IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 44 OF 2023 - 2024

BETWEEN

M/S KGG INVESTMENT LIMITED

JV WITH PERNTELS COMPANY LTD ..... APPELLANT

AND

TANGA URBAN WATER SUPPLY

AND SANITATION AUTHORITY ..... RESPONDENT

DECISION

CORAM

1. Hon. Justice (Rtd) Sauda Mjasiri - Chairperson
2. Mr. Rhoben Nkori - Member
3. Mr. Pius Mponzi - Member
4. Mr. James Sando - Secretary

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. James Kasusura - Advocate - Kasubagi Attorneys
2. Mr. Richard Mlay - Managing Director

3. Mr. Paul Ngomaikola - Logistics and Marketing Manager

FOR THE RESPONDENT

1. Ms. Scholastica Lugongo - Ag. Head Legal Unit
2. Mr. Edrick Kipanda - Director of Procurement Management Unit (DPMU)
3. Mr. Fadhili Mattaka - Procurement Officer

This Appeal was lodged by **M/S KGG Investment Limited** in a Joint Venture (JV) with **M/S Perntels Company Limited** (hereinafter referred to as **"the Appellant"**) against **Tanga Urban Water Supply and Sanitation Authority** commonly known by its acronym as **"Tanga UWASA"** (hereinafter referred to as "**the Respondent"**). The Appeal is in respect of Tender No. TR208/2023/2024/W/25 for Procurement of Contractor for Improvement of Water Infrastructure at Tanga City Phase III, Lot 2-2- Rehabilitation and Expansion of Mowe Treatment Plant (hereinafter referred to as "**the Tender**").

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

The Tender was conducted through International Competitive Tendering method as specified in the Public Procurement Act No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations GN. No. 446 of 2013 as amended (hereinafter referred to as "**the Regulations**").

On 4th April 2024, the Respondent through the National e-Procurement System (NeST) invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was set on 8th May 2024. On the deadline, the Respondent received eight 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 M/S China Railway Seventh Group Company Limited. In addition, it recommended a contract price of Tanzania Shillings Twenty One Billion Eight Hundred Eighty Two Million Eight Hundred Thirty Six Thousand Eight Hundred Eighty Eight and Ninety Nine Cents only (21,882,836,888.99) VAT exclusive.

The Tender Board approved the award of the Tender as recommended by the Evaluation Committee at its meeting held on 30th May 2024 subject to due diligence. The due diligence was conducted from 31st May to 1st June 2024. On 3rd June 2024, the Tender Board approved the due diligence report which recommended award of the Tender to M/S China Railway Seventh Group Company Limited.

On 4th June 2024, the Respondent issued the Notice of Intention to award the Tender. The Notice informed the Appellant that the Respondent intends to award the Tender to M/S China Railway Seventh Group Company Limited. In addition, the Notice informed the Appellant that its tender was disqualified for failure to comply with specific and general experience criteria in the Tender Document.

Dissatisfied with the reasons given for its disqualification, on 6th June 2024 the Appellant applied for administrative review to the Respondent. On 7th June 2024, the Respondent issued its decision which dismissed the Appellant's application for administrative review. Aggrieved further, on 11th June 2024, the Appellant lodged this Appeal to the Appeals Authority.

When the matter was called on for hearing 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?

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions were made by Mr. James Kasusura, learned Advocate. He commenced on the first issue by stating that the Tender was advertised on 4th April 2024. Tender opening took place on 8th May 2024. On 4th June 2024, the Appellant received the Notice of Intention to award the Tender. The Notice informed the Appellant that its tender was disqualified for failure to comply with specific and general experience criteria provided in the Tender Document. The Appellant was dissatisfied with the reasons given for its disqualification. Thus, on 6th June 2024, it applied for administrative review to the Respondent. On 7th June 2024, the Respondent issued its decision which rejected the Appellant's application for administrative review. The Respondent's decision stated that in compliance with specific experience criterion which required tenderers to submit a contract with a value of TZS 8,000,000,000.00. The Appellant

submitted a contract with a value of Tanzania Shillings Seven Billion Three Hundred Twenty Two Million Sixty Two Thousand Eight Hundred and Three (TZS 7,322,062,803.00) VAT inclusive. According to the Respondent, the submitted contract had a lower value compared to what was specified in the Tender Document. Thus, the Appellant's Tender was found to be non-responsive. The Appellant was dissatisfied with the Respondent's decision and filed this Appeal.

