Therapeutic Food (RUTF) and Nutri-FEEDO Lite brand of Ready to Use Supplementary Food (RUSF). Accordingly, in preparing the Group's Consolidated Financial Statements, the Parent Company (M/s Devesh) would indicate the component that the 1st Interested Party handles, in addition to reflecting the status of the entire business enterprise.

The Board is persuaded that even though wholly-owned subsidiary companies may prepare their own individual financial statements, the law

(as can be seen from the judicial precedents of the Courts of India and England cited hereinabove), permits a wholly-owned subsidiary to rely on the Financial Statements of the Parent Company as the two companies are treated as one concern (or a single economic entity) when preparing Consolidated Financial Statements of the Parent Company and its subsidiaries.

Accordingly, the Board finds that a wholly-owned subsidiary may rely on the Financial Statement of its Parent/Holding Company.

On the fourth sub-issue, that is, **Whether the 1st Interested Party's Parent Company (M/s Devesh) expressly allowed the 1st Interested Party to rely on its Financial Statements**, the Board makes the following findings:-

At page 162 of the 1st Interested Party's original bid, a Certified True Copy of Extracts of a Board Resolution dated 15th March 2019 passed by M/s Devesh is attached therein stating as follows:-

"This Company has informed the Board that its M/s Nuflower Foods and Nutrition Private Limited (100% subsidiary company of Devesh Foods and Agro Products Private Limited) is participating in the tender invited by Kenya Medical

Supplies Authority (KEMS), 13 Commercial Street, Industrial Area, P.O Box, 47715-00100, Nairobi, Kenya; Tender Ref IFT No: GF ATM HIV NFM-18/19-OIT-15/Supply Nutritional Supplements (II): Ready to Use Therapeutic Food (RUTF) and Ready to Use Supplementary Food (RUSF)

Devesh Food and Agro Products Private Limited has allowed Nuflower Foods and Nutrition Private Limited (100% subsidiary company of Devesh Foods and Agro Products Private Limited to use its financial, technical, supply experience, turnover and other credentials/documents for the purpose of above mentioned tender. The Board has unanimously passed following resolutions:-

"RESOLVED THAT Company shall provide all the financial, technical turnover, supply experience and other credentials/documents to participate in the above mentioned tender"

By order of the Board of Devesh Foods and Agro Products Pvt Limited"

Further to this, at page 161 of its original bid, a letter dated 15th March 2019 written on the letterhead of M/s Devesh and addressed to the Procuring Entity, provides as follows:-

“Sub: Letter for allowing to claim our Technical. Financial, Manufacturing & Supply experience by Nuflower Foods and Nutrition Pvt Limited (our 100% subsidiary company and the bidder in the above said tender)

Ref IFT No: GF ATM HIV NFM-18/19-OIT-15/Supply Nutritional Supplements (II): Ready to Use Therapeutic Food (RUTF) and Ready to Use Supplementary Food (RUSF)

Respected Sir,

Devesh Food and Agro Products Pvt Limited (DFAPL) is a Parent Company/Holding Company to Nuflower Foods and Nutrition Pvt Limited (Bidder)

Devesh Food and Agro Products Pvt Limited (DFAPL) has allowed Nuflower Foods and Nutrition Pvt Limited (Bidder) company to use our Technical, Financial, Manufacturing, Supply Experience and other credentials for the purpose of the above said tender vide Board Resolution passed by the Board of Directors of DFAPL (Copy Enclosed) and hereby submit the following documents as sought, for your convenience...”

The above two documents are sufficient evidence that M/s Devesh expressly allowed the 1st Interested Party to rely on the financial statements of M/s Devesh for purposes of demonstrating the 1st Interested Party's Average Annual Turnover in response to the criterion outlined in Clause (D) (3) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document.

The Board finds that M/s Devesh passed a Board Resolution granting express authority to the 1st Interested Party to use the financial, technical, supply experience, turnover and other credentials/documents for the purpose of subject tender and also informed the Procuring Entity that the 1st Interested Party is its wholly owned subsidiary.

On the fifth sub-issue, that is:- **Whether the Financial Statements relied upon by the 1st Interested Party satisfy the criterion under Clause (D) (3) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document**, the Board makes the following findings:-

- At page 261, the 1st Interested Party attached a Turnover Certificate of M/s Devesh with the following details:-

Financial Year	Turnover in INR Million	Turnover in USD Million	Turnover in KES Million
2015-16	2,597.14	36.58	3,687.94

2016-17	2,194.66	30.91	3,116.42
2017-18	1,119.65	15.77	1,589.90
2018-19 As on February 2019	1,253.37	17.65	1,779.79
Average Turnover	1,791.21	25.23	2,543.51

Note: 1. Applicable INR to USD Conversion rate 1USD @71/-

**2. Applicable INR to KES Conversion rate 1 INR
@1.42 KES**

- At pages 318 to 398, the 1st Interested Party attached the Financial Statements of M/s Devesh as follows:-
 - ✓ 2015-2016 -Turnover Revenue 2,597.14 INR
 - ✓ 2016-2017 -Turnover Revenue 2,194.66 INR
 - ✓ 2017-2018 -Turnover Revenue 1,119.65 INR
 - ✓ 2018-2019 -Turnover Revenue 1,253.37 INR

