IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 2 OF 2021-22

BETWEEN

M/S AQUA POWER TANZANIA LIMITED
(T/A TURBINE TECH)..... APPELLANT

AND

TANZANIA ELECTRIC SUPPLY
COMPANY LIMITED .....1ST RESPONDENT

M/S CSI ENERGY GROUP
TANZANIA LIMITED..... 2ND RESPONDENT

RULING

CORAM

1. Hon. Justice (rtd) Sauda Mjasiri - Chairperson
2. Dr. Leonada Mwagike - Member
3. Mr. Rhoben Nkori - Member
4. Ms. Florida Mapunda - Ag. Secretary

SECRETARIAT

1. Ms. Agnes Sayi - Senior Legal Officer
2. Ms. Violet Limilabo - Senior Legal Officer

FOR THE APPELLANT

1. Mr. Gachao Kiuna - Director
2. Ms. Bertha Lema - Company Secretary
3. Mr. Lu Xiaoqiang - Deputy General Manager
4. Mr. Walter Nyaki - Partner

FOR THE 1ST RESPONDENT

1. Mr. Gabriel P. Malata - Solicitor General
2. Mr. Daniel Nyakiha - State Attorney
3. Ms. Halima Ally - State Attorney
4. Mr. Abdallah M. Awadh - Principal Procurement Officer
5. Eng. E. G. Manirabona - Senior Manager Projects
6. Eng. Abdallah Chikoyo - Ag. Manager Projects – Generation
7. Mr. Laurian H. Kyarukuka - Ag. Legal Manager - Litigation

FOR THE 2ND RESPONDENT

1. Ms. Tunu Aludin - Advocate, Aymak Attorneys
2. Mr. Rico Adolf - Advocate, Aymak Attorneys
3. Nicholas Kahoza - Advocate, Aymak Attorneys
4. Mr. Penningtone Paschal - Advocate, Aymak Attorneys
5. Jon Gunnar Gylfason - CSI Managing Director

This Appeal was lodged by **M/S Aqua Power Tanzania Limited (T/A Turbine Tech** (hereinafter referred to as **"the Appellant"**) against **Tanzania Electric Supply Company Limited** commonly known by its acronym as **TANESCO** (hereinafter referred to as **"the 1st Respondent"**) and **M/S CSI Energy Group Tanzania Limited** (hereinafter referred to as **"the 2nd Respondent"**). The appeal is in respect of Tender No. PA/001/2020-21/HQ/W/34 for execution of the remaining construction works including supply, installation, testing and commissioning of the natural gas based 185MW power plant project – Kinyerezi I Extension (hereinafter referred to as **"the Tender"**).

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

The 1st Respondent floated a tender way back on 4th September 2020, whereby four tenderers submitted their bids. After completion of evaluation process and other internal procedures, M/S CSI Energy Group (Tanzania) Ltd was proposed for award of the Tender. Other tenderers who participated in the tender process were notified accordingly. Upon receipt of the notice of intention to award and being dissatisfied with award proposal, the Appellant challenged it by way of application for administrative review to the 1st Respondent and subsequently by appealing to this Appeals Authority. After the hearing of the said appeal, on 23rd December 2020, the Appeals Authority delivered its decision which nullified the proposed award and ordered the 1st Respondent to restart the Tender process.

After the Appeals Authority's decision was issued, the 2nd Respondent M/S CSI Energy Group (Tanzania) Ltd filed an application for Judicial Review (Miscellaneous Civil Cause No. 104 of 2021). The High Court issued its Ruling on 23rd June 2021 which dismissed the Application and upheld the Appeals Authority's decision by ordering the 1st Respondent to re-tender.

The 1st Respondent re-advertised the Tender through the Daily News newspaper dated 14th July 2021. The deadline for submission was initially set for 3rd August 2021; however, it was extended until 17th August 2021.

