IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 26 OF 2021-22

BETWEEN

M/S FOMAST COMPANY LIMITED.....APPELLANT

AND

PUBLIC PROCUREMENT REGULATORY AUTHORITY .....1ST RESPONDENT

TANZANIA NATIONAL ROADS AGENCY – RUKWA ..... 2ND RESPONDENT

DECISION

CORAM

1. Hon. Justice (rtd) Sauda Mjasiri - Chairperson
2. Mr. Rhoben Nkori - Member
3. Adv. Rosan Mbwambo - 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. Elias Fredrick Kisamo - Quantity Surveyor
2. Mr. John Mapunda - Managing Director

FOR THE 1ST RESPONDENT

1. Mr. Amosi M. Ndegi - Principal Legal Officer
2. Mr. Urso Luoga - State Attorney

FOR THE 2ND RESPONDENT

1. Adv. Gurisha Y. Muwanga - Senior Legal Counsel
2. Adv. Usaje Mwambene - Legal Counsel Tanroads, HQ
3. Eng. M. J. Mwanga - Regional Manager, Tanroads - Rukwa
4. Eng. N. A. Fashe - Head of Procurement Management Unit

The Appeal was lodged by **M/S Fomast Company Limited** (hereinafter referred to as **"the Appellant"**) against the **Public Procurement Regulatory Authority** (hereinafter referred to as "**the 1st Respondent"**) and the **Tanzania National Roads Agency - Rukwa** (hereinafter referred to as "**the 2nd Respondent"**).

The Appeal is in respect of a debarment order issued by the 1st Respondent following termination of Contract No. AE/001/2021-22/RK/W/20 for recurrent maintenance spot improvement rehabilitation to gravel standard and periodic maintenance along Kasansa - Muze and Muze - Mtosiwa unpaved regional roads (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 20th September 2021, the 2nd Respondent through a letter with Ref. No. AE/001/2021-2022/RK/W/20/32 awarded the contract to the Appellant. On 24th September 2021, the Appellant signed the contract with the 2nd Respondent. The contract value was TZS 480,625,000.00 (Four Hundred Eighty Million Six Hundred Twenty Five Thousands) only VAT exclusive. The contract period was one hundred and eighty (180) days.

On 15th October 2021, the 2nd Respondent vide a letter with Ref No. AE.190/299/16/4 informed the Appellant that the official commencement date of the contract would be 19th October 2021 after the handover of the site. The said letter also required the Appellant to submit Performance Security in the form of Unconditional Bank Guarantee in the amount of 10% of the contract value (TZS 480,625,000.00) within twenty-eight (28) days after Site Possession. The said requirement was pursuant to Clause 3.1 (a) & 3.2 of the General Conditions of Contract (GCC) and Clause 4 of the Special Conditions of Contract (SCC).

That, on 19th October 2021, the 2nd Respondent conducted the site handing over meeting and the Appellant was issued with a Site Possession Certificate. The act marked the official hand-over of the site to the Appellant.

On 2nd November 2021, the 2nd Respondent through a letter with Ref. No. AE.190/299/16/8 reminded the Appellant on the requirement to submit performance security and consequences which might arise.

Having not received the performance security, on 16th November 2021, the 2nd Respondent through a letter with Ref.No. AE.190/299/16/12 issued a second reminder to the Appellant. The 2nd Respondent further informed the Appellant that, the contract would be terminated after a lapse of 14 days from the date of the said letter if it fails to submit the performance security as required.

On 15th December 2021, the 2nd Respondent convened a Site Management meeting and amongst the issues discussed was failure by the Appellant to submit the performance security. The Appellant regretted for the delay and requested an extension of 7 days to submit it (i.e by 21st December 2021).

On 28th December 2021, the 2nd Respondent through a letter with Ref. No. AE.190/299/16/27 terminated the Contract with the Appellant for failure to submit performance security as required. On 5th January 2022, the 2nd Respondent vide a letter with Ref.No.190/299/16/30 submitted a debarment proposal to the 1st Respondent.

The 1st Respondent, after a preliminary review of the debarment proposal with its supporting documentary evidence, issued a Notice of

Intention to debar the Appellant through a letter with Ref. No. EA.8/116/16/A/13 dated 26th January 2022. The said notice was served physically upon the Appellant on 31st January 2022. The notice required the Appellant to submit its written defence within 14 days as per Regulation 96 (4) of the Public Procurement Regulations, GN. No. 446 of 2013 and GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

On 9th February 2022, the 1st Respondent received a letter from the Appellant with Ref No. FCL/PPRA/2022/01 dated 8th February 2022 requesting for extension of time to submit its written defence. On 15th February 2022, through a letter with Ref.No.EA.8/116/16/A/20 the 1st Respondent informed the Appellant that the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Regulations do not provide a room for extension of time to submit a written defence.