At page 115 of its original bid, the 1st Interested Party specified that the value of the items that it had bidden for i.e. RUTF and RUSF is **USD 2, 145,341.38**. If the Average Annual Turnover of M/s Devesh relied upon by the 1st Interested Party is considered, the Average Annual Turnover is two times the value of the items offered, as follows:-

$$-36.58+30.91+15.77+17.65= 100.91/4 \text{ which results to:- } \mathbf{25.23}$$

**-25.23 Million USD is more than two times the value of USD
2,145,341.38**

Therefore, on the fifth sub-issue, the Board finds that the Financial Statements relied upon by the 1st Interested Party satisfy the criterion under Clause (D) (3) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document.

In totality of the second main issue for determination, the Board finds that the Procuring Entity rightfully evaluated the 1st Interested Party's bid at the Preliminary Evaluation Stage with respect to the criterion outlined in Clause (D) (3) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document.

In determining the appropriate orders to grant in the circumstances, the Board has found that the Procuring Entity, in its re-evaluation, failed to take into consideration the Board's finding in Review No. 70/2019, that the 2nd Interested Party failed to demonstrate that the evidence it provided of contracts, a purchase order and letters of notification of award from previous supply of pharmaceutical drugs correspond to the two items it had bid for.

Accordingly, the 2nd Interested Party could not qualify for award of the subject tender, having failed to meet a mandatory requirement at the

Preliminary Evaluation Stage. The Board already outlined the importance of the subject tender and the urgent need for Nutritional Supplements to be supplied to HIV positive patients. It would therefore serve no purpose to direct the Procuring Entity to conduct another evaluation (even after it already conducted a re-evaluation) and arrive at the conclusion that the 2nd Interested Party failed to meet this criterion. The Procuring Entity will arrive at the same conclusion as the Board that the next lowest evaluated bidder be considered for award of the tender.

In the decision rendered in Review No. 70/2019 on 26th July 2019, the Board extended the tender validity period for a further period of 45 days from 5th July 2019. By this time, 28 days of the tender validity period was remaining. Therefore, the tender validity period was 73 days as at 26th July 2019.

The Applicant lodged Request for Review No. 94/2019 on 22nd August 2019. By this time, the tender validity period had run for 27 days (i.e. 27th July to 22nd August 2019), therefore 46 days of the tender validity period remained and started running a day after 12th September 2019, when the Board rendered its decision in Review No. 94/2019.

The Applicant lodged a Certificate of Urgency and Chamber Summons on 26th September 2019 seeking leave of the Court to institute Judicial Review proceedings. The Applicant was granted leave to institute proceedings during the hearing of 1st October 2019 and the same operated as a stay of the

decision of the Board in Review No. 94/2019. It is therefore clear that as at 1st October 2019, 19 days of the tender validity period had run.

Accordingly, 27 days of the tender validity period remained and the High Court delivered its decision on 24th December 2019 remitting the matter back to the Board for fresh hearing and determination. In essence, the Board was seized with the matter, at least a day after the same was remitted back to it. In order to allow the Procuring Entity to conclude the subject procurement process, the Board finds it just to extend the tender validity period, in addition to the remaining 27 days in terms of the final orders herein.

In totality, the Request for Review partially succeeds in terms of the following specific 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 Procuring Entity's Letter of Notification of Award of Tender No. GF ATM HIV NFM-18/19-OIT-015- for Supply of Nutritional Supplements (II) dated 9th August 2019 addressed to M/s Nuflower Foods and Nutritional Pvt Limited with respect to Item 2, Ready to use Supplemental Food (RUSF) 500-520 KCAL/100G is hereby upheld.**

- 2. The Procuring Entity's Letter of Notification of Award of Tender No. GF ATM HIV NFM-18/19-OIT-015- for Supply of Nutritional Supplements (II) dated 9th August 2019 addressed to M/s Sai Pharmaceuticals Limited with respect to Item 1, Ready to use Therapeutic Food (RUTF) 520-550 KCAL/92G, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity is hereby directed to award Tender No. GF ATM HIV NFM-18/19-OIT-015- for Supply of Nutritional Supplements (II) in respect of Item 1, Ready to use Therapeutic Food (RUTF) 520-550 KCAL/92G to the next lowest evaluated bidder, taking into consideration the Board's findings in this case and to proceed with the procurement process to its logical conclusion.**
- 4. The Tender Validity Period of the subject tender is hereby extended for a further forty-five (45) days from the date of expiry of the remaining 27 days.**
- 5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 19th day of March 2020

**CHAIRPERSON
PPARB**

**SECRETARY
PPARB**

Delivered in the presence of:-

- i.** Mr. Ketan for the Applicant;
- ii.** Mr. Waudu holding brief for Mr. Ogamba for the Respondents;
- iii.** Mr. Nyaburi holding brief for the 1st Interested Party;
- iv.** No appearance made for the 2nd Interested Party.