

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL NO 150 OF 2013

BETWEEN

M/S BAOTOU BEIFANG

CHUANGYE CO.LTD.....APPELLANT

AND

TANZANIA RAILWAYS LIMITED.....RESPONDENT

RULING

CORAM:

- | | |
|---------------------------------|----------------|
| 1. Hon. A. G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Mr. K. M. Msita | -Member |
| 3. Mr. F.T. Marmo | -Member |
| 4. Mrs. R.A. Lulabuka | - Member |
| 5. Ms. F.R. Mapunda | - Ag.Secretary |

SECRETARIAT

- | | |
|-----------------------|-----------------|
| 1. Mr. H. O. Tika | - Legal Officer |
| 2. Ms. V. S. Limilabo | -Legal Officer |

FOR THE APPELLANT:

1. Mr. Emili Masawe - Advocate, Company Secretary, Masindiko Company Limited
2. Mr. Max John Mwasilu - Deputy Director General- Masindiko Company Limited
3. Dr. Francis M. Shao - Director General, Masindiko Company Limited
4. Ms. Paulina J. Shao - Director, Masindiko Company Limited

FOR THE RESPONDENT:

1. Ms. A. Makundi - Corporate Secretary, TRL
2. Mr. Anthony E. Munishi - Head PMU, TRL
3. Mr. M.G. Kaupunda – Chairman, Evaluation Committee.
4. Mr. Gilbert A. Minja - Chairman Tender Board, TRL

This Ruling was scheduled for delivery today 03rd of July, 2013, and we proceed to deliver it.

The Appeal at hand was lodged by M/S BOUTOU BEIFANG CHUANGYE CO. LTD (hereinafter referred to as “the Appellant” against the TANZANIA RAILWAYS LIMITED commonly known by its acronym TRL (hereinafter referred to as “the Respondent”).

The said Appeal is in respect of Tender NO. PA/113/2012-13/ME/G/OE/014 for supply of 274 New Goods Wagon (hereinafter referred to as “the tender”). The said tender was divided into three Lots, namely;

- i) LOT 1: Supply of 174 Covered Large Bogie Wagons
- ii) LOT 2: Supply of 50 Petrol Tank Bogie Wagons
- iii) LOT 3: Supply of 50 Container Carrier Bogie Wagons

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as “the Authority”), as well as oral submissions by the parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent vide the Guardian news paper dated 30th October, 2012 invited tenderers to submit tenders in respect of the tender under Appeal.

The deadline for the submission of the said tenders was initially set for 4th January, 2013 but was later extended to 28th January, 2013.

A total of thirty seven tenderers purchased the Tender Document but only 10 submitted their tenders on the deadline set. The said tenders were received from the following firms;

S/N	TENDERER	QUOTED PRICE IN USD (CIF DSM)
1.	Hindusthan Engineering & Industries Limited	LOT.1.18,209,317.50 LOT 2. 5,912,500/- LOT 3. 4,365,682.50
2.	Catic Beijing Co. Ltd.	LOT 1. 14,677,686/- LOT 2. 4,604,014/- LOT 3. 3,577,568/-

3.	CNR Import and Export Corporation Limited	LOT.1 14,774,860/- LOT.2. 4,376,300/- LOT.3 3,740,700/-
4.	Texmaco Rail & Engineering Ltd	LOT.1. 15,047,564/- LOT. 2. 4,679,783/- LOT.3. 3,948,645/-
5.	Transnet Rail Engineering	LOT 1.20,492,695/- LOT 2. 7,979,504/- LOT 3. 4,420.901/-
6.	Modern Industries	LOT 1. 23,737,242/- LOT 2. 6,676,836/- LOT 3. 6,631,787/-
7.	Hunan Construction Engineering Group Corporation	LOT 1.16,543,306/- LOT 2. 5,523,820/- LOT 3. 4,201,467/-
8.	Lucky Exports	LOT 1. 20,306,068/- and parts 311,883/- LOT 2. 6,140,877/- and parts 88,801/- LOT 3. 6,344,693/- and parts 88,801/-
9.	Baotou Beifang Chuangye Co. Ltd	LOT 1. 13,907,907/- LOT 2. 3,973,960/-

		LOT 3. 3,299,015/-
10.	DCD Rolling Stock	LOT 1. 28,409,502/- LOT 2. 7,962,400/- LOT 3. 5,922,800/-

The tenders were then subjected to three stages of evaluation, namely; preliminary examination, detailed examination and financial comparison.