The learned counsel submitted that the Appellant has been executing various water projects in different regions in Tanzania. Thus, it is well experienced and eligible for award of this Tender. The learned counsel stated that having read the requirements of this Tender, the Appellant decided to participate in a Joint Venture (JV) with M/S Perntels Company Limited. The purpose of forming a JV was to enhance the capacity of the Appellant in complying with the requirement of the Tender. In complying with specific experience criterion, the Appellant attached a contract with a value of TZS 7,322,062,803.00 and contracts executed by its JV partner with a value of not less than TZS 2,000,000,000.00. Thus, if the contracts executed by the Appellant and its JV partner had been considered altogether, the Appellant would have complied with the specific experience criterion.

The learned counsel stated that the Respondent's act of requiring tenderers to substantiate specific experience by submitting a contract with a value of TZS 8,000,000,000.00 was unfair as the specified value was too high for the local Tanzanian Contractors' companies. The learned counsel stated further that the specific experience criterion was inappropriate and

discriminatory to local contractors. He contended that the Respondent's act of having such criterion implies that it intended to favour few tenderers and deny others a right to participate in the Tender.

In support of his argument the learned counsel cited PPAA Appeal Case No. 76 of 2010 between ***M/S Cool Care Services Ltd, M/S Daikin Tanzania Ltd, and M/S Remco (International Ltd) versus Local Authorities Pensions Fund***. In the referred Appeal, this Appeals Authority rejected the Respondent's argument that the annual volume of construction works could measure the financial capability of a tenderer. It further stated that the annual volume of construction works of TZS 5,000,000,000.00 was unrealistic for such kind of a project and contrary to Regulation 14(6) of GN. No. 97 of 2005.

The learned counsel submitted that the Respondent's act of having a discriminatory criterion on specific experience contravened the requirement of Section 51 (4) of the Act. The referred provision prohibits procuring entities from imposing discriminatory criteria, requirements or procedures with respect to the qualifications of tenderers. Therefore, the Respondent's act of disqualifying the Appellant on specific experience criterion was unfair.

The learned counsel contended further that the Tender under Appeal was internationally advertised. Hence, a preference scheme was to be applied in accordance with Section 54(2) of the Act. This provision categorically requires procuring entities to apply a margin of preference to protect the rights of local contractors in tender competitions where foreign firms are

involved. The learned counsel asserted that the Respondent failed to comply with the requirement of the law. This is due to the fact that if the margin of preference would have been applied, the Appellant could have emerged as the successful tenderer.

The learned counsel argued that the Respondent's act in this regard goes against the government initiatives which aim at ensuring that local contractors are given priority when competing with foreign contractors. The learned counsel alleged that the intention of the government on the preference scheme was to ensure money circulates locally and stabilize the national economy. Therefore, the Respondent's failure to adhere to the requirements of the preference schemes contravenes government initiatives of empowering local contractors.

The learned counsel also challenged the award proposed to M/S China Railway Seventh Group Company Limited. This is on the ground that due diligence was not conducted as required by the law. The learned counsel stated that Section 53(3) of the Act and Regulation 224(4) of the Regulations require procuring entities when conducting due diligence to a foreign firm to seek reference of legal existence of a tenderer from Tanzania diplomatic missions abroad or from any other reliable source. The learned counsel asserted that the proposed successful tenderer being a foreign firm, the Respondent was required to conduct due diligence as required by the law to verify its legal existence and capability to execute the contract. However, the Respondent failed to do so. Thus, the Respondent's omission in this regard invalidates the award proposed to the successful tenderer, the learned counsel contended.

In support of his argument on this point, the learned counsel cited PPAA Appeal Case No. 107 of 2011 between ***M/S Dar Essentials Limited versus National Institute of Transport.*** In the referred Appeal, the Appeals Authority found that the successful tenderer had only provided a list showing turnover values for the years 2005 to 2009. It also provided a list indicating projects executed in China, Greece, Azerbaijan and Mauritius without any supporting documents to substantiate its involvement on the referred project. Therefore, the Appeals Authority nullified the Respondent's intention to award the Tender for failure to conduct due diligence to the successful tenderer.

Finally, the Appellant prayed for the following orders: -

i. Review of the tender evaluation criteria and order award of the tender to the Appellant, and

ii. Any other relief the Appeals Authority may deem fit and just to grant.