The Tender was conducted using International Competitive Tendering method as per the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 as amended by GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

On 15th July 2021 the Appellant wrote a letter to the 1st Respondent seeking clarification as to why the invitation to Tender did not indicate the date of issue and was not available on the TANePS portal.

The 1st Respondent through a letter dated 15th July 2021, responded to the Appellant that the Tender had not been advertised on the TANePS portal and the date of issue is 14th July 2021. The said letter was sent by email on 17th July 2021 and physically delivered to the Appellant's office on 20th July 2021.

Dissatisfied with the 1st Respondent's response on its request for clarification, on 29th July 2021, the Appellant lodged this appeal before the Appeals Authority.

Upon receipt of the 1st Respondent's letter which suspended the Tender process due to the existence of Appeal Case No. 2 of 2021-22, M/S CSI Energy Group (Tanzania) requested to be joined in the proceedings as one of the Respondent for the reason that, in the Appellant's Statement of Appeal there are accusations against it. The request was granted pursuant to Rule 12 (4) of the Public Procurement Appeals Rules of 2014 as amended in 2017 (hereinafter referred to as "**Appeals Rules**").

GROUNDS OF APPEAL

The grounds of appeal as stated in the Appellant's Statement of Appeal may be summarized as follows: -

1. That, negotiating a contract with a bidder whose award was nullified is contempt of the Appeals Authority and the High Court of Tanzania's orders. The Appellant submitted that, the 1st Respondent had intention to award the Tender to M/S CSI Energy Group (Tanzania) Ltd and to enter into a contract with it without restarting the Tender process as ordered by the Appeals Authority and the High Court.
2. That, the 1st Respondent had failed to comply with the basic principles of procurement and disposal contrary to Section 63 of the Act.

3. That, the 1st Respondent contravened Section 64(1) of the Act as it failed in the selection of the method of procurement.

4. That, the 1st Respondent failed to comply with the requirements of competitive tendering as it gave bidders an unreasonable period of six (6) working days to prepare a tender valued at over 100 Billion Tanzanian Shillings for a major project. The 1st Respondent's act in this regard contravened Section 67 of the Act.

5. That, the 1st Respondent failed to comply with Sections 68 & 69 of the Act and the First Schedule of the Act by not advertising the Tender through TANePS and in any International newspaper instead it advertised the Tender in one Local newspaper hence minimized competition.

6. Finally, the Appellant prayed for the following orders: -

   i. Suspension of procurement proceedings;
   ii. Initiation of investigation by the Authority;
   iii. Recommendation on disciplinary measures;
   iv. Transfer of procurement to the Government Procurement Services Agency; and
   v. Blacklisting of CSI Energy Group (Tanzania) Limited.

REPLY BY THE 1ST RESPONDENT

The 1st Respondent's reply to the Appellant's grounds of Appeal was preceded with a Preliminary Objection on the following points of law;

1. **The Appeal is vexatious, frivolous and untenable in law for want of decision by the Procuring Entity capable of being appealed against.**

2. **The Appeal is incompetent for want of legal authorization to institute this Appeal.**

The above notwithstanding, the 1st Respondent's reply to the Appellant's grounds of Appeal may be summarized as follows:-

1. That, the 1st Respondent re-advertised the Tender in question on 14th July, 2021 in order to comply with the decision of the Appeals Authority and the Ruling of the High Court in Miscellaneous Civil Cause No.104 of 2021 which ordered re-tendering.