During Preliminary Evaluation four tenderers, namely; M/s Catic Beijing Co. Ltd, M/s CNR Import and Export Corporation Limited, M/s Texmaco Rail & Engineering Ltd and M/s DCD Rolling Stock were disqualified for failure to comply with the requirements of the Tender Document.

The remaining six tenders were subjected to detailed evaluation; whereby, the tender by M/s Hunan Construction Engineering Group Corporation and M/s Baotou Beifang Chuangye Co. Ltd were disqualified on the grounds that they had submitted boggie wagons of helical coil suspension instead of rubber suspension spring contrary to the Technical Specifications Clauses

17.1, 18.1, 18.2 and 15.1 for covered large boggie wagons, petrol tank boggie and container carrier boggie wagons respectively.

The remaining four tenders submitted by M/s Hindusthan Engineering & Industries Limited, M/s Transnet Rail Engineering, M/s Modern Industries and M/s Lucky Exports were then subjected to price comparison, whereby the tender by M/s Hindusthan Engineering & Industries Limited was found to be the lowest evaluated tender.

The Evaluation Committee therefore, recommended award of the tender to M/s Hindusthan Engineering & Industries Limited for all the three Lots at the following prices;

- a) Lot 1. USD 18,209,317.50
- b) Lot 2. USD 5,912,500/-
- c) Lot 3. USD 4,365,682.50

The Tender Board at its meeting held on 20th February, 2013, approved the recommendations made by the Evaluation Committee.

On 26th February, 2013, the Respondent vide a letter referenced PA/113/2012-13/ME/G/OE/014 communicated the award of tender to the successful tenderer, namely, M/s Hindusthan Engineering & Industries Limited.

The Appellant having observed that the Bid validity period for the tender under Appeal had lapsed and they were yet to receive the tender results, wrote a letter dated 04th April, 2013, to the Respondent seeking guidance on whether they should extend their Bank guarantee for a further period or not.

On 10th April, 2013, the Respondent vide a letter referenced TRL-PA/113/2012-13/ME/G/OE/014 notified the Appellant and other tenderers who had participated in the tender process that their tenders were unsuccessful.

Being dissatisfied with the award of tender to the successful tenderer, the Appellant vide a letter referenced PA/113/2012-13/G/OE/013/TRL/TZ dated

20th April, 2013, sought for an administrative review to the Respondent on the grounds that;

- (a) The Tender by the successful tenderer was modified during the tender opening without a notice of modification contrary to Clause 24.1 of Instruction To Bidders (hereinafter referred to as "the ITB")
- (b) The original tender by the successful tenderer was not withdrawn as required by ITB 24.3
- (c) The Respondent maintained both bids by the successful tenderer thus, making them to have two bids contrary to Clause 5.1 of the ITB
- (d) The successful tenderer submitted an alternative bid while the same has been restricted under ITB Clause 19.1. The Appellant was of the view that, the successful tenderer had an inside information on the tender from the

Respondent. Hence, the Respondent breached the law.

- (e) They requested during the tender opening ceremony, the two tenders by the successful tenderer to be read out so as to allow their bid to be considered further, but the Respondent did not accept their plea.
- (f) Contrary to ITB Clauses 24.1 and 24.4 the two tenders by the successful tenderer were both read out and allowed to proceed contrary to the law.
- (g) The Respondent's act is in contravention of Section 43(c) of the Public Procurement Act, Cap 410 of 2004 (hereinafter referred to as the Act).
- (h) The price by the successful tenderer was higher compared to that of the Appellant's. The award to them leaves doubts and thus contravening Section 43(c) of the Act.

The Respondent vide a letter referenced TRL-PA/113/2012-2013/ME/G/OE/006 dated 07th May, 2013 responded to the Appellant's request whereby, amongst other things, informed them that;

- (a) Tenderers who attended the tender opening were informed of the notice and the modified tender by the successful tenderer and they accepted it before reading the tender price. Furthermore, Clause 24(1) of the ITB allows modification of the tender.