On 25th February 2022, the 1st Respondent received a written defence from the Appellant vide its letter with Ref. No. FCL/PPRA/2022/02 dated 24th February 2022. On 16th March 2022, the Appellant was debarred by the 1st Respondent from participating in Public Procurement for a period of six (6) months effective from 16th March 2022 up to 15th September 2022. Dissatisfied with the Debarment Order, on 23rd March 2022, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal as well as oral submissions during the hearing may be summarized as follows: -

1. That, the debarment of the Appellant in participating in public procurement by the 1st Respondent violated the constitutional right of the Appellant in that the 1st Respondent failed to ensure that the Appellant is afforded an opportunity to be heard before the decision was taken. The Appellant received the notice of intention to debar on 31st January 2022 and on 8th February 2022 applied for extension of time to file its written defence as one of its directors lost his wife, thus were unable to file their defence within the time limit.

   The Appellant submitted further that, knowing serious consequences which might arise after a debarment order is made; it requested for extension time from the 1st Respondent to prepare and submit its defence. However, the 1st Respondent declined to entertain the request. According to the Appellant, the extension of time was essential even though the governing law is silent. This is due to the fact that, the debarment order is a death penalty to a company's business life. Thus, before such an order is made, the affected party has to be accorded a right to be heard. The 1st Respondent's act of rejecting the Appellant's request for extension of time, contravenes Article 13 of the Constitution of United Republic of Tanzania, 1977 as amended (hereinafter referred to as "**the Constitution**") which provides

for a right to be heard. The Appellant added that, any law which curtails a right to be heard is unconstitutional. Therefore, the 1st Respondent's act of declining to entertain the Appellant's request for extension of time is unlawful.

2. That, the debarment of the Appellant in participating in public procurement by the 1st Respondent was shrouded with secrecy and a calculated move which contravened procedures of transparency and fairness as entrenched in the Act and its Regulations.

   The Appellant expounded that, it was served with the notice of intention to debar on 31st January 2022. It was required to file its written defence by 14th February 2022. On 8th February 2022 the Appellant requested for extension of time to file its written defence by 25th February 2022. The 1st Respondent declined to entertain the request for extension of time because the law does not allow it. This position was communicated through the letter dated 15th February 2022 received by the Appellant on 24th February 2022 after the lapse of the time within which the Appellant ought to have filed its defence. The Appellant added that, having not received the 1st Respondent's response for extension of time by 14th of February 2022, it assumed that its request was accepted. On 24th February 2022 the Appellant filed its written defence. The 1st Respondent's delay to respond to the Appellant's request for extension of time indicates that the debarment process was unfair and lacked transparency contrary to the requirement of the Act and its Regulations.

3. That, the 1st Respondent wrongly interpreted the provisions of the Act and its Regulations in debarring the Appellant. Expounding on this point the Appellant stated that, the debarment order was issued on 16th March 2022 anchored on Section 62(2)(b) & (c) of the Act read together with Regulation 93(3)(b)&(c) of the Regulations. The said provisions allow the 1st Respondent to issue a debarment order on the tenderer's failure to comply with bid securing declaration. According to the Appellant, its debarment proposal emanated from the termination of contract for non submission of the performance security, thus non - compliance with the bid securing declaration.

The Appellant submitted that, the debarment order issued by the 1st Respondent is legally premature since the termination of contract which was the basis for debarment has been challenged. The Appellant claimed that there are ongoing proceedings challenging the 2nd Respondent's act of terminating the contract. The said proceedings have been initiated by the Appellant's letter dated 3rd January 2022 and was followed by a letter dated 4th March 2022 addressed to the 2nd Respondent. The Appellant added that, the letter dated 8th February 2022 which requested for extension of time, also informed the 1st Respondent that there are proceedings which have been commenced challenging the 2nd Respondent's termination of the contract. It added that, the said proceedings were initiated pursuant to Clause 31 of the GCC.

The Appellant submitted further that, since the 1st Respondent was aware that the termination of contract which was the basis

for debarment has been challenged, it ought to have waited for the completion of the commenced proceedings. According to the Appellant a debarment order could have been issued after an arbitration or court order which sustains the termination of the contract. Therefore, the 1st Respondent's debarment order has been issued prematurely and was thus unlawful.

4. That, a debarment is a serious punishment. Its consequences may lead to a loss of employment to the Appellant's employees.