2. That, the Appellant has committed a fraudulent act of fabricating evidence that calls for blacklisting of the Appellant from participating in any public tender. The grounds justifying the **BLACKLISTING** of the Appellant are reproduced as hereunder:-

    i. Fraudulent or corrupt practices for cooking evidence with intent to defraud the Appeals Authority hence causing injustice, delays and suffering to the 1st Respondent at the expense of the Government and public at large contrary to Sections 62(3)(a) and 104(1)(a) & (b) of the Act.

    ii. Fraudulently authoring Appendices 24 & 25 and illegally claiming that the same were authored and issued by the 1st Respondent contrary to Sections 62(3)(a) and 104(1)(a) &(b) of the Act.

iii. Breach of procurement process by appealing to this Honourable Authority knowing that there is no decision made by the Procuring Entity capable of being appealed against thus contravening Rule 4 of the Appeals Rules and Sections 95(2) (a) & (3), 96(6) and 97(1) of the Act.

iv. Fraudulent baptizing the 1st Respondent and the entire Government that it is engaging in unscrupulous acts of contravening the Act by meeting with CSI Energy Group (Tanzania) Ltd with intent to favour it through Single Sourcing procurement method thus tarnishing the image of the 1st Respondent and the entire Government locally and internationally.

v. Fraudulent act by the Appellant of instituting Miscellaneous Cause No. 10 of 2021 which is pending in the High Court of Tanzania at Dar es Salaam which intend to challenge the decision by PPAA arising from Appeal Case No. 17 of 2020 – 21 dated 23rd December, 2020, knowingly that the same has been upheld by the High Court of Tanzania through Miscellaneous Civil Cause No. 104 of 2021 dated 23rd June, 2021 which ordered re-tendering.

vi. While the Appellant bitterly opposed the Application by CSI Energy Group (Tanzania) Ltd challenging the decision by PPAA mentioned in paragraph (v) herein above which it supported, the Appellant is fraudulently challenging the PPAA decision before the same Court an act which shows that it is acting with ill will to sabotage, delay and frustrate the intended Government project for the provision of power utility thus, denying or curtailing the intended service to the public and national development.

3. That, tenderers were given twenty one (21) days within which to submit the tenders to the 1st Respondent. Further to that, the 1st Respondent extended the time for the submission of tenders by informing all tenderers, the Appellant inclusive. It is evident that, this ground of Appeal is tainted with lies as the tenderers were given enough time and no complaints were lodged to the 1st Respondent for consideration and decision making.

4. That, the 1st Respondent states that, it complied with Section 68 of the Act by publishing the Tender in the World English Circulated News Paper called Daily News which is read worldwide through its Website www.dailynews.co.tz. Further, the Tender was advertised in the 1st Respondent's website www.tanesco.co.tz of which up to 3rd August 2021 a total of 294 viewers downloaded the advert. The 1st Respondent stated further that, none of the tenderers, the Appellant inclusive, complained or sought for clarification on any of the raised concern by the Appellant to indicate, inter alia, how it has been affected by any of the procurement process initiated by the 1st Respondent.

5. That, the Tender was first re-advertised on 15th January, 2021 through TANePS website and that as the fiscal year of 2020/21 had been closed for which the respective tender was floated, it was impossible to upload the same as such the 1st Respondent floated the tender off TANePS. Thus, advertisment of the tender in World-wide platforms was made as per the details provided in paragraph 4 herein above. Further, the advertisement made by the 1st Respondent was in

accordance with the Procurement laws and was accessible to everybody, thus, up to 3rd August 2021 a total of 294 local and international viewers downloaded the advert.

6. Finally, the 1st Respondent prayed for the following orders:-

   (a) The remedies prayed by the Appellant in items 5.1, 5.2, 5.3, 5.4, and 5.5 be dismissed with costs in that:-

      i. Prayers 5.1 and 5.2 have no merit and not recognized by the Public Procurement Laws.

      ii. Prayers 5.3 and 5.4 have no merit for lack of sufficient evidence to warrant issuance of the sought orders.

      iii. Prayer 5.5 is untenable under our laws, the Public Procurement Laws inclusive, as it aims to punish a tenderer who is not a party to the proceedings and has not been accorded a right to be heard.

   (b) Based on prayer 5.5 to the Appellant's Statement of Appeal and in addition to prayers in paragraph (a) herein above, the 1st Respondent prayed for the orders of **BLACKLISTING** the Appellant as per the justifications specified under item 2 (i) to (iv) of the 1st Respondent's Statement of Reply.