Based on the above facts, the read out tender by the successful tenderer cannot be construed and treated as two distinct tenders. The successful tenderer had only one modified tender.

- (b) The modification by the successful tenderer was made prior to the time of tender opening. Tenderers could have been deprived of their right to participate fairly if at all the successful

tenderer had modified its tender after the tender opening.

- (c) None of the tenderers who attended the tender opening ceremony demanded for a copy of the notice modifying the successful tenderer's tender. Thus, the claims by the Appellant are not correct since they had followed the required procedures; and the entire tender process was done in a transparent manner.
- (d) The Appellant's contentions in paragraphs (g) and (h) of their statement contradict each other. While paragraph (g) provides that the Respondent refused to read out the tender price by the successful tenderer, paragraph (h) provides that the prices of the successful tenderer's tender were read out.
- (e) That, the Appellant's complaint had arisen from the tender opening day, that is 28th January, 2013. Hence, they ought to have submitted their complaint within 28 days from

that date as per Section 80(2) and (3) of the Act and Regulation 110 of the Government Notice No.97 of 2005.

Upon being dissatisfied with the replies by the the Respondent, the Appellant, on 31st May, 2013, decided to lodge their Appeal to this Authority.

On receiving notification of the Appeal by the Appellant, the Respondent raised six points of Preliminary Objections which centred on the jurisdiction of this Authority to entertain the Appeal and the legality of the Appeal filed before this Authority. The said objections were;

- a) The Appeal is time barred
- b) The person who moved the Authority is not legally authorized in terms of the law
- c) The Appeal is premature as no notice was issued as per Rules 6 (1) (3) and 8(2) (a) of the Public Procurement Appeals Rules of 2005.

- d) No declaration has been made in the Statement of Appeal by the Appellant in terms of Section 84(1) of the Act.
- e) Form No. 2 is incomplete as it does not reflect the recipient of copy of service as required by the law and the said Form No. 2 of the Public Procurement Appeals Rules of 2005.
- f) The Respondent has certified that the goods to be procured are for the revival of the ailing Tanzania Railways Limited and hence the tender is in the Public interest.

In view of the objections raised, and as a matter of procedure, the Authority was obliged to resolve first the Preliminary Objections first before addressing the merits of the Appeal.

THE RESPONDENT'S SUBMISSION ON THE PRELIMINARY OBJECTIONS.

During the hearing of the Appeal the Respondent withdrew point (f) of the Preliminary Objections

relating to the issue of public interest. The Respondent submitted on the remaining five points of Preliminary Objections as follows;

In relation to the first point of Preliminary Objection, the Respondent submitted as follows;

That, the Appeal before this Authority is time barred in terms of Sections 79(1) of Act and Regulations 109 and 110 of the Public Procurement (Goods, Works, Non Consultant Services and Disposal of Public Assets by Tender) Regulations, Government Notice No. 97 of 2005 (hereinafter referred to as "GN. No. 97/2005") and Rule 13 of the Public Procurement Appeals Rules Government Notice No. 205 of 2005 (hereinafter referred to as "the GN. No. 205/2005").

That, the Appellant's complaint originated from the tender opening ceremony that took place on 28th January, 2013. Having been dissatisfied with how the tender opening was conducted, the Appellant was required to lodge their complaint to the Respondent within 28 days from that date pursuant to Section

79(1) of the Act read together with Regulations 109 and 110 cited above. To the contrary, the Appellant lodged their complaint to the Respondent on 20th April, 2013, that is, after the expiry of the time prescribed under the law.

That, the Respondent having realised that the Appellant was complaining on matters that emerged during the tender opening ceremony, on 7th May, 2013, they informed them that their complaint has been filed out of time but they still opted to appeal to this Authority on 31st May, 2013.

That, the Appeal before this Authority ought to have been filed within 14 days from the date when they became aware of the circumstances giving rise to the dispute, pursuant to Rule 7 of GN No. 205 of 2005, if at all the Appellant was still aggrieved by the Respondent's decision issued on 10th April 2013.

