

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 27 OF 2024 - 2025

BETWEEN

M/S JISHAM CONSTRUCTION CO. LTDAPPELLANT

AND

NATIONAL IRRIGATION COMMISSION.....RESPONDENT

DECISION

CORAM

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| 1. Hon. Justice (Rtd) Sauda Mjasiri | - Chairperson |
| 2. Adv. Rosan Mbwambo | - Member |
| 3. Eng. Stephen Makigo | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|-------------------------|---------------------------|
| 1. Ms. Florida Mapunda | - PALS Manager |
| 2. Ms. Agnes Sayi | - Principal Legal Officer |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |
| 3. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

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| 1. QS. Juma Swai | - Managing Director |
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FOR THE RESPONDENT

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| 1. Mr. Ayoub Sanga | - Senior State Attorney – |
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- | | |
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| | Office of the Solicitor General (OSG) |
| 2. Mr. Mathew Dismas Fuko | - State Attorney - Office of the Solicitor General (OSG) |
| 3. Mr. Andrew A. Rugarabamu | - Director of Legal Services |
| 4. Mr. Yahya Amour | - Head of Procurement Management Unit (PMU) |
| 5. Mr. Salim Mwinshashi | - Senior Procurement Officer |

This Appeal was lodged by **M/S Jisham Construction Co. Ltd** (hereinafter referred to as "**the Appellant**") against the **National Irrigation Commission** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. 00005/2024/2025/W/11 for Rehabilitation of Matarajira, Mtazamo and Bahi Irrigation Schemes at Bahi District in Dodoma (hereinafter referred to as "**the Tender**").

The Tender was conducted through National Competitive Tendering method as specified in the Public Procurement Act, No. 10 of 2023 (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 518 of 2024 (hereinafter referred to as "**the Regulations**").

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: -



On 15th October 2024, the Respondent through National e-Procurement System of Tanzania (**NeST**) invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was set on 25th October 2024. By 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 Ozin Group Limited. The recommended contract price was Tanzania Shillings Three Billion Three Hundred Twenty-Five Million Nine Thousand only (TZS 3,325,009,000.00) VAT exclusive for a completion period of 365 days.

The record of Appeal indicates that on 18th December 2024, the Respondent issued a Notice of Intention to award the contract. The Notice stated that the Respondent intends to award the contract to M/S Ozin Group Limited. In addition, the Notice informed the Appellant that its tender was disqualified for failure to demonstrate specific experience in civil/irrigation works. Further, the Appellant's tender was disqualified for failure to attach any document that proves ownership of the listed or ability to obtain key equipment as required by the Tender Document.

Dissatisfied with the reasons given for its disqualification, on 20th December 2024, the Appellant filed an application for administrative review to the Respondent. On 27th December 2024, the Respondent issued its decision which rejected entirely the application for administrative review and reiterated its position as contained in the Notice of intention to award.

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Aggrieved further with the Respondent's decision, the Appellant filed this Appeal before the Appeals Authority on 2nd January 2025.

When the matter was called on for hearing, the following issues were framed, namely: -

- 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 QS Juma Swai, Managing Director. He commenced on the first issue by stating that the Appellant was one of the tenderers which participated in the Tender under Appeal. After completion of the evaluation process, the Respondent issued the Notice of Intention to award the Tender. The Notice indicated that the Respondent intended to award the Tender to M/S Ozin Group Limited. In addition, it stated that the Appellant's tender was disqualified for failure to comply with specific experience and equipment requirements as provided in the Tender Document. Aggrieved with the reason given for its disqualification, the Appellant filed an application for administrative review to the Respondent and subsequently filed this Appeal.

QS. Swai submitted that in this Appeal the Appellant is challenging its disqualification for failure to comply with specific experience and equipment requirements. Starting with the Appellant's disqualification for failure to attach evidence of ownership of the listed equipment, QS Swai



submitted that there was no slot in NeST which allowed tenderers to attach evidence of ownership if a tenderer specified that it owns the listed equipment. He elaborated that if a tenderer specified to have leased the listed equipment, NeST opened a slot for it to attach the lease agreement. Thus, the Appellant's failure to attach evidence of ownership for the listed equipment was caused by NeST. Hence, the Appellant should not have been penalized for the system's anomaly, QS Swai contended.