   (c) **Alternatively, and without prejudice to prayers (b) herein above** prohibit/ bar the Appellant from participating in the tender in dispute.

   (d) The 1st Respondent be allowed to proceed with the procurement process.

REPLY BY THE 2ND RESPONDENT

The Reply by the 2nd Respondent to the Appellant's grounds of Appeal was preceded with a Preliminary Objection on the following points of law:-

1. **The Appeal is irreparably defective for contravening the provisions of Section 95 (2) (a) of the Act.**

2. **The Appeal is improperly before this esteemed Authority for want of a decision by the Accounting Officer of the procuring entity capable of being appealed against.**

The above notwithstanding, the 2nd Respondent's reply to the Appellant's grounds of Appeal may be summarized as follows:-

1. That, the Appellant's grounds of Appeal are disputed for being preferred under Section 95 (2) (a) of the Act which prohibits a tenderer from seeking review to either the accounting officer or the Public Procurement Appeals Authority in relation to the selection of a method of procurement.

2. That, the 2nd Respondent disputes the Appellant's allegations that the 1st Respondent had prospective intention to award the tender to it. Since the said allegations are baseless, unfounded and marred with ill will.

3. That, none of its directors, employees or person acting for and on its behalf, has attended or has been a party to any negotiation meeting whatsoever regarding the alleged award of the tender to it.

4. That, this appeal is marred with malice and intended to derail and deter the Tender process.

5. Finally, the 2nd Respondent prayed that the Appellant's Statement of Appeal in its entirety and prayers sought under paragraphs 5.1, 5.2, 5.3, 5.4, and 5.5 be dismissed with costs on the following grounds:-

   i. That the reliefs claimed under paragraph 5.1 are devoid of merit and overtaken by events.

   ii. That the reliefs claimed under paragraph 5.2 are untenable since the current appeal/ review was filed prior to the submission of the Tender let alone the award of the respective contract.

   iii. That the reliefs claimed under paragraph 5.3 lack the requisite legal merit as it is founded on an inexistent provision of the law.

   iv. That the reliefs claimed under paragraph 5.4 are untenable for lack of sufficient evidence to warrant the issuance of the same.

   v. That the reliefs claimed under paragraph 5.5 are untenable under the prevailing procurement laws and the same are not only devoid of merit but lack the sufficient evidence to warrant the issuance of the same.

DETERMINATION ON THE PRELIMINARY OBJECTIONS

In view of the following preliminary objections raised by both Respondents which are reproduced hereunder:-

i. **The Appeal is vexatious, frivolous and untenable in law for want of decision by the Procuring Entity capable of being appealed against;**

ii. **The Appeal is incompetent for want of legal authorization to institute this Appeal; and**

iii. **The Appeal is irreparably defective for contravening the provisions of Section 95 (2) (a) of the Act.**

The Appeals Authority directed that the preliminary objections raised be heard first.

SUBMISSIONS BY THE 1ST RESPONDENT ON THE PO

The learned Solicitor General appearing for the 1st Respondent addressed the Appeals Authority on the first preliminary objection. He submitted that this Appeals Authority is an appellate authority which is empowered to entertain appeals arising from the decision of the procuring entities. A tenderer who is dissatisfied with the decision of the accounting officer or when the accounting officer fails to issue a decision within the prescribed time limit, is entitled to appeal to the Appeals Authority.

The learned Solicitor General submitted further that, this appeal is centered under Section 95 (1) of the Act, whereby any tenderer who is aggrieved by the acts or decision of the procuring entity is allowed to file an application for administrative review to the accounting officer challenging the said decision. If the tenderer is dissatisfied with the accounting officer's decision, then it may refer the appeal to the Appeals

Authority pursuant to Section 97 of the Act. According to Section 97 (1) of the Act, in order for a tenderer to prefer an appeal to this Appeals Authority it must be aggrieved by a decision or non-decision of the procuring entity. Furthermore, the learned Solicitor General submitted that, according to Rule 4 of the Appeals Rules, only a tenderer who is dissatisfied with the decision of the procuring entity is allowed to lodge an appeal to the Appeals Authority.

