

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 16 OF 2024-2025

BETWEEN

M/S GRAIDO GLOBAL RELIEF, AID AND

DEVELOPMENT COMPANY.....APPELLANT

AND

TANZANIA AGRICULTURAL RESERACH

INSTITUTE.....RESPONDENT

DECISION

CORAM

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| 1. Adv. Rosan Mbwanbo | - Ag. Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|-------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi | - Principal Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |
| 4. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

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| 1. Mr. Jason Ardon | - East Africa Representative |
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FOR THE RESPONDENT

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| 1. Mr. Yusuph Keu | - Procurement Manager |
| 2. Ms. Lilian Kimaro | - Legal Officer |
| 3. Mr. Waziri Bori | - Procurement Specialist |

This Appeal has been preferred by **M/S Graido Global Relief, Aid and Development Company** (hereinafter referred to as "**the Appellant**") against the Tanzania Agricultural Research Institute, commonly known by its acronym as "**TARI**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. IE 054/2023/2024/TAISP/G/02 for Procurement of Scientific Laboratory, Seed Cleaning Equipment, Seed Grader and Cold Storage Facilities Equipment for TARI Ilonga and Selian (hereinafter referred to as "**the Tender**"). The Tender had 4 lots of which Lot 4 is the subject of this Appeal.

The background of this Appeal may be summarized from the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") as follows: -

The Government of the United Republic of Tanzania had received financing from the African Development Bank (AfDB) and Japan International Corporation Agency (JICA). The Government allocated this financing towards the cost of Tanzania Agricultural Input Support Project (TAISP) and intended to apply part of the fund to cover eligible payment under the contracts for the Tender. Therefore, the Tender was conducted using the International Competitive Tendering method as specified in the African



Development Bank's Procurement Method and Procedures for Procurement of Goods and Works (hereinafter referred to as "**AfDB Procurement Method and Procedures**").

On 19th April 2024, the Respondent through the Daily News newspaper invited eligible tenderers to participate in the Tender. Deadline for submission of tenders was set on 3rd June 2024. On the deadline, the Respondent received six tenders, including that of the Appellant.

The received tenders were subjected to evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to all four (4) Lots. Specifically, award for Lot 4 was recommended to M/S Jemo Holdings Co. Ltd. The recommended contract price was Tanzania Shillings One Billion Nine Hundred Fifty-Five Million Three Hundred Four Thousand Eight Hundred Fifty-Six and Seventy-Eight Cents only (TZS 1,955,304,856.78) VAT Exclusive. The Tender Board approved the Evaluation Committee's recommendations at its meeting held on 28th June 2024.

The record of Appeal indicates that AfDB through a letter dated 29th August 2024, issued a "No Objection" to the evaluation report. It advised the Ministry of Agriculture (parent ministry) to proceed with the process of signing the contract. On 11th September 2024, the Ministry of Agriculture informed the Respondent that the "No Objection" has been granted by AfDB, hence it should proceed with the process of signing the contract.

The Respondent through a letter dated 26th September 2024, issued a notice of unsuccessful bid to the Appellant. The notice stated that the



Respondent had awarded the contract for Lot 1 and 2 to M/S Peritus Exim Private Ltd and Lot 4 to M/S Jemo Holdings Co. Ltd. In addition, the notice informed the Appellant that its tender was disqualified for having offered compound biological trinocular digital microscope with camera and software model (A12.2601) that has binocular head viewing contrary to the required model (LB-1270) that has a trinocular viewing head.

Dissatisfied with the reason given for its disqualification, on 30th September 2024, the Appellant applied for administrative review to the Respondent. The Respondent through a letter dated 10th October 2024 issued its decision which rejected the Appellant's application for administrative review. Aggrieved further, on 18th October 2024, the Appellant filed this Appeal to the Appeals Authority.

