IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 31 OF 2022-23

BETWEEN

M/S AMANDI HOLDING LTD..APPELLANT

AND

PUBLIC PROCUREMENT REGULATORY

AUTHORITY (PPRA)..1ST RESPONDENT

TANZANIA PORTS AUTHORITY (TPA)...................2nd RESPONDENT

DECISION

CORAM

1. Hon. Justice (rtd) Sauda Mjasiri - Chairperson
2. Mr. Rhoben Nkori - Member
3. Dr. William Kazungu - Member
4. Mr. James Sando - Secretary

SECRETARIAT

1. Florida Mapunda - Deputy Executive Secretary
2. Violet Limilabo - Senior Legal Officer

FOR THE APPELLANT

1. Mr. Luka Elisangaya - Advocate -Dentors East Africa Law Chambers
2. Mr. Gabi Kazdan - Division Manager

FOR THE 1ST RESPONDENT

1. Mr. Ayoub Sanga - State Attorney - OSG
2. Mr. Stephen Kimaro - State Attorney - OSG
3. Mr. Paul Kadushi - Director of Legal and Public Affairs -PPRA
4. Mr. Joachim Maambo - Manager Legal and Secretarial Affairs -PPRA
5. Mr. Hilmar Danda - Principal State Attorney - PPRA
6. Mr. Deusdedith Bishweko - Legal Officer - PPRA

FOR THE 2ND RESPONDENT

1. Mr. Ayoub Sanga - State Attorney - OSG
2. Mr. Stephen Kimaro - State Attorney - OSG
3. Mr. Christian Chiduga - Litigation Services Manager - TPA
4. Mr. Fredrick Mnale -Principal Security Services Officer - TPA
5. Mr. Nashanda Mgonja - Senior Procurement Officer -TPA
6. Mr. Geofrey Mwakasala - Procurement Officer

This Appeal was lodged by **M/S Amandi Holding Ltd** (hereinafter referred to as **"the Appellant"**) against the **Public Procurement Regulatory Authority** known by its acronym as **"PPRA"** (hereinafter referred to as **"the 1st Respondent"**) and the **Tanzania Ports Authority** known by its acronym as **"TPA"** (hereinafter referred to as **"the 2nd Respondent"**).

The Appeal is in respect of a debarment order issued by the 1st Respondent following the Appellant's failure to execute contract No. AE/016/2013-14/CTB/G57 for Design, Supply, Installation, Configuration and

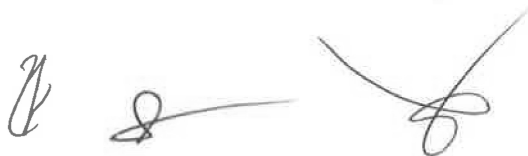
Commissioning of Integrated Security System (ISS) for Dar es Salaam Port and the Headquarters Building (hereinafter referred to as **"the Contract"**).

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:-

On 28th August 2014, the 2nd Respondent awarded the contract to the Appellant. On 16th October 2014 the Appellant and the 2nd Respondent signed the contract. The value of the contract was United States Dollars Six Million Three Hundred Forty One Thousand Five Hundred Seventy Six only (USD 6,341,576.00) VAT exclusive. The delivery period was seven months from the date of signing the contract.

The record of Appeal indicates that, the contract was not completed within the specified period as there were several extensions. The final works completion certificate issued on 30th June 2020 indicated that the work was completed on 30th May 2018. The final works completion Certificate bears a proviso that there are pending issues that would have to be cleared after an investigation being conducted by the Prevention and Combating of Corruption Bureau (PCCB) is completed.