Regarding non-compliance with specific experience requirement, QS Swai submitted that the Tender Document required tenderers to demonstrate specific experience in civil/irrigation works. In demonstrating its compliance with the said requirement, the Appellant submitted completion certificate on the project for extension of Lake Victoria pipeline to Tabora, Nzega and Igunga. The Appellant also submitted completion certificate for extension of Lake Victoria water supply scheme to Ndekeli, Mangashini, Tumbi and Chabutwa.

QS. Swai submitted that Section IV - Qualification and Evaluation Criteria, particularly technical evaluation criteria require tenderers to demonstrate specific experience in civil/irrigation projects. He contended that as per the wording of the Tender Document, it is crystal clear that tenderers were required to demonstrate their experience in either civil or irrigation works. The Appellant demonstrated its experience in civil works as it has executed several water projects. QS. Swai added that experience in construction of water works projects is similar to all other water projects. The difference is output of the water. He stated further that the Respondent should have

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accepted the specific experience submitted by the Appellant as the Tender Document also requires experience in civil works which includes water works.

In view of the above submissions, QS Swai stated that the Appellant complied with the specific experience requirement as provided in the Tender Document. Thus, it ought not to have been disqualified from the Tender process.

Based on the above, the Appellant prayed that the Appeals Authority should order the Respondent to re-instate the Appellant's tender in the Tender process. In addition, the Respondent should subject the Appellant's tender to financial evaluation as it complied with all the technical requirements and has a competitive price compared to that of the proposed successful tenderer.

REPLY BY THE RESPONDENT

The Respondent's submissions were made by Mr. Ayoub Sanga, Senior State Attorney from the Office of the Solicitor General. Mr. Sanga commenced his submissions on the first issue by praying to adopt the Statement of Reply with its attachments to be part of the Respondent's submissions.

The learned State Attorney stated that the Appellant was among the tenderers which participated in the Tender. During evaluation, the Appellant's tender did not comply with the specific experience requirement. It also failed to attach documents which proved ownership of the listed



equipment as required by the Tender Document. Thus, its tender was disqualified.

In expounding the reasons given for the Appellant's disqualification, the learned State Attorney commenced by submitting on a ground relating to equipment. He submitted that Section IV - Qualification and Evaluation Criteria, particularly Item 4-Technical submission, required tenderers to demonstrate ownership or ability to obtain the required listed key equipment. In response to this requirement, the Appellant listed a number of equipment and indicated that they were self owned. However, no documents were attached to prove the ownership.

The learned State Attorney submitted that in this Appeal the Appellant conceded to have failed to attach evidence of ownership for the listed equipment. However, it alleged that NeST did not have a slot for attaching documents of ownership. In addition, the Appellant contended that only tenderers with leased equipment were able to upload lease agreements. The learned State Attorney disputed the Appellant's argument in this regard and stated that NeST has a slot for uploading documents of ownership. He elaborated that those other tenderers who owned the required equipment, uploaded documents of ownership at the relevant slot. Thus, it is not true that a slot for uploading ownership documents was not available in NeST.

The learned State Attorney submitted that Section 87 of the Act requires evaluation of tenders to be done in accordance with the criteria provided in the Tender Document. When evaluating the tenders the Respondent

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adhered to all the criteria provided in the Tender Document. Consequently, it was determined that the Appellant's tender did not include documents of ownership for the listed equipment. Hence, its tender was found to be non-responsive. Therefore, the Appellant's disqualification on this ground is justified, the learned State Attorney contended.

In elaborating on the Appellant's failure to comply with specific experience requirement, the learned State Attorney submitted that Clauses 11.1 (h), 12.1 and 12.3 of the Instruction to Bidders (ITB) require tenderers to comply with requirements provided in the Tender Data Sheet (TDS) and Section IV – Qualification and Evaluation Criteria. Section IV – Qualification and Evaluation Criteria states clearly that on specific experience tenderers were required to demonstrate their experience in performing contracts of a similar nature in terms of physical size, complexity, methodology and other requirements as specified in the Tender Document. Thus, the Appellant was required to comply with the specified requirements.