After receiving this Appeal, the Appeals Authority notified the Respondent about the existence of the Appeal and required it to submit a Statement of Reply. The Respondent submitted its Statement of Reply and the relevant documents. Having reviewed the submitted documents, the Appeals Authority observed that the Tender was conducted using the AfDB Procurement Method and Procedures. In view of this observation, the Appeals Authority found it necessary to satisfy itself if it has jurisdiction to determine this Appeal.

When the matter was called on for hearing before framing up of the issues, the Appeals Authority asked the parties to address it on the point of whether it has jurisdiction to determine this Appeal.



Addressing on this point Mr. Jason Ardon, the Appellant's representative stated that, the Respondent is a public institution, hence when conducting its procurement, it has to adhere to the requirements of the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") which was repealed and replaced by Act No. 10 of 2023, effective from 17th June 2024. He added that, all the Respondent's procurement despite the source of fund is to adhere to the requirements of the Act.

Mr. Jason stated further that it is undisputed that the Tender was conducted under the AfDB Procurement Method and Procedures. However, according to the Guidance Note issued by the African Development Bank on Handling Project's Procurement Related Complaints, issued on October 2022 (hereinafter referred to as "**Guidance Note**") , the Appeals Authority has jurisdiction to determine this Appeal. He elaborated that Section 6.2.3 of the Guidance Note states clearly that procurement dispute arising out of the tenders processed under the African Development Bank's Procurement Procedures are to be resolved in accordance with the procurement dispute resolution mechanism available in the borrower's country. Thus, since the Appeals Authority is one of the avenues for procurement dispute resolution for this country (borrower's country), it has jurisdiction to determine this Appeal.

Mr. Yusuph Keu, Procurement Manager made the Respondent's submission on this point by stating that in this Tender both the Act and the AfDB Procurement Method and Procedures were applicable. He stated that since

the donor procedures and the Act were applicable in this Tender, the Appeals Authority has jurisdiction to entertain this Appeal.

The Appeals Authority reviewed the Guidance Note and observed that Section 6.3 of the Guidance Note provides guidance on the complaint processing for the tenders conducted under the AfDB Procurement Method and Procedures. Specifically, Section 6.3.3 of the Guidance Note required procurement dispute to be resolved through the dispute resolution mechanism available in the borrower's country. Section 6.3.3 reads as follows: -

"6.3.3 Handling by the Borrower:

*Complaints are typically reviewed at two stages (though this may vary in some countries). **The first review is ordinarily done by the contracting authority as specified by law while the second is carried out by the appeals body in charge of reviewing decisions of the specified first review body.** The review will first determine whether the Complaint is admissible or not. When a Complaint is considered not admissible, a substantiated letter shall be sent to the complainant with a copy to the Bank".*

The Guidance Note states that disputes arising out of procurement conducted under AfDB Procurement Method and Procedures are to be resolved in accordance with borrower's procurement dispute resolution mechanism. In view of the above quoted provision, the Appeals Authority has jurisdiction to determine this Appeal.



Given the above finding, the Appeals Authority proceeds with the determination of the Appeal on merits and the following issues were framed: -

1.0 Whether the disqualification of the Appellant's tender was justified; and

2.0 What reliefs, if any, are the parties entitled to?

Having framed the issues, the Appeals Authority required the parties to address it on each of the framed issues.

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions were made by Mr. Jason Ardon. He started by giving the background of this Appeal. He stated that on 26th September 2024, the Appellant received the Notice of Unsuccessful bid from the Respondent. The Notice indicated the names of the tenderers which were to be awarded contracts for Lots 1, 2 and 4. The Notice also stated the reason for the Appellant's disqualification from the Tender. Dissatisfied with the reason given for its disqualification for lot 4, on 30th September 2024, the Appellant applied for administrative review to the Respondent. The Respondent issued its decision on 10th October 2024. Dissatisfied with the Respondent's decision, the Appellant lodged this Appeal.