That, the Appellant did not comply with the law when lodging their Appeal, thus, their Appeal be rejected by

the Authority through the powers vested unto it by Rule 13(1) of GN. No 205 of 2005.

With regard to the second point of Preliminary Objection, the Respondent submitted that, there was no record indicating that, the person who lodged this Appeal was dully authorized by the Appellant to do so.

That, according to the Appellant's tender submitted to the Respondent, the person who was authorized to act on behalf of the Appellant in relation to the Tender under Appeal was one Li Jianguo but the Appeal at hand was lodged and signed on behalf of Masindikoko Company Limited.

That, there is no Power of Attorney by the Appellant indicating that the said Masindikoko Company Limited was dully authorized to Appeal on their behalf.

In relation to the third point of Preliminary Objection, the Respondent submitted that, the Appeal was prematurely lodged, since the Notice of Intention to Appeal had not been filed and served to them as

required under Rules 6 (1) (3) and 8(2) (a) of GN. No. 205 of 2005.

The Respondent submitted further that, Rule 8 of GN No. 205/2005 provides for the requirement of various supporting documents to be attached to the Statement of Appeal and one being a Notice of Intention to Appeal. Contrary to the requirement of the law, the Appellant had not issued a Notice of Intention to Appeal to the Respondent indicating that they intended to challenge their decision to this Authority. Thus, the Appellant's failure to issue a Notice of Intention to Appeal had contravened Rules 6(1) and 8(2) of GN No. 205 of 2005.

With regard to the fourth point of Preliminary Objection, the Respondent submitted that, there is no declaration in the Statement of Appeal lodged by the Appellant in terms of Section 84(1) of the Act. The Appellant had failed to declare in their Statement of Appeal the loss they would suffer if the tender process would not be suspended.

The Appellant's failure to declare such an injury contravenes the law and renders their Appeal to be untenable in law.

In relation to the fifth point of Preliminary Objection, the Respondent submitted that, the Statement of Appeal by the Appellant does not indicate the recipient of a copy of service as required under Form PPAA No. 2 of the Public Procurement Appeals Rules of 2005. Thus the Appellant's omission makes their Appeal to be incomplete in the eyes of the law.

The Respondent therefore, prayed for the rejection of this Appeal for being filed out of time and also in contravention of the law.

APPELLANT'S REPLIES ON THE PRELIMINARY OBJECTIONS

The Appellant's replies on the Preliminary Objections may be summarized as follows;

That, they filed their Appeal to the Authority within the time prescribed under the law after the Respondent had rejected their Application for administrative review.

With respect to the second point of Preliminary Objection, the Appellant submitted that, the person who signed and lodged the Appeal on behalf of the Appellant had been duly authorised vide a letter dated 11th November, 2012 titled "Manufacturer's Authorization letter for tender No. PA/113/2012-13/ME/G/OE/014 & PA/113/2012-13/ME/G/OE/013". That being the case, they have mandate and powers to represent the Appellant in this matter.

In relation to the third point of Preliminary Objection the Appellant submitted that, their Appeal was not prematurely lodged as contended by the Respondent; because they wrote to the Respondent before indicating their dissatisfaction for the award of tender to the successful tenderer and requested them to review the tender process but they rejected their application. It is on those grounds they opted to seek for their rights before this Authority.

With regard to the issues of lack declaration contrary to Section 84(1) of the Act and PPAA Form no 2 being incomplete, the Appellant submitted that, these are not legal points to be determined under preliminary objections.

The Appellant therefore, prayed that the preliminary objections raised be dismissed and the Appeal be heard on merits.

ANALYSIS BY THE AUTHORITY AND RULING ON THE PRELIMINARY OBJECTIONS.