The learned Solicitor General expounded further that, before the Appeals Authority there is an appeal which did not emanate from the decision of the Accounting officer, that is to say, there was no application for admnistrative review filed to the 1st Respondent before this appeal was filed. Therefore, the learned Solicitor General argued that, without a decision from the 1st Respondent this appeal does not have any legs to stand on.

The learned Solicitor General explained the effects of lodging an appeal without a decision from the accounting officer. He relied on this Appeals Authority's decision in Appeal No. 15 of 2020-21 between ***M/S Creditinfo Tanzania Limited and TPB Bank PLC***. In this matter an appeal was dismissed for being filed prematurely.

On the second preliminary objection, the learned Solicitor General submitted that, it is trite law that where a corporate entity wishes to institute any suit before any court or tribunal it must be initiated by a board resolution. The learned Solicitor General explained that this position has been settled by the Court of Appeal in Civil Application No. 28 of 2014 in ***Ursino Palms Estate Limited versus Kyela Valley***

Foods Ltd and 2 others. In this case it was ruled that in the absence of a resolution from the Board of Directors and/or shareholders no proceedings can be instituted. The rationale behind the requirement of resolution to institute legal proceedings is provided by the High Court of Tanzania (Commercial Division) at Dar es Salaam in the Commercial case No. 57 of 2004 between ***St. Bernad's Hospital Company Limited versus Dr. Linus Maemba Mlula Chuwa*** where at pages 6 and 7 it was stated that uncontrolled companies would find themselves in futile and costly disputes commenced at the whims of erratic (or those with personal grudges to quench) officers in their employment.

The learned Solicitor General also cited another case on a similar position by the High Court of Tanzania (Land Division) at Dar es Salaam in the Land case No. 147 of 2018 between ***Evarist Steven Swai and M/S Msafiri Enterprises Company Limited versus The Registered Trustees of Chama cha Mapinduzi and 2 others.*** The relevant point is found at page 4 where it was stated that, the rationale of having a board resolution is to eliminate wasteful litigation at the expense of a company by an individual shareholder and not to incur loss to the company at the expense of unaware shareholders/directors. The learned Solicitor General referred the Appeals Authority to another case by the High Court of Kenya (Milimani Commercial & Admiralty Division) at Nairobi in the Civil case No. 45 of 2012 between ***Kenya Commercial Bank Limited versus Stage Coach Management Ltd*** which make reference to the case of ***Bugerere Coffee Growers Ltd versus Sebaduka and another [1970] IEA 147*** where the suit was dismissed for lack of board resolution.

According to the learned Solicitor General, the record of appeal does not have a board resolution authorizing Mr. Gachao Kiuna to institute this appeal on behalf of the Appellant. Therefore, the appeal should be dismissed in view of the above cited decisions.

Based on the two preliminary objections the learned Solicitor General humbly prayed that this appeal be dismissed with costs. He argued that costs are justified since the 1st Respondent conducted legal research and spent public money which could be utilized in other activities. He asked for costs in accordance with Section 13 of the Government Proceedings Act, Cap 5 and Section 97 (g) of the Act.

SUBMISSIONS BY THE 2ND RESPONDENT ON THE PO

On the first preliminary objection, the learned Counsel supported the 1st Respondent's argument on the PO. The learned Counsel stated that, the Appellant ought to have the decision of the 1st Respondent's accounting officer before lodging this Appeal. From the record of Appeal there is no proof that the Appellant had applied for administrative review to the 1st Respondent. The learned Counsel expounded further that, the Appeals Authority is not the place for lodging a fresh complaint rather for lodging an appeal. The learned counsel submitted that according to Section 97(3) of the Act, a tenderer may lodge an appeal directly to the Appeals Authority if the same could not be entertained by the accounting officer as per Section 96(5) of the Act. However, this was not the case in this appeal.