Mr. Jason submitted that the Respondent erred in law for disqualifying the Appellant's tender for failure to comply with Item 11 of the Technical Specifications. He stated that Item 11 required tenderers to submit compound biological trinocular digital Microscope with cameras and



software. The required model for Item 11 was LB-1270 Optical System-Infinite-Optical System. He submitted that in complying with Item 11, the Appellant offered to supply compound biological trinocular digital microscope with Model- A12.2601 – CT, A59.3518 instead of Model LB-1270 that was required in the Tender Document.

Mr. Jason submitted further that the specifications offered by the Appellant complied with the requirements of Item 11 of the technical specifications. He expounded that the Appellant offered a different model from the one that was specified in the Tender Document. In addition, the offered model discharges the same functions as the model specified by the Respondent. He stated further that the offered model has trinocular head viewing, camera software with 5.0MP, LCD and infinity optical system. He explained that the manufacturer authorization and technical compliance sheet of the offered model were submitted with the Tender for more clarity. Thus, the Appellant complied with the requirement of Item 11.

Mr. Jason stated that complying with the specified model is not necessary as according to the Appellant, the specification of the model was for mere guidance and reference because what makes a microscope is specifications not the model.

The Appellant submitted that half of items in Lot 4 had model numbers just like item 11. The Appellant offered specifications, not the model provided and the Respondent did not raise a finger on them. Picking item 11 alone is according to the Appellant not justified.



The Appellant complained that the Respondent erred in law for evaluating the tenders by using brand names provided in the Tender Document. Tenderers were not required to offer the same model as provided in the Tender Document, since model numbers are not technical specifications which tenderers were required to comply with.

Mr. Jason submitted that the Respondent's act of considering model numbers during evaluation had contravened Item 7 of the Standard Tendering Document for Procurement of General Goods under National and International Competitive Tendering issued by the Public Procurement Regulatory Authority (PPRA) in February 2022 (hereinafter referred to as "**PPRA Standard Tendering Document**"). This clause strictly prohibits procuring entities from issuing technical specifications that make reference to brand names and catalogue numbers. According to these items reference to brand names in the tender document should be avoided as far as possible. It is provided that even where it is unavoidable it should be followed by the words "*or substantially equivalent*" or "*at least equivalent*". He stated further that if the Respondent was in need of a specific model, it should have procured the same through single source and not open competitive tender.

Mr. Jason concluded his submissions by stating that the Respondent erred in law for disqualifying the Appellant's tender for failure to comply with model number which was not supposed to be part of the technical specifications. During evaluation of tenders the Respondent was required to consider the offered technical specifications and not model number.



Thus, the Respondent's act of considering model number had contravened the principle of fairness and minimized competition. The Appellant also submitted that its tender has a price difference of TZS 370 Million from that of the proposed successful tenderer. It therefore, offered a tender with value for money.

Based on the above submissions, Mr. Jason prayed for the following orders: -

- i. A declaration that the Respondent's decision to dismiss the Appellant's application for administrative review was erroneous and should be set aside; and
- ii. The Respondent be ordered to re-instate the Appellant in the Tender process and re-evaluate its tender.

REPLY BY THE RESPONDENT

The Respondent's reply submissions were made by Mr. Yusuph Keu, Procurement Manager. He started by pointing out that the Respondent is a research institution. Hence, when procuring equipment it gives priority on the accuracy of the items to be procured. He contended that the Respondent normally floats competitive tenders to have various options from supplying vendors.

Mr. Keu submitted that the Respondent intended to procure several items in the Tender, thus it floated a competitive tender with the required technical specifications. He stated that among the specified specifications included model numbers which aimed at obtaining the required accuracy

for the items that were to be procured. Tenderers were required to comply with the technical specifications as issued and not otherwise.

Mr. Keu stated that had the Appellant found that some of the specifications were not clear, it ought to have sought for clarifications from the Respondent in compliance with the requirements of the Tender Document. However, the Appellant did not do so. It opted to participate in the Tender with the same terms and conditions. Mr. Keu stated that the Appellant's act of participating in the tender implied that it was ready to be bound by all the terms and conditions provided in the Tender Document. Thus, it cannot argue at this juncture that the Tender requirements were discriminatory and lacked competition.

