IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 27 OF 2021-22

BETWEEN

M/S CHELESI GENERAL ENTERPRISES LTD.....APPELLANT

AND

TANZANIA NATIONAL ROADS AGENCY – RUKWA ..... 1ST RESPONDENT

PUBLIC PROCUREMENT REGULATORY AUTHORITY .....2ND RESPONDENT

DECISION

CORAM

1. Adv. Rosan S. Mbwambo - Ag. Chairperson
2. Dr. William M. Kazungu - Member
3. Mr. Pius M. Mponzi - Member
4. Ms. Florida R. Mapunda - Ag. Secretary

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. Elias Fredrick - Quantity Surveyor
2. Mr. Huzuni Malcusi Chelesi - Managing Director
3. Ms. Neema Chelesi - Director
4. Mr. John Nduguru - Accountant

FOR THE 1ST RESPONDENT

1. Mr. Kenan T. Komba - Chief Legal Counsel
2. Mr. Usaje A. Mwambene - Senior Legal Counsel
3. Eng. Fashe, N. A. - Head of Procurement Management Unit (HPMU)

FOR THE 2ND RESPONDENT

1. Mr. Bernard Kongora - Director of Legal Public Affairs (DLPA)
2. Mr. Joachim E. Mambo - Ag. Manager Legal and Secretariat Affairs (Ag. MLSA)

This is an Appeal by **M/S Chelesi General Enterprises Ltd** (hereinafter referred to as **"the Appellant"**) against the **Tanzania National Roads Agency - Rukwa** (hereinafter referred to as "**the 1st Respondent**") and the **Public Procurement Regulatory Authority** commonly known by its acronym as **"PPRA"** (hereinafter referred to as "**the 2nd Respondent**"). The Appellant is challenging a debarment order issued by the 2nd

Respondent on 23rd February, 2022 following a debarment proposal submitted by the 1st Respondent dated 29th December, 2021.

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 debarment proposal was preceded by termination of Contract No. TANROADS/RK/2021-2022/W/24 for Periodic Maintenance, Recurrent Maintenance, Spot Improvement and Rehabilitation to Gravel Standard along Mtowisa - Ilemba Unpaved Regional Road (hereinafter referred to as "**the contract**"). On 1st September 2021, the 1st Respondent through a letter with Ref. No.AE/001/2021-22/RK/W/24/32 awarded the contract to the Appellant. On 24th September 2021, the Appellant signed the contract with the 1st Respondent. The contract value was TZS 588,970,000.00 (Five Hundred Eighty Eight Million Nine Hundred Seventy Thousand) only VAT exclusive. The contract period was one hundred and eighty (180) days. On 5th October 2021, the 1st Respondent conducted the site handing over meeting and the Appellant was issued with a Site Possession Certificate.

According to Clause 3.1 and 3.2 of the General Conditions of Contract (GCC) the Appellant was required to submit performance guarantee within twenty eight (28) days of the date of site possession, that is by 2nd November, 2021. The Appellant did not furnish the security as required. On 2nd November, 2021 the 1st Respondent through a letter with Ref. No.

AE.190/299/17/10 reminded the Appellant on the requirement to submit performance security and consequences which might arise.

Having not received the performance security, on 19th November 2021, the 1st Respondent through a letter with Ref. No. AE.190/299/17/12, once again, issued a second reminder to the Appellant. The 1st Respondent further informed the Appellant that the contract would be terminated after a lapse of 14 days from the date of the said letter should it fail to submit the performance security.

On 23rd November 2021 and 7th December 2021, the 1st Respondent invited the Appellant to attend management meetings. The Appellant did not attend the said meetings as scheduled. Consequently, on 17th December 2021, the 1st Respondent through a letter with Ref.No.AE.190/299/17/19 terminated the Contract for failure to submit performance security.

After the termination the 1st Respondent vide a letter with Ref.No.190/299/17/22 dated 29th December 2021, submitted a proposal to the 2nd Respondent to debar the Appellant. Upon preliminary review of the debarment proposal the 2nd Respondent issued a Notice of Intention to debar the Appellant through a letter with Ref. No. EA.8/116/16/A/12 dated 17th January 2022. The notice required the Appellant to submit its written defence within 14 days pursuant to 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**"). This notice was served upon the Appellant by dispatch. The Appellant accordingly submitted its written defence to the 2nd Respondent on 19th January 2022.