PCCB vide a letter dated 5th August 2020 with ref. No. PCCB/HQ/GCR/121/2019/10/OP/2 requested the Controller and Auditor General (CAG) to conduct a special audit on the matter. After completion of the special audit, the CAG's report was tabled before the Parliament which passed a resolution requiring the Government to take action against the 2nd Respondent's staff involved in the disputed contract. In addition, the



Parliament directed the 1st Respondent to take action against the company which executed the contract. Following the directive, the 1st Respondent formed a committee which investigated the matter. After completion of the investigation, the 1st Respondent on 12th December 2022 served the Appellant with the Notice to show cause why it should not be debarred. On 22nd December 2022 the Appellant submitted its written representation to the 1st Respondent. On 3rd January 2023 the 1st Respondent issued its decision which debarred the Appellant and its affiliates from participating in public procurement for a period of five (5) years. Dissatisfied with the debarment decision, on 14th February 2023, the Appellant lodged this Appeal to the Appeals Authority.

The Respondents were notified about the existence of the Appeal and required to submit replies thereon. The Respondents' reply was preceded with a point of preliminary objection to wit:-"*The Appeal is untenable in law that the Appellant has no locus standi*".

When the matter was called for hearing the Respondents withdrew the preliminary objection and the Appellant did not object. Thereafter the following issues were framed:-

1.0. Whether the Appellant's debarment is justified and in accordance with the law; and

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

SUBMISSIONS BY THE APPELLANT

In this Appeal the Appellant was represented by Mr. Luka Elisangaya, learned advocate. He commenced his submissions by stating that the Appeal emanated from the debarment decision issued by the 1st Respondent on 3rd January 2023 for the alleged failure of the Appellant to execute the contract.

The learned counsel submitted that on 16th October 2014 the Appellant entered into the contract with the 2nd Respondent. The contract was to be completed within seven months that is by 16th May 2015. The learned counsel contended that when the Appellant was at the final stages of executing the contract, it was served with an addendum which changed the scope of works. According to the 2nd Respondent the said changes were brought by the Big Result Now (BRN) initiatives. The served addendum was signed on 3rd July 2015 and it changed the scope of work by increasing the number of materials to be supplied including additional spare parts that resulted in the increase of the contract amount from USD 6,341,576.00 to USD 7,777,895.00. The learned counsel submitted that Clause 6 of the issued addendum allowed parties to the contract to discuss the completion period. The delay in completion of the project was caused by the 2nd Respondent and therefore it was not proper to shift the burden to the Appellant, the learned counsel contended.

The learned counsel submitted that the 2nd Respondent issued the Appellant with a final works completion certificate dated 30th June 2020. The said certificate indicates that the final completion date was 30th May 2018. That is to say, the final completion date on the certificate confirmed

that the contract was fully executed to the satisfaction of the 2nd Respondent. The learned counsel elaborated that much as the execution of the contract was completed in May 2018, by late 2015 the project was almost complete and training sessions on the installed system were conducted to the 2nd Respondent's staff.

The learned counsel submitted further that on 3rd September 2019, the Appellant submitted to the 2nd Respondent a proposal for an all-inclusive integrated security system preventive maintenance and repairs for purposes of ensuring amongst others, routine preventive maintenance, replacement of faulty equipment as well as training and knowledge transfer of the installed system. The Appellant knew that the system was delicate and bound to breakdown if it is operated without any routine maintenance. However, the 2nd Respondent never replied to the said proposal.

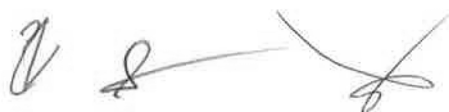
The learned counsel submitted further that during execution of the contract and after completion of the installation of the system, the Appellant did not receive any complaint or reservation from the 2nd Respondent regarding the failure or underperformance of the system. Surprisingly, on 12th December 2022, the 1st Respondent served the Appellant with the notice of intention to debar from participating in public procurement on the ground that it failed to execute the contract. The Appellant was surprised to be issued with the said notice after four years of completion of the contract, the learned counsel contended.