Mr. Keu submitted that during evaluation of tenders, the Appellant's tender was found to have not complied with Item 11 of the Technical Specifications. Item 11 required tenderers to submit Compound Biological Trinocular Digital Microscope with Cameras and Software with Model LB-1270 Optical System-Infinite-Optical System. The Appellant offered to supply compound biological trinocular digital Microscope with cameras and software with Model A12.2601 which was different to Model LB-1270 Optical System-Infinite-Optical System. It was further observed that the Appellant's offered model had options of binocular or trinocular viewing head instead of having a trinocular viewing head only. The Appellant's offered model also lacked camera, software (5.0MP), LCD and infinity optical system. Thus, the Appellant's tender was disqualified for being non-responsive to the technical requirements, Mr. Keu contended.

Mr. Keu submitted that as a training institution the Respondent required model LB- 1270 as the same produces the highest degree of accuracy and the best outcome from its functionality. In view of the Respondent's needs as research institution, it had not contravened any law as contended by the Appellant.

Finally, Mr. Keu prayed for the following orders: -

- i. A declaration that the Respondent's decision to dismiss the Appellant's application for administrative review was right and just because the same had no merit; and
- ii. The re-instatement relief sought by the Appellant should not be granted as it had not complied with the technical specification required by the Respondent. Thus, the reliefs sought are devoid of merits.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the disqualification of the Appellant's tender was justified

In resolving this issue, the Appeals Authority reviewed parties' contentions whereby on the one hand the Appellant disputes its disqualification from the Tender for failure to comply with model number which was specified as part of the technical specifications. The Appellant stated that the Respondent had included model numbers on some of the technical specifications. When preparing its tender, the Appellant believed that the model numbers were for providing guidance to tenderers on the required technical specifications. Surprisingly, when evaluating the tenders the



Respondent considered model numbers and disqualified the Appellant's tender. The Appellant stated that the Respondent's act of disqualifying its tender based on the model number is improper and in contravention of Item 7 of the PPRA Standard Tendering Document. According to the Appellant the referred provision prohibits the inclusion of brand names and model numbers in the Technical Specifications.

On the other hand, the Respondent contended that the Appellant's tender was fairly disqualified for failure to comply with Item 11 of the Technical Specifications. The Respondent stated that under Item 11 several specifications were provided including the model number of the required equipment. The Respondent elaborated that it specified the model number on its technical specifications so as to obtain the equipment with the required accuracy. The Respondent stated that it being a research institution, accuracy on the required research equipment is given more priority. Thus, the Respondent's act of specifying model number is justified and had not contravened the law as contended by the Appellant.

In ascertaining the validity of the parties' contentions, the Appeals Authority reviewed the Tender Document, specifically Item 11 of Section VI -Technical Specifications. The referred Item specified the technical requirements for Compound Biological Trinocular Digital Microscope with camera and software. Item 11 reads as follows: -

"• (5.0 MP), LCD AND INFINITE OPTICAL SYSTEM-

*• **Model - LB - 1270;** Optical System - Infinite Optical System;
viewing Head - Seidentopf Trinocular Viewing Head, Inclined at 30°,*

360° Rotatable, Interpupillary 48-75mm, Light Distribution: 20:80 (eyepiece: trinocular tube).

•"

(Emphasis Added)

The Appeals Authority reviewed the Appellant's tender submitted to the Respondent and observed that in complying with Item 11 of the technical specifications, the Appellant offered to supply "*(5.0MP) LCD AND INFINITE OPTICAL SYSTEM, Model A12.2601- CT, A59.3518 Optical System - Infinite Optical System; viewing Head - Seidentopf Trinocular Viewing Head, Inclined at 30°, 360° Rotatable, Interpupillary 48-75mm, Light Distribution: 20:80 (eyepiece: trinocular tube).*"

Before determining whether or not the Appellant's tender complied with the technical specifications as provided in the Tender Document, the Appeals Authority finds it appropriate to consider Item 11 of Section VI- Technical Specifications if complied with the law.