SUBMISSIONS BY THE RESPONDENT

The Respondent's submissions were led by Ms. Scholastica Lugongo, Acting Head of Legal Unit and was assisted by Mr. Edrick Kipanda, Director of Procurement Management Unit (DPMU). Ms. Lugongo commenced her submissions on the first issue by adopting the Respondent's written Statement of Reply. She stated that the Appellant was one of the tenderers which participated in the Tender. During the evaluation process, the Appellant's tender was found to have not complied with specific and general experience requirements. Thus, its tender was disqualified.

Ms Lugongo submitted that during the hearing of this Appeal the Appellant admitted to have not complied with the specific experience requirement as provided in the Tender Document. The Appellant alleged that the said criterion was discriminatory and hindered participation of local tenderers.

Ms. Lugongo submitted that the specific experience criterion provided in the Tender Document required tenderers to submit one contract executed from 1st January 2020 to 31st March 2024 with a value of TZS 8,000,000,000.00. The requirement also allowed tenderers to submit ongoing contracts that had been executed above 80%. The said contract was to be of a similar size, complexity, methodology and technology with the Tender under Appeal. In addition, the submitted contract must have been satisfactorily and substantially completed by a tenderer as a prime contractor, supplier, service provider, joint venture member and/or management contractor for the mentioned duration. Ms. Lugongo asserted that the Respondent provided a criterion in the Tender Document so that it could assess the technical and financial capacity of tenderers.

In complying with the specific experience requirement, the Appellant submitted a contract with a value of TZS 7,322,062,803 VAT inclusive which was below the required contract value of TZS 8,000,000,000 provided in the Tender Document. Further, the contract was still in progress and not executed by 80% or more.

The Respondent stated that tenderers were required to demonstrate their capacity of constructing 35,000 m^3 riser water storage reservoir and intermediate booster station, construction of clarifier chamber and

disinfection chamber. The Respondent indicated that the Appellant's components such as rapid filter sand, clarifiers and chemical dosing facilities did not comply with the minimum requirements provided in the Tender Document.

Ms. Lugongo contended that the Appellant did not only fail to comply with specific experience requirement, but also failed to comply with general experience requirement. As per the Tender Document, tenderers were required to submit three contracts each with a value of TZS 5,000,000,000.00 for substantiating compliance with general experience criterion. In compliance with this requirement, the Appellant attached three contracts as follows: -

i. Completed Contract No. LGA/041/HQ/2017/2018/W/03 for Construction of Water Supply System and Civil Works at Mukabaye Village in Kibondo District amounting to One Billion Twenty One Million Eighty Eight Thousand Five Hundred Eighty One and Twelve Cents only (TZS 1,021,088,581.12) VAT Inclusive.

ii. On progress contract No. AE.102/2021-2022/PWN/W/27 for Construction of Kivinja Water Supply Project at Kibiti District with a value of Tanzania Shillings One Billion Three Hundred Seventy-Four Million Six Hundred Seventy Two Thousand Four Hundred Ninety Seven and Eighty Five Cents only (TZS 1,374,672,497.85) VAT inclusive.

iii. On progress contract No. AE-102/2022-2023/TBR/W/13 – for Extension of Lake Victoria Pipeline to Kigwa B, Nzigala, Matanda,

Kinamagi, Mbuyuni, Igalula, Ipululu, Vumilia, Isenefu, Imalakaseko, Goweko, Kamama, Mwitikila, Tambukareli, Nsololo, Kimungi, Itundaukulu and Kawekapina at Uyui District in Tabora Region amounting to Tanzania Shillings Seven Billion Three Hundred Twenty Two Million Sixty Two Thousand Eight Hundred and Three (TZS 7,322,062,803) VAT inclusive.

Ms. Lugongo stated that amongst the three submitted contracts only one was above the value of TZS 5,000,000,000.00. She added that the submitted contract was still in progress and no proof was availed that it had already been executed by 80%. In the absence of sufficient proof, the Respondent did not consider the contract to have complied with general experience requirement. Regarding the other two contracts which were each below TZS 5,000,000,000.00, the Respondent found the Appellant's tender to be non-responsive for failure to comply with the general experience requirement.

Ms. Lugongo submitted that Section 51(1) of the Act stipulates clearly that for a tenderer to participate in the tender proceedings it should be able to comply with the criteria set out in the Tender Document. Thus, the Appellant ought to have assessed itself if it was capable of complying with the requirements of the Tender prior to submission of its tender. On the contrary, the Appellant submitted its tender without assessing its capability. Consequently, it failed to comply with the requirements of the Tender.