The learned counsel submitted that Regulation 93(1) of the Public Procurement Regulations, GN. No. 446 of 2013 as amended (hereinafter referred to as "**the Regulations**") relied upon by the 1st Respondent when

issuing the notice of intention to debar, provides guidance as to who may initiate debarment proceedings. The Notice of intention to debar may be issued as a result of the findings resulting from a special audit or investigation or if such a proposal has been submitted by any person. The notice of intention to debar did not indicate if the same was issued as a result of investigation/audit conducted. It only indicated under paragraphs 2 and 3 that the investigation conducted revealed that the Appellant failed to execute the contract. The notice did not indicate who conducted the alleged investigation. Furthermore, the investigation report was not attached to it.

The learned counsel contended further that the notice of intention to debar was not in accordance with the format provided under the Second Schedule to the Debarment Guidelines issued by the 1st Respondent. The Debarment Guidelines require the notice of intention to debar to comply with either of the three formats provided therein. The notice of intention to debar issued by the 1st Respondent did not comply with any format provided and therefore it was invalid.

The learned advocate submitted that paragraph 2.12 of the statement of reply indicates that on 8th December 2022 the 1st Respondent formed a team to conduct investigation on the contract executed by the Appellant. The 1st Respondent's team conducted the investigation and the Appellant was not involved. The Appellant failed to comprehend the 1st Respondent's intention of conducting the investigation on a contract executed four years back without involving the firm that executed it. The learned counsel contended that the 1st Respondent's act in this regard denied the Appellant



the right to be heard. For purposes of fairness, the Appellant ought to have been involved in the investigation process and explain what transpired before the 1st Respondent reached a conclusion that the firm is to be debarred.

The learned counsel contended further that, much as the investigation was conducted without involving the Appellant, the notice of intention to debar ought to have been attached with the investigation report that would show the findings that have been made against the Appellant. The findings of the report would have assisted the Appellant to respond to all allegations levelled against it. In support of his argument on this point the learned counsel cited the case ***of Severo Mutegeki and another versus Mamlaka ya Maji Safi na Mazingira Mjini Dodoma (DUWASA)***, Civil Appeal No. 343 of 2019, Court of Appeal of Tanzania at Dodoma. In this case the court found that non-involvement of the appellants during an audit conducted resulted to their conviction without being involved or heard.

The learned counsel also cited the case of ***M/S Intersystem Holding Ltd versus the Public Procurement Regulatory Authority***, Appeal Case No. 16 of 2015-16. In this case the Appeals Authority observed that for a notice of intention to debar to be proper the same has to be attached with evidence that led to a debarment proposal.

The learned counsel argued that the referred cases both portray the importance of natural justice. That is a party should not be condemned unheard. Therefore, if an investigation was conducted, one who is being

investigated should be involved. Thus, the 1st Respondent should have involved the Appellant in the investigation which was conducted over the system that was installed by it and which was in use for the past four years. The learned counsel added that since the system was operational for the past four years with no routine maintenance and repairs, it would have definitely been worn out, therefore the involvement of the Appellant at the investigation stage was crucial.

Therefore, the 1st Respondent's act of not involving the Appellant during the investigation stage and failure to avail it with a copy of the findings made during the investigation denied the Appellant a fair trial and a right to be heard. Much as the Appellant submitted its written representation on 22nd December 2022, the same was not exhaustive as it was not availed with the investigation report. In the written representation the Appellant explained that it fulfilled its obligations under the contract which rendered the 2nd Respondent to issue the final works completion certificate.

The learned counsel argued further that prior to the debarment notice, the Appellant had never been involved or questioned in respect of any audit or investigation as alleged. Furthermore, the 2nd Respondent owes the Appellant a sum of USD 750,000.00 as an outstanding amount from the contract which had not been paid despite several reminders.

The learned counsel stated further that the debarment decision indicates under paragraph 3 that the investigation conducted by the 1st Respondent confirmed the findings made by the CAG during its special audit. According to the Appellant, the 1st Respondent did not disclose such information

when it issued the notice of intention to debar. Thus, it denied the Appellant a chance to respond to all allegations levelled against it.

The learned counsel concluded his submissions by stating that the 1st Respondent erred in law and fact by relying on information unknown to the Appellant and which was insufficient to render a debarment.