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

    i. A declaration that Appellant's debarment from participating in public procurement by the Respondents was tainted with irregularities, shrouded with secrecy, unlawful and unconstitutional;

    ii. That, the 1st Respondent's decision of 16th March 2022 debarring the Appellant from participating in public procurement be vacated;

    iii. That, the Appeals Authority order the Respondents to foot the costs of this Appeal as per the following breakdown:-

        (a) Filing fees for this Appeal; and

        (b) Advocate's fees ..... TZS 5,000,000.00

    iv. Any other order the Honorable Appeals Authority may deem fit and fair to grant.

SUBMISSIONS BY THE 1ST RESPONDENT

The 1st Respondent's reply to the grounds of Appeal as well as oral submissions during the hearing may be summarized as follows:-

1. That, the Appellant was accorded a right to be heard as it was served physically with the notice of intention to debar on 31st January 2022. The Appellant was aware of the consequences of not submitting its written defence within the specified time limit. However, on 8th February 2022, it sought for extension of time for the reason that one of its directors lost his wife, thus they would be unable to submit the written defence. The 1st Respondent declined the Appellant's request, as the company being a corporate body has more than one director; thus the remaining director should have pursued the matter.

   The 1st Respondent submitted further that, the delay in responding to the Appellant's request for extension of time, cannot be termed as lack of transparency since the extension itself is not allowed under the law.

   The 1st Respondent expounded further that, the Appellant's defence though was late, submitted on 24th February 2022 the same was considered in the debarment decision. Therefore, the Appellant was accorded a right to be heard accordingly.

2. That, the Appellant was debarred as a result of termination of contract for failure to submit performance security. According to the record of the 2nd Respondent the Appellant was awarded the

contract and was handed over the site on 19th October 2021. The Appellant was required to submit performance security within 28 days of the site hand over date. However, up to 28th December 2021 when the contract was terminated the Appellant failed to submit the performance security. Due to such an anomaly the 1st Respondent debarred the Appellant.

3. That, the 1st Respondent's debarment order was issued pursuant to Section 62 (1) and (3) (b) of the Act and Regulation 96(4) of the Regulations. The decision to debar the Appellant was legally and properly made and founded on justifiable grounds. The 1st Respondent added further that, according to the 2nd Respondent's record, the Appellant was given several reminders to submit performance security and yet failed.

4. That, there is no requirement under the Act which requires a debarment proposal to be accompanied with evidence from other institutions as alleged by the Appellant. The law requires a debarment proposal to be accompanied with evidence from within the procuring entity which led to such proposition. The 1st Respondent added that there is no record which indicates that there are proceedings which have been commenced by the Appellant challenging the 2nd Respondent's termination of contract. The 1st Respondent is not aware of any dispute concerning the termination.

5. Finally, the 1st Respondent prayed for the following: -
    i. Reliefs sought by the Appellant be quashed;

ii. The Appeals Authority refrain from lifting up the debarment decision made by the 1st Respondent;

iii. Costs of this dispute be borne by the Appellant; and

iv. Any other relief as may deem fit to grant.

SUBMISSIONS BY THE 2ND RESPONDENT

The 2nd Respondent's reply to the grounds of Appeal as well as oral submissions during the hearing may be summarized as follows:-

1. That, no constitutional provision has been violated. The Appellant was given time within which to respond to the debarment proposal but for reasons unknown to the 2nd Respondent, the Appellant decided to waive its right to be heard by not responding to the debarment proposal.

2. That, there was no calculated secrecy to debar the Appellant. The decision of the 1st Respondent to debar the Appellant from participating in public procurement was justified for the reason that, the Appellant failed to submit performance security. After the debarment proposal was submitted by the 2nd Respondent to the 1st Respondent, the Appellant failed to submit its defence. Thus, the 1st Respondent's decision to debar the Appellant was correct and the same was in line with the Act and the Regulations.

3. That, the 2nd Respondent disputes the ground of Appeal under paragraph (4) and states that, by the time the Appellant issued a notice of dispute, the 2nd Respondent had already submitted

a request to debar the Appellant. Therefore, there is no provision of the law that has been violated; and

4. Finally, the 2nd Respondent prayed for the following orders :-

   i) The Appellant's remedies sought under item 5(i) and (ii) are baseless and unfounded in law. The same ought to be dismissed in their entirety with costs; and

   ii) As to the remedy sought in paragraph 5 (ii), the Respondent avers that, the Appellant does not deserve the purported filing fees for Appeal and advocate fees on the ground that the appeal has no merits and is founded on misconception of facts and law.