Ms. Lugongo asserted that Regulation 203(1) of the Regulations requires evaluation of tenders to be done in accordance with the criteria set out in

the Tender Document. She said that the evaluation of the Tender under Appeal was conducted in accordance with the requirements provided in the Tender Document. While evaluating the tenders, the Appellant's tender was found to be non-responsive during technical evaluation. Thus, it was disqualified. Ms. Lugongo contended that the Respondent's act of disqualifying the Appellant's tender was proper and in accordance with Regulation 205(c) of the Regulations as the Appellant failed to comply with major technical requirements. Ms. Lugongo added that the Respondent's act of rejecting the Appellant's tender was in accordance with Regulation 206(2) of the Regulations which requires a non-responsive tender to be rejected and should not subsequently be made responsive by correction or withdrawal of the deviation or reservation.

In support of her submissions, Ms. Lugongo cited PPAA Appeal Case No. 35 of 2021-2022 between ***M/S Aroche Systecs & Investico Limited against Tanzania Airports Authority***. In the referred Appeal, this Appeals Authority rejected the Appellant's argument that non submission of an anti-bribery policy/code of conduct and compliance programme ought to have been treated as a minor deviation.

Regarding the Appellant's contention that the specific experience criterion was discriminatory and unfair, Mr. Kipanda, the Respondent's DPMU submitted that the estimated contract value for this Tender was about TZS 26,000,000,000.00. Hence, when the Respondent was setting specific experience criterion, it considered the value of the intended project and the need of enhancing competition among eligible contractors. In that regard, the Respondent set the specific experience criterion to be one third (1/3) of

the intended contract value, that is TZS 8,000,000,000.00. Thus, the required contract value for specific experience criterion was fair and not discriminatory as alleged by the Appellant.

Mr. Kipanda stated further that Regulation 125(3) of the Regulations prohibits the procuring entity from revising the requirements establishing technical and financial capability during the evaluation process. Therefore, the Appellant's contentions that the requirements of the Tender were discriminatory are unacceptable at this juncture.

Concerning the Appellant's complaint on the Respondent's failure to apply the preference scheme, Mr. Kipanda submitted that the applicability of the preference scheme is guided by Section 54 of the Act read together with Regulation 31 of the Regulations and 13th Schedule to the Regulations. According to the referred provisions of the law, a preference scheme is applied at the financial comparison stage where all tenders have been checked for their eligibility and technical compliance with the requirements of the Tender. In the disputed Tender process, the Appellant's tender was disqualified at the technical evaluation stage. Thus, it did not reach the financial comparison stage where the margin of preference could have been applied. In view of the above fact, the Appellant's contention that the Respondent had failed to comply with government initiatives of building capacity for local contractors in applying margin of preference is unfounded and baseless.

Regarding the Appellant's argument on due diligence, Mr. Kipanda submitted that due diligence was conducted as per the requirement of the

law. He expounded that Regulation 224 of the Regulations requires procuring entities to conduct due diligence to determine if the proposed successful tenderer had legal capacity, experience and financial status to execute the contract. The referred provisions of the law provide various ways that the due diligence could be conducted. Thus, it was not necessary for the Respondent to travel to the successful tenderer's country in order to conduct the due diligence.

Finally, the Respondent prayed for dismissal of the Appeal and refund of the incurred costs in relation to this matter.

ANALYSIS BY THE APPEALS AUTHORITY

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

From the record of this Appeal, it is clear that the Appellant's tender was disqualified for failure to comply with specific and general experience requirements provided in the Tender Document. To substantiate if the disqualification of the Appellant's tender was justified, the Appeals Authority reviewed the Tender Document. It observed that Section IV-Qualification and Evaluation Criteria provide requirements that were considered during technical evaluation. On the section of experience, there were requirements for specific and general experience. On specific experience, tenderers were required to submit one completed contract or 80% executed with a value of TZS 8,000,000,000.00. Whereas for general experience, tenderers were required to submit three contracts each with a

value of TZS 5,000,000,000. The required contracts were to be completed or in progress between 1st January 2020 to 31st March 2024.