Finally, the Appellant prayed for the following orders: -

i. The Appeals Authority be pleased to uplift the debarment decision;

ii. The 1st Respondent to remove the Notice of debarment decision published or to be published in the Procurement Journal;

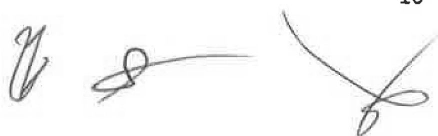
iii. The 1st Respondent to clear the Appellant's name and image by publishing the Appellant's innocence in a Public Procurement Journal and in any other relevant international bulletin or journal;

iv. The Respondents to pay costs of the Appeal and costs related to seeking legal opinion with regards to this matter amounting to USD 12,000; and

v. Any other orders and reliefs as the Appeals Authority may deem fit and just to grant.

REPLY BY THE RESPONDENTS

The Respondents were represented by Mr. Ayoub Sanga, learned State Attorney from the Office of the Solicitor General. He commenced his submissions by stating that it is an old principle of the law that parties are



bound by their own pleadings. He referred the case of ***James Gwagilo versus Attorney General,*** 1994 TLR 73, whereby it was stated that submissions from the bar cannot be taken as evidence if not pleaded in the pleadings. The same position was also stated in the case of ***Said Sultan Ngalema versus Isack Boaz Ng'iwanishi and four others***, Civil Application No. 362/17 of 2021, Court of Appeal of Tanzania at Dar es Salaam (unreported). The court stated that "*as is well known a statement of fact by counsel from the bar is not evidence and therefore the court cannot act on it*".

The learned State Attorney in emphasizing his point also cited the case of ***Farida and another versus Domina Kagaruki***, Civil Appeal No. 136 of 2006, Court of Appeal of Tanzania (unreported) which was relied upon in the case of ***Salum Omary Amiri versus Habibu Selemani Habibu and another***, Civil Appeal No. 305 of 2021, High Court of Tanzania, (Dar es salaam sub District Registry) (unreported).

In relation to the Appellant's argument that it was denied a right to be heard prior to its debarment, the learned State Attorney submitted that according to Regulation 93(1) of the Regulations, debarment proceedings may be initiated by the authority as a result of audit or investigation conducted by it or as a result of the debarment proposal submitted to it by any other person.

The learned State Attorney stated that, the Appellant's debarment arose out of the investigation conducted by the 1st Respondent. The law mandates the 1st Respondent to conduct investigation and does not require a party who may be affected by the investigation to be involved. After

completion of the investigation, the Appellant was served with the notice of intention to debar pursuant to Regulation 96(1) of the Regulations. The Appellant was required to show cause as to why it should not be debarred. Under paragraph 2.11 of the Statement of Appeal the Appellant conceded to have received the notice of intention to debar and on 22nd December 2022 it submitted its written representation. Thus, the Appellant cannot claim at this juncture that it was not accorded a right to be heard.

In emphasizing his argument, the learned counsel cited the case of ***Agro Industries Ltd versus Attorney General***, (1990-1994) 1 EA 1(CAT) where the court stated that "*the whole purpose of a notice is to afford a party an opportunity to be heard. Since the appellant knew or ought to have known the consequences of an adverse decision, that is, revocation of their rights over the two farms, they had adequate notice*".

The learned State Attorney submitted further that as long as the Appellant was properly served with the notice of intention to debar and filed its written representation thereof, it implies that the Appellant was accorded a right to be heard. In addition, he submitted that the Appellant's written representation did not comply with the requirement of Regulation 96(5) of the Regulations, yet the 1st Respondent considered the submitted defense before debarring the Appellant.

With regard to the argument that the notice of intention to debar did not comply with Debarment Guidelines, the learned State Attorney stated that such an argument is a new point raised during the hearing as it was neither raised in the Appellant's written representation nor in the statement

of Appeal. Thus, the same should not be considered. In the alternative, the learned State Attorney submitted that, if the notice of intention to debar failed to comply with the format provided in the Debarment Guidelines, the Appellant ought to prove how such an omission affected its rights. To the contrary, the Appellant failed to prove the same.