On the third preliminary objection, the learned Counsel for the 2nd Respondent submitted that, according to the Appellant this appeal emanated from Section 95 (2) (a) of the Act and Rule 6 of the Appeals Rules. The 2nd Respondent argued that the relied provisons are in fact deterring and not supporting this Appeal. The learned counsel stated that it seems that the Appellant failed to interpret the law since Section 95 of the Act cannot be read alone, it has to be read together with Sections 96 and 97 of the Act. The relied provision simply states that in the event a tenderer is aggrieved it has the right to submit application for administrative review and appeal.

The learned counsel expounded further that, the Appellant relied on Section 95 (2) (a) of the Act which the same prohibit choice of a procurement method by the procuring entity to be challenged. The learned Councel submitted further that, if a complaint or appeal is allowed on the choice of procurement method, the same would open a Pandora's box for anyone to complain.

The learned counsel argued further that, the Appellant erred in relying on Rule 6 (d) of the Appeals Rules. The said Rule provides guidance on matters which an appeal can lie, thus it cannot be the basis for this appeal. Therefore, the learned Counsel concluded its argument on the third preliminary objection by submitting that the appeal has been lodged based on deterring provisions.

The learned Counsel therefore prayed that this appeal be dismissed in its entirety with costs as per Section 97 (5) (i) of the Act.

REPLY BY THE APPELLANT ON THE PO

The Appellant submitted that, the appeal is centred on Section 95 (2) of the Act and Rule 6 (3) of the Appeals Rules. According to the Appellant Rule 6(3) of the Appeals Rules elucidate clearly matters on which an appeal to this Appeals Authority can lie. Moreover, the Appellant conceded that Section 95(1) of the Act is not relevant to this appeal.

The Appellant expounded its argument further by indicating that, it could not have lodged an application for administrative review to the 1st Respondent since the time given was short. However, after being required to consider the requirement of Sections 95(1), (2) and 96 (4) of the Act, the Appellant readily conceded that its appeal was lodged prematurely before the Appeals Authority as it ought to have lodged an application for administrative review to the 1st Respondent after receipt of the 1st Respondent's response on the request for clarification. Thus, the appeal was lodged prematurely.

With regard to the second preliminary objection, the Appellant submitted that Rule 10 of the Appeals Rules does not require a board resolution to be amongst the documents which are to be attached when lodging an appeal. The Appellant claimed that its appeal complied with the requirement of the law.

Given the fact that the Appellant conceded on the first preliminary objection that the appeal was lodged prematurely before the Appeals Authority, it humbly prayed that this Appeals Authority not to make an order as to costs.

ANALYSIS BY THE APPEALS AUTHORITY

In determining the POs raised, the main issue for consideration is ***whether or not the appeal is properly before this Appeals Authority***.

In resolving this issue the Appeals Authority took cognizance of the fact that all parties were in agreement that the appeal has been pre-maturely lodged before the Appeals Authority. Despite the agreement, the Appeals Authority deemed it proper to enlighten the Appellant about procedural requirement for filing an application for administrative review and subsequently thereafter an appeal. In so doing the Appeals Authority revisited Sections 96 (1) and (4) and 97 (1), (2) and (3) of the Act read together with Regulations 104, 105 (1), 106 (9) and 107 (1) of the Regulations as amended. For the purposes of clarity the provisions are reproduced as hereunder:-

> *Section 95 (1) "Any tenderer who claims to have suffered or who may suffer any loss or injury as a result of a breach of a duty imposed on a procuring entity or an approving authority by this Act may seek a review in accordance with sections 96 and 97."*

> *Section 96 (1) "Any complaints or dispute between procuring entities and tenderers which arise in respect of procurement proceedings, disposal of public assets by tender and awards of contracts shall be reviewed and decided upon a written decision of the accounting officer of a procuring entity and give reasons for his decision."*

Section 96 (4) "The accounting officer shall not entertain a complaint or dispute unless it is submitted within seven working days from the date the tenderer submitting it became aware of the circumstances giving rise to the complaint or dispute or when that tenderer should have become aware of those circumstances, whichever is earlier".