Having gone through the documents submitted and having heard the oral submissions by parties the Authority is of the view that, the Preliminary Objections are based on the issue whether the Appeal is properly before the Authority. Having identified the main issue, the Authority proceeded to resolve it by framing the following sub issues;

- whether the Appeal is incompetent for being lodged out of time

- Whether the Appeal had been lodged by a legally authorized person
- Whether the Appeal is premature for failure to comply with Rules 6(1) and (3) of the Appeals Rules
- Whether the absence of a declaration in terms of Section 84(1) of the Act amounts to a ground for a preliminary objection
- Whether the Statement of Appeal was incomplete for failure to comply with the requirement of Form PPAA No. 2

Having identified the sub issues, the Authority resolved them as follows:

1.0. Whether the Appeal is incompetent for being lodged out of time

In resolving this sub issue, the Authority deemed it necessary to revisit Section 79(1) of the Act read

together with Regulations 109 and 110 of GN No. 97/2005 relied by the Respondent that were not complied with by the Appellant when lodging their Appeal. The said provisions provide as follows;

S.79(1) "Subject to sub-section (2) of this section, any supplier, contractor or consultant who claims to have suffered or that may suffer any loss or injury as a result of a breach of duty imposed on a procuring entity or an approving authority by this Act, may seek a review in accordance with Sections 81 and 82 of this Act, provided that, the application for a review is received by the procuring entity or approving authority within twenty eight days of the supplier, contractor or consultant becoming aware of the circumstances giving rise to the complaint or when the supplier, contractor or consultant should have become aware of those circumstances". (Emphasis added)

Reg. 109 "A supplier, service provider, contractor or asset buyer who claims to have suffered or that may suffer any loss or injury as a result of a breach of duty imposed on a procuring entity or an approving authority by this Act or these Regulations may seek a review in

accordance with Section 79 of the Act".
(Emphasis supplied)

Reg. 110 "The supplier, service provider, contractor or asset buyer shall submit an application for review within twenty eight days of the supplier, service provider, contractor or asset buyer becoming or should have become aware of the circumstances giving rise to the complaint or dispute". (Emphasis added)

The above cited provisions entail that, dissatisfied tenderers are required to submit their complaints to the procuring entity or approving authority within 28 days from the date when they become aware of the circumstances giving rise to a dispute or should have become aware of it.

Having reviewed the documents submitted before it, the Authority observes that, the Appellant's Appeal is based on two grounds, namely; improper modification of the tender submitted by the successful tenderer and unfair disqualification. In reviewing further the said documents, the Authority noted that, the complaint in relation to the modification of tender by the successful

tenderer originated from the tender opening ceremony that took place on 28th January, 2013, whereby the Appellant and other tenderers challenged the modification process conducted by the Respondent while the issue of unfair disqualification arose after the tender results were communicated to them.

From the above facts, the Authority is of the view that, the Appellant's complaint in relation to modification of tenders that was carried out during the tender opening ought to have been filed with the Respondent within 28 days from 28th January, 2013 when the opening of tenders took place pursuant to Sections 79 and 80 of the Act. That means, the application for administrative review in relation to modification of tenders ought to have been lodged to the Respondent latest by 25th February, 2013.

Upon being dissatisfied with the decision of the Respondent, the Appellant ought to have referred their complaint to the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") pursuant to Section 81 of the Act. If they would have

been dissatisfied with PPRA's decision, then they ought to have lodged their complaint to this Authority pursuant to Section 82 of the Act.

To the contrary, the Appellant did not follow the review channel as provided for under the Act; they waited until tender results were communicated to them and then started to raise the issue of modification of tender that took place during tender opening.

It is the considered view of the Authority that, if at all the Appellant had genuine complaint in relation to what had transpired during the tender opening process, they ought to have lodged their complaint to the Respondent within the prescribed time limit under the law. Therefore, the Appellant's act of raising the issue of modification of the tender after expiry of the 28 days was contrary to Sections 79 and 80 of the Act read together with Regulations 109 and 110 of GN. No 97/2005. Hence, the Appellant's act of raising the issue of modification of tenders as one of the grounds of Appeal to this Authority has contravened the law, as that issue is time barred since it ought to have been

raised within 28 days from the date of the tender opening.

Furthermore, the Authority considered the Appellant's complaint in relation to unfair disqualification and observes that, the Appellant ought to have lodged their complaint directly to this Authority after receipt of the tender results.

According to the facts of this Appeal the tender results were communicated to the Appellant vide a letter dated 10th April, 2013 and was received on 19th April, 2013. On 20th April 2013, the Appellant filed an application for administrative review to the Respondent. On 7th May, 2013, the Respondent issued its decision in relation to the Appellant's complaint which was received by the said Appellant on 21st May, 2013. On 31st May 2013, the Appellant lodged the Appeal to this Authority.