On the argument that the investigation report was not attached with the notice of intention to debar, the learned State Attorney submitted that it is not the requirement of Regulation 96(2) of the Regulations. The Regulation requires the debarment notice to contain facts constituting the grounds for the proposed debarment. The notice issued by the 1st Respondent to the Appellant contained such information, however, the Appellant did not respond to all the allegations raised. That it can be concluded that, it has conceded.

The learned State Attorney distinguished the case of ***Severo Mutegeki and another versus Mamlaka ya Maji Safi na Mazingira Mjini Dodoma (DUWASA)*** (supra) cited by the Appellant that it involves labour issues and therefore not relevant under the circumstances. He submitted further that the case is about an audit conducted by internal auditors, when investigating employees, therefore they ought to have been given a right to be heard before taking any displinary action against them.

The learned State Attorney distinguished the case of ***Intersystem Holding Limited versus Public Procurement Regulatory Authority*** (supra) relied upon by the Appellant as it related to debarment proceedings initiated by a procuring entity and there was no sufficient evidence to support the same unlike in the present Appeal.

The learned State Attorney elaborated further that much as the Appellant was not involved in the investigation, its rights have not been affected. The findings of the investigation team were communicated to the Appellant through the notice of intention to debar. Thus, the right to be heard was duly accorded to it.

Regarding justification for debarment, the learned State Attorney submitted that, the Appellant's debarment proceedings were initiated by the 1st Respondent after conducting an investigation on the execution of the contract entered between the Appellant and the 2nd Respondent on 16th October 2014. According to the 1st Respondent it conducted such an investigation following the directives issued by the Parliament after deliberating on the special audit report tabled by the CAG on the same contract. The CAG's report depicted a number of anomalies and the Parliament during its deliberations passed a resolution directing the 1st Respondent to take appropriate measures against the Appellant.

The learned State Attorney submitted that the Appellant signed the contract with the 2nd Respondent on 16th October 2014. The contract was expected to be executed within seven months. However, in the course of the execution the 2nd Respondent issued an addendum which changed the scope of work due to BRN initiatives. The changed scope involved the road to gate No. 8 and 4A from 2 to 3 lanes each and the road to gate No. 5 from 3 to 5 lanes of 19 meters width each. Thus, this caused parties to sign an addendum to the main contract on 3rd July 2015.

On 27th March 2015, the Appellant applied to the 2nd Respondent for extension of time to complete the works. On 19th June 2015, the 2nd Respondent vide a letter with reference No. PMU/2013-14/G57 granted extension of 14 weeks with effect from 16th May 2015. Hence, the completion period after the addendum to the contract was expected to be 30th August 2015.

The learned State Attorney expounded that, the Appellant did not complete the works within the period of three months which ended on 30th August 2015. Thus, it was granted a further extension up to 30th December 2016. Yet, the Appellant was unable to complete the work.

The Appellant was issued with the final works completion certificate on 30th June 2020. The said certificate contained a disclaimer that there are pending issues that will have to be cleared after an investigation being conducted by PCCB. The learned State Attorney submitted further that much as the Appellant claimed to have completed the project in late 2015, there is no evidence provided to substantiate the same. The available documents indicate that until 30th December 2016 when the last extension ended the Appellant was still executing the contract. Furthermore, the completion certificate indicates that the official completion date was 30th May 2018, however up to 3rd September 2019, the Appellant was still executing the contract.

The learned State Attorney submitted that the Appellant's statement of appeal contradicts its assertions made as it indicates that at paragraph 2.6 the contract was completed and operated by late 2015, paragraph 2.8

indicates that the work was completed on 30th May 2018, while at paragraph 2.9 the Appellant indicates that in the course of performing the contract on 3rd September 2019, it submitted a proposal to the 2nd Respondent for routine maintenance and repairs. The Respondents stated that much as the proposal for routine maintenance has not been received by the 2nd Respondent, this implies that until 2019 the Appellant was still performing the contract.