ANALYSIS BY THE APPEALS AUTHORITY

During the hearing the following issues were framed by the Appeals Authority in agreement with the parties: -

1.0 Whether the debarment of the Appellant by the 1st Respondent was justified; and

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

Having identified the issues, the Appeals Authority proceeded to resolve them as follows: -

1.0 Whether the debarment of the Appellant by the 1st Respondent was justified.

In resolving this issue, the Appeals Authority deemed it proper to review the Appeal record and in so doing it was observed that on

24th September 2021, the Appellant and the 2nd Respondent entered into the contract. The site was handed over to the Appellant on 19th October 2021. The Appellant was required to submit Performance Security in the form of Unconditional Bank Guarantee within twenty-eight (28) days after site possession pursuant to Clause 3.1 (a) & 3.2 of the GCC and Clause 4 of the SCC.

Clause 4 of the SCC reads as follows:-

> Clause 4 "*Performance Security was to be in the form of Unconditional Bank Guarantee at the rate of 10% of the contract amount.*
>
> *The Contractor was required to submit the said performance security* ***within 28 calendar days after site possession otherwise the contract shall not come into effect****".*
>
> *(Emphasis supplied)*

The record of Appeal indicates further that, the Appellant failed to submit performance security despite several reminders, as a result on 28th December 2021 the 2nd Respondent terminated the contract. Subsequently, the 2nd Respondent on 5th January 2022 submitted a debarment proposal to the 1st Respondent.

In order to ascertain if the debarment proposal was submitted in accordance with the law, the Appeals Authority revisited Regulation 94 (1) of the Regulations which provides guidance on submission of debarment proposal. Regulation 94(1) reads as follows: -

Reg. 94 (1) ***"A person who wishes to submit a proposal for debarment of a tenderer to the Authority shall do so within twenty eight days of becoming aware of the circumstances or grounds which give rise to the debarment."***

(Emphasis Added)

The above mentioned provision states clearly that a debarment proposal has to be submitted within twenty eight (28) days from the date of becoming aware of the circumstances or grounds giving rise to a debarment.

The debarment proposal submission form indicates that the 2nd Respondent became aware of the ground giving rise to a debarment on 28th December 2021 when it terminated the contract with the Appellant for failure to submit Performance Security. The 2nd Respondent emphasized this position during the hearing.

Having reviewed the sequence of events in this Appeal, the 2nd Respondent's submissions during the hearing, the requirement of Clause 4 of the SCC and Regulation 94(1) of the Regulations the Appeals Authority is of the view that, the reason for termination of the contract which later on led to a debarment was the Appellant's failure to submit performance security. Counting from 19th October 2021, the 28 days within which the Appellant ought to have submitted performance security lapsed on 16th November 2021.

It is the Appeals Authority firm view that, the circumstances giving rise to a debarment arose on 16th November 2021 when the Appellant failed to submit performance security. Counting from 16th November 2021 the 28 days within which the 2nd Respondent ought to have submitted a debarment proposal lapsed on 14th December 2021. The 2nd Respondent instead of commencing the debarment proceedings went on issuing reminders and extensions for the Appellant to submit performance security. Apparently, the 2nd Respondent submitted a debarment proposal on 5th January 2022 that is twenty two (22) days after the lapse of the stipulated time limit.

From the above findings the Appeals Authority is of the settled view that, the proposal for debarment was submitted beyond the prescribed time limit as per Regulation 94(1) of the Regulations. Therefore, the 2nd Respondent's delay in submitting the debarment proposal rendered all subsequent debarment proceedings invalid.

Given the circumstances, the Appeals Authority concludes the first issue in the negative that the debarment of the Appellant was not justified.

The above determined point suffices to conclude this Appeal as the debarment proposal which initiated the debarment of the Appellant was lodged in contravention of the law. Therefore, the Appeals Authority would not delve on other grounds of the Appeal.

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

Taking cognizance of the findings on the first issue herein above, the Appeals Authority hereby allow the Appeal and nullifies the 1st Respondent's decision to debar the Appellant from participating in public procurement for a period of six (6) months effective from 16th March 2022 up to 15th September 2022. The Appeals Authority uplifts the debarment order and orders the 1st Respondent to communicate this order in the same manner the debarment was effected.

Each party to bear its own costs.

It is so ordered.

This Decision is binding on the Parties and may be executed in terms of Section 97 (8) of the Act.

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

The Decision is delivered in the presence of the Appellant and the Respondents this 22nd day of April 2022.

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HON. JUSTICE (rtd) SAUDA MJASIRI

CHAIRPERSON

MEMBERS:

1. **MR. RHOBHEN NKORI**.....
2. **ADV. ROSAN MBWAMBO**.....