In ascertaining if the Appellant complied with the specific and general experience requirements, the Appeals Authority reviewed the Appellant's tender submitted on NeST. It observed that for specific experience, the Appellant attached contract No. AE-102/2022-2023/TBR/W/13, with a value of TZS 7,322,062,803.00. The attached contract was signed on 4th October 2023 and its execution status was not disclosed. Since the Appellant's attached contract had a value which was less than the specified value for specific experience, the Appeals Authority is of the firm view that the Appellant failed to comply with the specific experience requirement.

The Appeals Authority considered the Appellant's contention that in complying with specific experience requirement it attached a contract with a value of TZS 7,322,062,803.00. The Appellant also claimed to have attached contracts executed by its JV partner with a value of not less than TZS 2,000,000,000.00. Thus, the Respondent ought to have considered the submitted contracts for ascertaining the Appellant's compliance with the specific experience criterion.

In ascertaining the validity of the Appellant's contention on this point, the Appeals Authority reviewed the specific experience requirement on the Tender Document. It observed that tenderers were required to attach one contract with a value of TZS 8,000,000,000.00. Thus, the Appeals Authority rejects the Appellant's proposition that contracts performed by its JV partner were to be considered during evaluation process. In addition, the

Appeals Authority reviewed the slot on NeST where the Appellant attached documents for proving compliance with specific experience criterion. It observed that the Appellant had attached only one contract with a value of TZS 7,322,062,803.00. There were no contracts attached from its JV partner. Thus, the Appeals Authority equally rejects the Appellant's contentions that its JV partner's contracts could also have been considered. Further the Tender requirements did not allow the Appellant to do so and had it been allowed the referred contracts were not attached.

The Appeals Authority in addition considered the Appellant's contention that the specific experience requirement provided in the Tender Document was unrealistic and discriminatory to local contractors, thus contravening the requirements of Section 51 (1) and (4) of the Act. Having reviewed the record of Appeal, the Appeals Authority observed that the Appellant was aware of the existence of the specific experience requirement prior to the submission of its tender. The Appeals Authority observed that had the Appellant found the specific experience criterion to be discriminatory to local contractors, it could have sought for clarification from the Respondent in compliance with Clause 8.1 of the Instructions To Tenderers (ITT) and Regulation 13 of the Regulations. The Respondent was required to respond to the clarifications sought within three days from the date of receipt. Had the Appellant been dissatisfied with the clarification given, it could have applied for administrative review to the Respondent in accordance with Sections 95 and 96 of the Act. If the Appellant would have been dissatisfied with the Respondent's decision or had the Respondent failed to issue its decision within the specified time limit, the

Appellant should have filed an Appeal to the Appeals Authority pursuant to Section 97 of the Act.

In view of the above observations, the Appeals Authority finds the Appellant's act of raising a concern regarding tender requirements after issuance of the Notice of Intention to award to be an afterthought. The Appellant was required to challenge the existence of the discriminatory criteria, if at all they existed after it purchased the Tender document. Therefore, the Appeals Authority rejects the Appellant's contention on this point.

The Appeals Authority is of the view that Appeal Case No. 76 of 2010 between ***M/S Cool Care Services Ltd, M/S Daikin Tanzania Ltd, and M/S Remco (International Ltd) versus Local Authorities Pensions Fund***, relied upon by the Appellant is distinguishable from the circumstances of this appeal. The cited Appeal case relates to an appeal which arose following the Appellant's requests for clarification prior to submission of tenders. The Appellant challenged the existence of unfair requirements on the Tender Document. In this Appeal, the Appellant neither sought for clarification nor challenged the existence of discriminatory requirements prior to the deadline for submission of tenders. Thus, the said decision is inapplicable in the circumstances of this Appeal.

The Appeals Authority also reviewed the slot on general experience in NeST to verify if the Appellant complied with the requirement as provided in the Tender Document. In doing so, the Appeals Authority observed that the Appellant attached three contracts. These were Contract No.

LGA/041/HQ/2017/2018/W/03 with the value of TZS 1,021,088,581.12 VAT Inclusive, Contract No. AE.102/2021-2022/PWN/W/27 with a value of TZS 1,374,672,497.85 VAT inclusive and Contract No. AE-102/2022-2023/TBR/W/13 with the value of TZS 7,322,062,803 VAT inclusive.