The Appellant was required to conduct training to the 2nd Respondent's staff on the entire integrated system, to the contrary, the Appellant claimed to have conducted training only on two components of X – ray machine and radio system. In addition, there is no proof that at that particular time of the training the two components of the system had been fully installed, tested and accepted by the 2nd Respondent.

The learned State Attorney contended that, there were defaults and failures of the system which were discovered during the special audits and investigations conducted in 2020 and 2022 respectively. The defaults noted were within the warranty period of three years from the commissioning of the system as per Clause 1.1 of the General Conditions of the Contract (GCC).

The learned State Attorney stated further that, the 2nd Respondent wrote a letter to the Appellant pointing out the dysfunction of some equipment installed as well as non-supply of other equipment agreed upon under the contract. The Respondents added that to prove that the system was not properly working on 30th June 2020, the Appellant supplied additional equipment not previously agreed upon but just to make sure that the work

was done to the required standard. The Appellant has not stated under which obligation it supplied the said equipment.

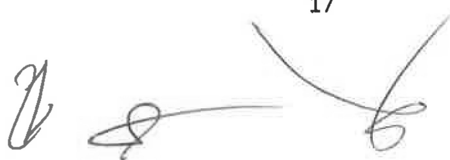
The findings of the investigation report indicate several shortfalls that included amongst others:- Installation of systems and types of equipment which do not perform to the intended level/standards, installment of less equipment compared to the list of the requirements under the contract, failure to conduct operational acceptance tests and full operational acceptance and failure to perform the contract within the contract period of seven months as explained in detail in the debarment decision.

The learned State Attorney stated that the Appellant in its written representation gave a blanket denial of the allegations by contending that it performed the contract to the required standard but failed to address each issue raised in the debarment notice, specifically, installment of less equipment compared to the list of requirements under the contract and failure to conduct operational acceptance tests and full operational acceptance. Therefore, the Appellant's failure to address the raised grounds for debarment is tantamount to admission.

Finally, the Respondents prayed for dismissal of the Appeal with costs and the Debarment Order be upheld accordingly.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the Appellant's debarment is justified and in accordance with the law



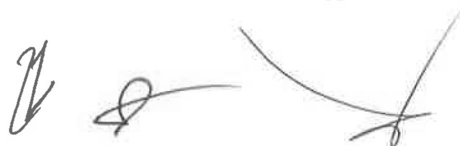
In ascertaining the validity of the parties' contention on the debarment order issued by the 1st Respondent, the Appeals Authority revisited Regulation 93(1) of the Regulations which reads as follows:-

> Reg.93(1) "***Debarment may be initiated by the Authority as a result of audit or investigation conducted by the Authority*** *or where a debarment proposal is submitted to it, by any person*".
>
> (Emphasis supplied)

The above quoted provision states in clear terms that the debarment proceedings could be initiated by the Authority (1st Respondent) following a special audit or investigation. Debarment proceedings may also be initiated by any person.

From the facts of this Appeal it is undisputed that the debarment proceedings against the Appellant were initiated by the 1st Respondent following the investigation conducted on the disputed contract. According to the 1st Respondent, it conducted an investigation on the contract between the Appellant and the 2nd Respondent following the Parliament's directive that it should take necessary action against the tenderer who failed to perform the contract.

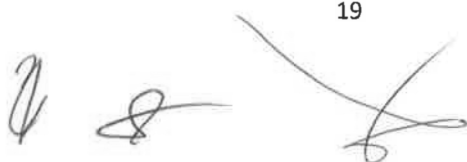
The record of Appeal indicates that the Parliament's directives on this matter were among resolutions reached at its 9th meeting having deliberated on the findings of the special audit report tabled before it by the CAG. The tabled report related to the execution of the contract.