The learned State Attorney submitted that during evaluation process, the Appellant's tender was found to have failed to comply with the requirement of Section IV - Qualification and Evaluation Criteria specifically on experience. This section required the Appellant to submit evidence of having specific experience in two irrigation projects each having a value of Tanzanian Shillings Two Billion, executed from 2021 to 2024. He stated that to the contrary the Appellant submitted experience in water projects



whose nature and methodology of construction were not similar to the required irrigation project.

In support of his argument the learned State Attorney cited PPAA Appeal Case No. 37 of 2021-22 between ***M/S Sahel Trading Co. Limited versus Tanzania Posts Corporation***. In the referred Appeal, this Appeals Authority nullified the award made to the proposed successful tenderer for the reason that the submitted experience was not relevant to the intended project. Therefore, the learned State Attorney urged the Appeals Authority to uphold the same position in this Appeal.

Regarding the Appellant's prayer that its tender should be reinstated in the Tender process and subjected to financial evaluation, the learned State Attorney submitted that according to Regulations 211 and 212 of the Regulations, a tender which is eligible to be subjected to financial evaluation should have complied with eligibility and technical requirements. From the evaluation report it is crystal clear that the Appellant failed to comply with technical requirements. Thus, its tender cannot be subjected to financial evaluation as prayed. Hence, the Appellant's prayer should be disregarded.

Finally the Respondent prayed for the following reliefs: -

- i) Dismissal of the Appeal in its entirety for lack of merit;
- ii) The Respondent should be allowed to proceed with the Tender process;
- iii) Cost of Appeal be borne by the Appellant; and



- iv) Any other relief as the Appeals Authority may deem appropriate to grant in the circumstances.

ANALYSIS BY THE APPEALS AUTHORITY

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

According to the record of Appeal, the Appellant's tender was disqualified for failure to comply with specific experience requirement and for not attaching documents of ownership on the listed equipment.

In substantiating if the Appellant's disqualification was justified, the Appeals Authority considered each of the given reasons as follows: -

a) Failure to prove ownership of the listed equipment

According to the record of Appeal, the Appellant's tender was disqualified for failure to demonstrate ownership or ability to obtain the required key equipment as per the Tender Document. In order to ascertain if the disqualification of the Appellant on this ground was justified, the Appeals Authority reviewed the Tender Document. It observed that Section IV - Qualification and Evaluation Criteria, Item 4 - Technical Submission particularly Equipment, tenderers were required to demonstrate ownership or ability to obtain seven key equipment. The required key equipment were; One Excavator CAT-320 GC or equivalent manufactured between 2000 and 2024, One Water Bowser manufactured between 2000 and 2024, One Motor Grader 140K-140GC or equivalent manufactured between 2000



and 2023, One Roller Compactor 10 Tons or above manufactured between 2000 and 2023, One Tipper Truck 15-20 Tons manufactured between 2000 and 2023, One Supervision Car Standard Wagon manufactured between 2000 and 2023, and One Bull Dowser CAT D6 GC or equivalent manufactured between 2000 and 2023.

In substantiating if the Appellant complied with the above requirement, the Appeals Authority reviewed the Appellant's tender submitted in NeST. It observed that the Appellant had listed all the equipment as per the Tender Document. It also indicated that some of the equipment were self owned and others were leased. On the leased equipment the Appellant attached the lease agreement. However, on the owned equipment no document was attached to prove ownership.

During the hearing of the Appeal, the Appellant contended that there was no slot for uploading certificate of ownership. In ascertaining the validity of this argument, the Appeals Authority reviewed NeST. It observed that there was no slot for uploading evidence of ownership. In addition, all tenderers which specified to own the equipment did not attach any proof of ownership. In the circumstances, the Appeals Authority agrees with the Appellant's argument that there was no slot for attaching document of ownership.

Therefore, the Respondent should not have disqualified the Appellant's tender for failure to attach documents of ownership. The Appeals Authority finds the Respondent's act of disqualifying the Appellant's tender on this reason to be not justified.