Based on the above facts the Authority is of the view that, the Appellant's complaint in relation to unfair disqualification arose when the Appellant became aware of the tender results, that is, on 19th April, 2013.

Therefore, the Appellant was required to lodge their appeal directly to this Authority within 14 days from the date they became aware of the circumstances giving rise to the Appeal pursuant to Section 82(2)(a) of the Act read together with Section 55(7) of the Act, since the procurement contract had already entered into force by virtue of Section 55(7) of the Act. For purposes of enlightening the Appellant, the Authority reproduces the said provisions as hereunder;

S.82 (2) A supplier, contractor or consultant entitled under section 79 to seek review may submit a complaint or dispute to the Public Procurement Appeals Authority: -

(a) "If the complaint or dispute cannot be submitted or entertained under Section 80 or 81 because of entry into force of the procurement contract and provided that the complaint or dispute is submitted within fourteen days from the date when the supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when that supplier, contractor or consultant

should have become aware of those circumstances". (Emphasis added)

S.55(7) "The procurement contract shall enter into force when a written acceptance of a tender has been communicated to the successful supplier, contractor or consultant". (Emphasis supplied).

The above cited provisions stipulate clearly that, after entrance into force of a procurement contract this Authority has sole original jurisdiction to entertain procurement disputes arising thereafter. That means, after the Appellant had become aware of the tender results and felt aggrieved by the decision reached by the Respondent; they ought to have lodged their Appeal directly to this Authority. That said, the Appeal to this Authority ought to have been lodged within 14 days from 19th April, 2013 when the Appellant became aware of the tender results. Counting from 19th April 2013, fourteen days lapsed on 3rd May, 2013 while the Appeal was lodged on 31st May, 2013; that is, 27 days after the expiry of the statutory 14 days. Therefore,

the Appellant's Appeal to this Authority was lodged out of time.

Accordingly, the Authority's conclusion in respect to the first sub issue is that the Appeal has been filed out of time.

2.0. Whether the Appeal had been lodged by a legally authorized person

In order to ascertain the validity of contentious arguments by parties, the Authority revisited the tender submitted by the Appellant and observed that, the person who had been authorised by the Company to transact with the Respondent in respect of the disputed tender was Mr. LI JIANGUO vide a Power of Attorney dated 20th January, 2013. None of the documents attached to the tender of the Appellant refers Masindiko Company Limited to be the lawful attorney of the said Appellant.

The Authority noted further that, in the Statement of Appeal, Mr. Li Jianguo named the Director General of Masindiko Company Limited to be their representative.

However, there was no legally accepted document to that effect.

The Authority revisited the letter, produced by Mr. Max Mwasilu which claimed to have empowered Masindiko Company Limited to be the legal representatives of the Appellant and noted that, the same letter was issued on 11th November, 2012, while the dispute between the Appellant and the Respondent arose in 2013. The Authority failed to comprehend the legality of the said letter while the Power of Attorney vesting powers to Mr. LI JIANGUO was issued on 20th January 2013. The Authority is of the opinion that, if at all the Appellant wanted Masindiko Company Limited or its directors to be their legally authorised representatives, the same would have been done through an acceptable legal instrument and not by a mere letter as was purportedly done by Mr. Li Jianguo.

The Authority further opines that, the Power of Attorney issued to Mr. Li Jianguo on 20th January, 2013 superseded the purported Power of Attorney given to Masindiko Company Limited on 11th November, 2012.

The Authority agrees with the Respondent that, Masindiko Company Limited is not privy to the disputed tender, and that they lacked legal capacity to appeal on behalf of the Appellant.

Therefore, the Authority's conclusion in regard to second sub issue is that, Masindiko Company Limited have not been properly authorized by the Appellant to prosecute this Appeal on their behalf; hence, they cannot move this Authority.