The record of Appeal indicates further that having received the Parliament's directives, the 1st Respondent formed the investigation team to investigate the matter. After completion of the investigation, the findings thereon led the 1st Respondent to initiate the debarment proceedings against the Appellant. On 12th December 2022 the Appellant was served with the notice of intention to debar and was required to file its written representation within fourteen days.

The Appeals Authority reviewed the notice of intention to debar and observed that it contained nine grounds for debarment of the Appellant. The Appellant was required to show cause as to why it should not be debarred. According to Regulation 96(2) of the Regulations the notice of intention to debar shall inform the tenderer facts constituting grounds for the proposed debarment. Furthermore, Regulation 96(3) of the Regulations requires a notice of intention to debar to require a tenderer to show cause as to why the firm should not be debarred from participating in public procurement. Having reviewed the notice of intention to debar the Appeals Authority observed that it complied with the requirements of the law.

The Appeals Authority observed further that the Appellant submitted its written representation responding to the notice of intention to debar on 22nd December 2022. According to Regulation 96(4) of the Regulations the tenderer's written representation has to be submitted within fourteen days from the date of receiving the notice. Counting from 12th December 2022 when the notice was served to 22nd December 2022 when written representation was filed, the Appeals Authority observed that the



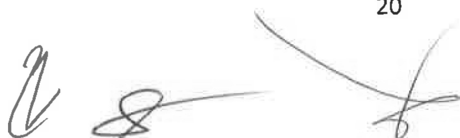
Appellant's written representation was submitted within the specified time limit.

The Appeals Authority noted further that on 3rd January 2023 the 1st Respondent issued the debarment decision which indicates that the Appellant has been debarred from participating in public procurement for a period of 5 years. According to Regulation 98(1)(a) of the Regulations the debarment decision has to be issued within thirty days from the date of receiving the tenderers written representation. The written representation was filed on 22nd December 2022 and the decision thereof was issued on 3rd January 2023, thus within time.

The Appeals Authority considered the Appellant's argument that it has been denied a right to be heard and observed that according to Regulation 96(1),(2) and (3) of the Regulations, the right to be heard under debarment proceedings is provided by being served with the notice of intention to debar which contain facts constituting grounds for the proposed debarment. Regulation 96(1), (2) and (3) is reproduced as hereunder:-

Reg. 96(1) "*where the Authority determines that there are grounds for debarment on the basis of the produced information, documents and evidences, the Authority shall within twenty one days from the date of receiving the evidence, issue to a respective tenderer a notice of debarment.*

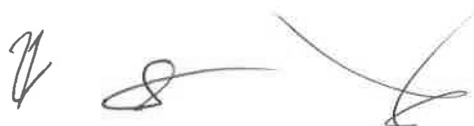
(2) The notice of debarment shall inform the tenderer of the facts constituting grounds for the proposed debarment.



> *(3) the notice shall require the tenderer to make written representation showing cause why he should not be debarred from participating in public procurement for a period specified pursuant to the Act and these Regulations*".

The Appeals Authority also considered the Appellant's assertion that the right to be heard was denied for not being involved in the investigation and not being served with the investigation report. Considering the requirements of Regulation 96(1), (2) and (3) of the Regulations, the Appeals Authority is of the view that a tenderer whose debarment proceedings has been commenced against is entitled to be accorded the right to be heard as per these provisions. Furthermore, Regulation 93(1) requires debarment proceedings to be commenced as a result of audit or investigation findings. This implies that after the findings have been established, debarment proceedings may be initiated. Thus, a right to be heard to a tenderer is accorded after being served with the notice of intention to debar. Furthermore, Regulation 96(1), (2) and (3) of the Regulations states clearly on what should be contained on the notice of intention to debar. Audit or investigation findings have not been itemised. Thus, the Appeals Authority reject the Appellant's argument that a right to be heard was denied for not being involved in the investigation or for not being served with an investigation report.