Section 97 (1) "A tenderer who is aggrieved by the decision of the accounting officer may refer the matter to the Appeals Authority for review and administrative decision.

(2) where-

(a) the accounting officer does not make a decision within the period specified under this Act; or

(b) the tenderer is not satisfied with the decision of the accounting officer,

the tenderer may make a complaint to the Appeals Authority within seven working days from the date of communication of the decision by the accounting officer or upon the expiry of the period within which the accounting officer ought to have made a decision"

Regulation 104 "A tenderer who claims to have suffered or who may suffer any loss or injury as a result of breach of a duty imposed on a procuring entity or an approving authority by the Act or these Regulations may apply for a review in accordance with sections 95 of the Act."

Regulation 105 (1) "Any application for administrative review shall be submitted in writing or electronically to the accounting officer of a procuring entity and a copy shall be served to the Authority within seven working days of the tenderer

becoming or should have become aware of the circumstances giving rise to the complaint or dispute".

Regulation 106 (9) "Where the complainant is not satisfied with the decision of the accounting officer or, where the accounting officer does not issue a decision within the specified time, the complainant shall submit his complaint or appeal to the Appeals Authority within seven working days from the date of communication of the decision by the accounting officer or from such date the decision ought to be issued."

Regulation 107 (1) "Complaints or disputes which-

(a) are not settled within the specified period under regulation106 (6);

(b) arise after the procurement contract has entered into force pursuant to section 60(11) of the Act,

shall be referred to the Appeals Authority within seven working days from the date when the tenderer received the decision of the accounting officer or, in case no decision is rendered after expiry of the time stipulated under regulation 106(5) or when the tenderer becomes aware or ought to have become aware of the circumstances giving rise to the complaint or dispute pursuant to section 97(3) of the Act."

The above quoted provisions entail that a tenderer who claims to have suffered or that may suffer any loss or injury as a result of a breach of a duty imposed to a procuring entity may submit a complaint to the accounting officer within seven (7) working days of becoming aware of the circumstances giving rise to a complaint. If the accounting officer

fails to issue a decision within the stipulated time or if a tenderer is dissatisfied with the decision of the accounting officer it may submit an appeal to the Appeals Authority pursuant to Section 97 of the Act read together with Regulation 107 of the Regulations.

According to the sequence of events, the response on clarification was sent to the Appellant on 17th July 2021 through email thus the Appellant ought to have applied for administrative review within seven (7) working days. That is to say the Appellant had to apply for review on/by 28th July 2021. The Appellant did not do so. Instead it filed an appeal directly to the Appeals Authority on 29th July 2021.

Given the above facts and the requirement of the law, it is obvious that the appeal has been filed prematurely as the Appellant ought to have exhausted the administrative review remedy before filing this appeal.

In view of the above, the Appeals Authority agrees with both Respondents that the appeal was filed prematurely, and thus it is not properly before the Appeals Authority.

The first PO herein above suffices to dispose the appeal for being filed prematurely before the Appeals Authority. We shall therefore not delve on the second and third POs.

Consequently, the Appeals Authority hereby dismiss the appeal and makes no order as to costs.

It is so ordered.

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

This Ruling is delivered in the presence of the Appellant, the 1st Respondent and the 2nd Respondent this 24th day of August 2021.

HON. JUSTICE (RTD) SAUDA MJASIRI

.....

CHAIRPERSON

MEMBERS:

1. DR. LEONADA MWAGIKE .....

2. MR. RHOBEN NKORI .....