The Appeals Authority reviewed Item 7 of the PPRA Standard Tendering Document relied upon by the Appellant which reads as follows: -

"7. Reference to brand names and catalogue numbers should be avoided as far as possible; where unavoidable the words "or at least equivalent" shall always follow such references".

This Item prohibits procuring entities from specifying brand names and catalogue numbers when issuing technical specifications.



The Appeals Authority further reviewed Item 6 of the PPRA Standard Tendering Document which reads as follows: -

"6. *Standards for equipment, materials, and workmanship specified in the Tendering Documents shall not be restrictive. Recognized international standards should be specified as much as possible. Reference to brand names, catalogue numbers, or other details that limit any materials or items to a specific manufacturer should be avoided as far as possible. Where unavoidable, such item description should always be followed by the words "or substantially equivalent."* When other particular standards or codes of practice are referred to in the TS, whether from Tanzania or from other eligible countries, a statement should follow other authoritative standards that ensure at least a substantially equal quality, then the standards mentioned in the TS will also be acceptable"

(Emphasis added)

The above quoted provision states clearly that procuring entities when floating tenders are prohibited from making reference to brand names, catalogue numbers or other details which indicates the specific manufacturer. The provision also allows if branding cannot be avoided, the words "*or substantially equivalent*" should follow immediately after the specifications with brand names or catalogue numbers.

The Appeals Authority reviewed Section VI -Technical Specifications as provided in the Tender Document. It observed that under Item 11 the Respondent had specified technical specifications which included model- LB 1270. There were no words "*or substantially equivalent*" which would mean that tenderers were required to submit equipment with the same model number or with equivalent specifications.

In view of this observation, the Appeals Authority finds the Respondent's act of specifying model number and without allowing tenderers to submit equivalent specifications to have not only contravened Items 6 and 7 of the of the PPRA Standard Tendering Document, but also Section 69(3) of the Act and Regulation 79(3) of the Public Procurement Regulations, GN. No. 446 of 2013 as amended (hereinafter referred to as "**the Regulations**") which was repealed and replaced by the Public Procurement Regulations, GN. No. 518 of 2024 which read as follows: -

"69(3) Tender documents shall not include requirements and terminologies which discriminate unfairly against participation by tenderers".

79(3) A procuring entity shall not include in any tender document or request for proposal any condition or specification such as to favour any one tenderer"

(Emphasis Supplied)

Under the circumstances the Appeals Authority finds that the Tender Document in Item 11 of Section VI – Technical Specifications made reference to brand name Model- LB 1270. Items 6 and 7 of the PPRA

Standard Tendering Document allow reference to brand name where it is unavoidable. However, should a tender document include a reference to brand name such item description should always be followed by words "*or substantially equivalent*". It is apparent that the model number specified under Item 11 of Section VI – Technical Specifications has not been followed by the words "*or substantially equivalent*".

In view of this observation the Appeals Authority is of the firm view that the Tender Document under Item 11 of Section VI – Technical Specifications for Lot 4 contravened the law. Thus, it goes without saying that the evaluation which was conducted on the basis of that requirement was not proper as well.

3.0 What reliefs, if any, are the parties entitled to?

Taking cognizance of the findings made hereinabove, the Appeals Authority hereby nullifies the Tender process in respect to Lot 4. The Appeal is allowed to that extent. We make no order as to costs.

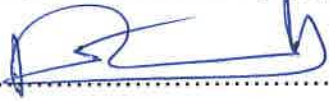
It is so ordered.

This decision is binding and can be enforced in accordance with Section 97(8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the parties.

This decision is delivered in the presence of the parties this 29th day of November 2024.

ADVOCATE ROSAN MBWAMBO



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Ag. CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO 

2. MR. RHOEN NKORI 