The Appeals Authority agrees with the Respondents' proposition as stated in the case of ***Agro Industries Ltd versus Attorney General*** (supra)

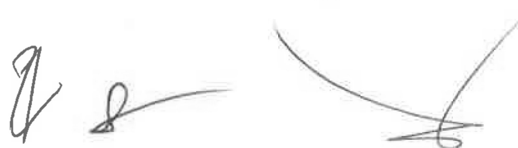


that the notice to show cause intends to protect a party's right against adverse consequences that may arise if one is denied such a right.

The Appeals Authority is of the considered view that the case of ***Intersystem Holding Limited versus Public Procurement Regulatory Authority*** is distinguishable from this Appeal in that the notice of intention to debar was not served to the Appellant and therefore it was not accorded a right to be heard. In this Appeal a comprehensive notice of intention to debar with detailed allegations was served and in response thereof the Appellant filed a written representation. This implies that the Appellant understood the allegations against it and had an ample opportunity to respond. The Appellant never sought for clarification on the notice of intention to debar. Therefore, the circumstances of this Appeal are different.

In relation to the case of ***Severo Mutegeki and another versus Mamlaka ya Maji Safi na Mazingira Mjini Dodoma (DUWASA)*** (supra), the Appeals Authority is of the considered view that the circumstances are quite different and distinguishable from this Appeal.

The Appeals Authority also considered the Appellant's argument that the notice of intention to debar was not in accordance with the format provided under the Second Schedule to the Debarment Guidelines issued by the PPRA. Having reviewed the Appellant's written representation to the 1st Respondent and the statement of Appeal, the Appeals Authority could not find it to be amongst the grounds of contention raised. The Appellant only raised this argument during the hearing. Thus, since it is a new



ground of Appeal, the same cannot be entertained by the Appeals Authority at this juncture.

In relation to the Appellant's assertion that there are no justifiable grounds that would warrant its debarment, the Appeals Authority revisited the record of Appeal and observed that the notice of intention to debar and the debarment decision contained grounds for debarment. The Appellant's written representation and the statement of appeal did not address any of the grounds raised for its debarment.

In view of the above, the Appeals Authority finds that it is not true that there were no justifiable grounds which could have rendered the Appellant's debarment. The grounds for debarment were made known to it, and the Appellant was therefore duty bound to show cause why it should not be debarred. The Appellant's failure to respond to the grounds for its debarment implies that it conceded to the debarment. Therefore, the Appeals Authority rejects the Appellant's assertion on this regard.

Under the circumstances the Appeals Authority finds the 1st Respondent's act of debarring the Appellant to be proper and in accordance with Section 62(3)(c) of the Act read together with Regulation 93(3)(c) of the Regulations. These provisions read as follows:-

> S.62(3)"*A tenderer shall be debarred and blacklisted from participating in public procurement or disposal proceedings if:-*
>
> *(c) the tenderer breaches the procurement contract*".

Reg.93(3) "*Subject to the provisions of the Act, a tenderer shall be debarred from participating in public procurement or disposal proceedings if:-*

(c) ***It is established that the tenderer fails to implement a procurement or disposal contract in which case he shall be barred for a period of not less than one year and not exceeding five years.***"

From the above findings, the Appeals Authority concludes the first issue in the affirmative that the debarment of the Appellant is justified and in accordance with the law.

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

Given the findings hereinabove, the Appeals Authority hereby dismiss the Appeal and upholds the 1st Respondent's debarment decision. The Appeals Authority equally rejects all the Appellant's prayers in this regard. We make no order as to costs.

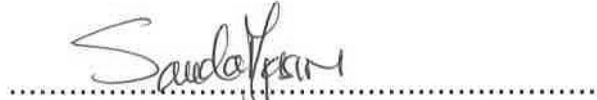
It is so ordered.

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 16th day of March 2023.

HON. JUSTICE (RTD) SAUDA MJASIRI



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CHAIRPERSON

MEMBERS: -

1. **MR. RHOBEN NKORI** ....

2. **DR. WILLIAM KAZUNGU** ....