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b) Lack of specific experience

In ascertaining if the Appellant complied with specific experience requirement, the Appeals Authority reviewed Section IV – Qualification and Evaluation Criteria, particularly technical evaluation criteria which provides guidance on the required specific experience. The relevant part reads as follows: -

"Specific Experience (SCORE: N/A)

Specific and Contract Management Experience: A minimum number of similar contracts based on the physical size, complexity, methods/technology and /or other characteristics described in the PE Requirement on contracts that have been satisfactorily and substantially completed (substantial completion shall be based on 80% or more of completed assignments under the contract) as a prime contractor /supplier/service provider, joint venture member, management contractor, supplier/service provider for mentioned duration. In the case of JVCA, the value of contracts completed by its member shall not be aggregated to determine whether the requirement of the minimum value of a single contract has been met. Instead, each contract performed by each member shall satisfy the minimum value of a single contract as required for single entity. In determining whether JVCA meets the requirement of total number of contracts, only the number of contracts completed by all members each of value equal or more than the minimum value required shall be aggregated.



<i>Specific Experience</i>	<i>The Tenderer shall submit evidence for having Specific Experience in Civil/Irrigation Projects</i>
<i>Specific Experience Start Year</i>	<i>2021-01-01</i>
<i>Specific Experience End Year</i>	<i>2024-09-30</i>
<i>Number of Specific Experience Contracts</i>	<i>2</i>
<i>Value of each Specific Experience contract in the specified tender currency</i>	<i>2000000000"</i>

The above quoted provision states clearly that tenderers were required to substantiate their specific experience by demonstrating a minimum number of similar contracts based on the physical size, complexity and method/technology which was used for the execution of the contract. Specific experience was also to be demonstrated with a minimum number of two contracts each with a specific value of TZS 2,000,000,000.00 executed from 1st January 2021 to 30th September 2024.

According to the Appellant the Respondent was required to accept the completion certificates submitted by it as they demonstrate specific experience in civil works. The Appellant submitted that the Tender Document allowed specific experience to be either from civil/irrigation works.



In ascertaining if the Appellant complied with specific experience requirement, the Appeals Authority revisited the Appellant's tender in NeST. It observed that in demonstrating specific experience the Appellant had attached two certificates of completion. The first certificate related to a project titled extension of Lake Victoria Pipeline to Tabora, Nzega and Igunga. The contract value was TZS 2,895,481,750.00 VAT inclusive. The contract was completed in 2021 and the Appellant was a subcontractor. The second certificate of completion related to a project titled extension of Lake Victoria Water Supply Scheme to Ndekeli, Mangashini, Tumbi and Chabutwa. The contract started from 23rd April 2024 to 31st August 2024 and had the value of TZS 2,552,325,132.00.

After reviewing the attached certificates of completion, the Appeals Authority observed that the executed contracts related to extension of Lake Victoria Pipeline. None of the projects related to irrigation scheme. The difference between the submitted contracts/projects and the intended project in the Tender is on the method/technology (methodology) which is the key characteristic for any project. Based on this observation, the Appeals Authority is in agreement with the Respondent that water projects executed by the Appellant in their nature and methodology of construction are not similar to the intended project under this Tender.

Given the above observations, the Appeals Authority is of the settled view that the Respondent's act of finding that the Appellant's tender was non-responsive for failure to comply with specific experience is proper and in

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accordance with Regulations 211 (2) (f) of the Regulations which reads as follows: -

"211 (2) *Ukiukwaji ufuatao wa masharti ya msingi ya kibiashara, utahalalisha kukataliwa kwa zabuni:*

(f) kushindwa kuzingatia viwango vya chini vya uzoefu kama vilivyoainishwa katika nyaraka ya zabuni".

(Emphasis supplied)

The above quoted provision provides guidance on the circumstances which justify rejection of the tender. One of the reasons which may result in the rejection of the tender is failure to comply with minimum experience criterion as specified in the tender document. Thus, based on the circumstances of this Appeal, the Respondent's act of disqualifying the Appellant's tender for failure to comply with the specific experience requirement is justified.

The Appeals Authority therefore 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 above findings, the Appeals Authority hereby dismiss the Appeal. The Respondent is ordered to proceed with the Tender process in observance of 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 121(7) of the Act.

The Right of Judicial Review as per Section 125 of the Act is explained to the parties.

This decision is delivered in the presence of the parties this 30th day of January 2025.

HON. JUSTICE (rtd) SAUDA MJASIRI



CHAIRPERSON

MEMBERS: -

1. ADV. ROSAN MBWAMBO.....



2. ENG. STEPHEN MAKIGO.....