According to the general experience requirement, each of the attached contracts was required to have a value of TZS 5,000,000,000.00. Having reviewed the Appellant's attached contracts, the Appeals Authority observed that two of them were below the required value of TZS 5,000,000,000.00 while one was above TZS 5,000,000,000.00. However, with regards to the contract that was above the general experience criterion, there is no proof that it was executed by 80%. Therefore, in view of the requirement of general experience as provided in the Tender Document, the Appeals Authority is of the settled view that the Appellant also failed to comply with general experience requirement as it did not submit three contracts each with a value above TZS 5,000,000,000.00.

Based on the above findings, the Appeals Authority is of the considered view that the Respondent's act of disqualifying the Appellant's tender complied with Regulations 206(2) of the Regulations which reads as follows: -

> *"206 (2) Where a tender is not responsive to the tender document, it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation."*

The above provision states clearly that, where a tender is not responsive to the requirements of the Tender Document it shall be rejected by the procuring entity and may not subsequently be made responsive.

The Appeals Authority considered the Appellant's assertion on the Respondent's failure to apply a margin of preference in this Tender. In ascertaining the validity of this point, the Appeals Authority reviewed Section 54(2) of the Act and Regulation 30 of the Regulations which read as follows:-

> *"54-(2) The procuring entity shall, when procuring goods, works or services by means of international or national tendering, or when evaluating and comparing tenders, grant a margin of preference for the benefit of tenders for certain goods manufactured, mined, extracted or grown in the United Republic, for works by Tanzania contractors or services provided by Tanzania consultants, provided that this is clearly stated in the tender documents subject to the provisions prescribed in the regulations made under this Act."*
>
> *"30-The purpose of these Regulations is to promote local industry and support socio-economic development by defining the: -*
>
> *(a) target group and eligibility requirements for benefitting from the preference and reservations schemes;*

(b) percentage margin of preference, where applicable."

The above quoted provisions require procuring entities when procuring goods, works or services by means of international or national tenders to apply a margin of preference provided that the same must be explicitly stated in the Tender Document.

The Appeals Authority revisited Clause 28 of the Tender Data Sheet (TDS) and observed that it was clearly specified that the preference scheme was applicable to this Tender.

Regulation 31(a) of the Regulations provides that for a tenderer to benefit with a preference scheme it must comply with the requirements provided under Section 54 and all the qualifications, capability and experience criteria for the intended works, goods or services to be procured. Regulation 31(a) reads as follows: -

"31. A person or a firm is qualified to benefit from the preference schemes if that person or firm meets the criteria specified in section 54 of the Act and:-

(a) ***has the necessary qualifications, capability, experience and, where appropriate, resources, equipments and facilities to provide the goods or services intended to be procured."***

(Emphasis supplied)

In ascertaining if the Appellant qualified for the preference scheme, the Appeals Authority reviewed the evaluation report. It observed that the

Appellant was disqualified at the technical evaluation stage for failure to comply with specific and general experience requirements. Hence, its tender was not considered for financial evaluation stage. Since the Appellant's tender was disqualified during technical evaluation, the Appeals Authority is of the settled view that the tender could not have been granted a margin of preference during comparison of tenders.

Regarding the Appellant's assertion that the Respondent failed to conduct due diligence as per the requirements of the law, the Appeals Authority reviewed the record of Appeal and observed that the Appellant's contention on this point was raised during the hearing. It was neither raised in the submitted application for administrative review to the Respondent nor to the Statement of Appeal filed before this Appeals Authority. In view of this fact, the Appeals Authority is of the firm view that the complaint relating to due diligence could not be entertained at this juncture as it was a new matter raised at the hearing. This position is supported by the Case of ***Farida & Another versus Domina Kagaruki***, Civil Appeal No. 136 of 2006, Court of Appeal of Tanzania at Dar es salaam(unreported), the court held that:-

> *"it is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and not raised at the lower court."*

In view of the findings made hereinabove that the Appellant failed to comply with the specific and general experience requirements as provided in the Tender Document, the Appeals Authority concludes the first issue in

the affirmative that the disqualification of the Appellant's tender was justified.

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

Taking cognizance of the findings on the first issue, the Appeals Authority hereby dismiss the Appeal in its entirety. The Appeals Authority rejects all the Appellant's prayers and allows the Respondent to proceed with the Tender process in accordance with the law. 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 28th day of June 2024.

HON. JUSTICE (rtd) SAUDA MJASIRI

Sauda Mjasiri
.....

CHAIRPERSON

MEMBERS: -

1. MR. RHOBEN NKORI.....

2. MR. PIUS MPONZI.....