3.0 Whether the Appeal is premature for failure to comply with Rules 6(1) and (3) of the Appeals Rules

In resolving this sub issue, the Authority revisited Rule 6(1) and (3) of GN No. 205/2005 relied upon by the Respondent in substantiating their third point of Preliminary Objection. The said Rule provides as follows:

“R. 6(1)A person who is dissatisfied with the matter or decision giving rise to a complaint or dispute may give notice of intention to appeal

within seven days from the date when he became aware of the matter or decision.” (Emphasis added)

“R. 6(3) Notice of Intention to appeal shall be made in three copies on Form PPAA No. 1 prescribed in the First Schedule to these Rules and shall be signed by the person who signed the tender documents or his legally authorized representative.” (Emphasis added)

Based on the above quoted provisions, the Authority is of the view that, a tenderer has an option of whether to give a notice or not before filing their Appeal; that is why the law uses the word may to indicate such an option. The Authority is of the firm view that, non compliance with Rule 6(1) does not invalidate the Appellant’s Appeal in any way if at all they had complied with other pre-requisites of the law since filing a notice of intention to appeal is optional and not mandatory.

With respect to the issue of signing the Appeal documents by the person who signed the tender

documents or his legally authorized representative pursuant to Rule 6(3), the Authority is of the view that the same has been deliberated under sub issue two above.

Having that said, the Authority concludes that the Appeal cannot be incompetent for failure to comply with Rule 6(1) of the Appeals Rules.

4.0 Whether the absence of a declaration in terms of Section 84(1) of the Act amounts to a ground for a preliminary objection

In resolving this sub issue the Authority considered the Respondent's argument that there was no declaration on the Statement of Appeal indicating that the Appellant would suffer loss if suspension of the tender under Appeal would not be granted. On the hand, the Appellant contended that, lack of declaration or otherwise was a factual matter and not a point of law. Thus, should not be considered as a ground of Preliminary Objection.

The Authority agrees with the Appellant's submission in this regard.

5.0 Whether the Statement of Appeal was incomplete for failure to comply with the requirement of Form PPAA No. 2

In resolving this sub issue, the Authority revisited PPAA Form No. 2 cited by the Respondent and observed that, under item 6 it requires the details of person or company whom a copy of the Statement of Appeal will be served.

However, the said item has no further explanation on it. The Authority revisited Rule 8 (1) (a) of GN 205 of 2005 and noted that, the law requires the Appellant upon filling PPAA Form No. 2 to indicate among other things the names of the parties in a dispute.

The Authority noted further that, Rule 9 of the said Appeals Rules requires the Secretary of the Authority to endorse the date on which the Appeal was received and send a copy to the Respondent and all other parties who participated in the procurement or disposal proceedings.

The Authority is of the view that, the aim of item 6 of the PPAA Form No 2 is to notify the other parties about the existence of such a dispute or Appeal. The law has vested such a responsibility to the Authority and in relation to this Appeal the Respondent was duly notified and they were able to file their replies within time.

The Authority is of the firm view that, nothing wrong has been occasioned by the Appellant for failure to indicate where the copy of their Appeal was to be served since the name of the Respondent was already identified in terms of Rule 8(1) (a) of GN No. 205.

The Authority's conclusion in respect of the fifth sub issue is that, the Appellant did not contravene the law for failure to indicate who was to be served with the Statement of Appeal.

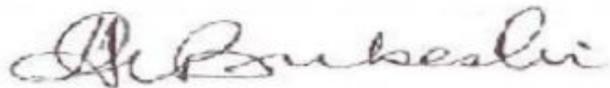
Having resolved the above sub-issues with respect to the main issue of whether the Appeal is properly before this Authority, the Authority's conclusion is that, the

Appeal is not properly before it as it was filed out of time by the person not legally authorized to do so.

Accordingly, the Appeal filed is hereby rejected, and the same is ordered struck out and each party to bear their own costs.

Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

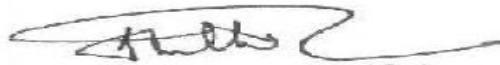
This ruling is delivered in the presence of the Appellant and the Respondent this 3rd July, 2013.



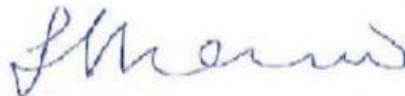
.....
JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. Mr. K.M. Msita



2. Mr. F.T Marmo



3. Mrs. R. A. Lulabuka