In its 12th Extra- Ordinary Meeting held on Monday 21st February 2022 the Technical Committee of the 2nd Respondent unanimously approved the proposal by the 1st Respondent to debar the Appellant. Through a letter dated 23rd February 2022, the 2nd Respondent informed the Appellant that it has been debarred by the 2nd Respondent from participating in Public Procurement for a period of one year effective from 21st February 2022 up to 20th February 2023. Dissatisfied with the Debarment Order, on 4th April 2022 the Appellant lodged this Appeal. On 8th April 2022 the Appellant filed amended Statement of Appeal.

Upon being served with the Statement of Appeal the 2nd Respondent raised a preliminary objection on a point of law that the Appeal has been filed out of the prescribed time. During the hearing the Appeals Authority directed that it would hear both the preliminary objection and the Appeal on merits together. Three issues for consideration were framed. While issue number one deals with the preliminary objection issues number two and three are on merits of the appeal. The issues are as follows, namely: -

1.0 Whether the Appeal is properly before the Appeals Authority;

2.0 Whether the debarment of the Appellant by the 2nd Respondent was justified; and

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

SUBMISSIONS BY THE 2ND RESPONDENT ON THE FIRST ISSUE, THE PRELIMINARY OBJECTION

Counsel for the 2nd Respondent commenced its submission by stating that, this Appeal has been filed out of time prescribed under Section 62(6) of the Public Procurement Act No. 7 of 2011, as amended (hereinafter referred to as "**the Act**"). The Counsel expounded that, the Appellant challenges the debarment order issued by the 2nd Respondent. According to the counsel the said debarment order was communicated to the Appellant on 23rd February 2022 via its email address chelesimark@yahoo.com at 16:31:52 EAT. The same letter was also sent to the Appellant's postal address on 25th February 2022. The Appellant had twenty one (21) days to file the Appeal to the Appeals Authority. However, the Appeal was filed on 4th April 2022. This was after expiry of forty five (45) days and without leave to file the Appeal out of time.

Counsel for the 2nd Respondent added that, the amended Statement of Appeal has been signed by a person who does not appear in the records of

the Tender proceedings. As per the records, all correspondences like the contract and other letters from the Appellant to the Respondents were signed by one Huzuni Malkusi Chelesi. However, the amended Statement of Appeal was signed by H.M. Chelesi. The difference in signatures raises doubt as to whether the person who signed the amended Statement of Appeal has authority to transact on behalf of the Appellant in this Appeal.

Finally, the 2nd Respondent prayed for dismissal of the Appeal with costs for being filed out of time and or for being signed by a person who has not been authorized.

REPLY BY THE APPELLANT

In response the Appellant submitted that the PO so raised lacks merit as it is a pure misconception of law and facts. The 2nd Respondent communicated its debarment decision to the Appellant through both email and ordinary post. However, the Appellant did not receive any email from the 2nd Respondent. The letter informing it about the debarment decision was collected from the Appellant box office on 23rd March, 2022. Therefore, the Appellant knew of the decision on 23rd March, 2022. The Appellant expounded that, it has two email accounts that is; Yahoo and Gmail. The Yahoo account (chelesimark@yahoo.com) through which the 2nd Respondent purported to have sent a debarment decision is no longer in use as it had some problems. The current and the existing email address is chelesimark@gmail.com.

The Appellant submitted further that the 2nd Respondent was duty bound to ensure that the debarment decision is received by the Appellant as soon as it was issued. The Appellant submitted further that the notice of intention to debar was issued on 17th January 2022 and was physically communicated to the Appellant by dispatch on the same date. The Appellant contended that the 2nd Respondent should have used the same modality to communicate the debarment decision.

The Appellant submitted further that upon receipt of the debarment decision through post on 23rd March 2022, it lodged its Appeal on 4th April 2022 and the amended Statement of Appeal was filed on 8th April 2022. Therefore, the Appeal was lodged within the specified 21 days as per Section 62(6) of the Act.

Regarding different signatures of the Appellant's representative, the Appellant submitted that such an argument should not be accepted as a point of law as it cannot stand on its own. According to the Appellant, this point needs to be supported by facts and evidence. The Appellant's representative has several signatures. Thus, one cannot challenge the signatures without verifying the facts. Therefore, the argument is not a pure point of law.

Finally the Appellant prayed that the preliminary objection should be dismissed with costs.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PRELIMINARY OBJECTION

The Appeals Authority revisited Section 62(6) of the Act read together with Regulation 103(1) of the Regulations. They read as follows: -

> *Sec. 62 (6) "A tenderer blacklisted pursuant to this section may* ***appeal against the decision to the Appeals Authority within twenty one days from the date when he became aware or should have become aware of such decision."***
>
> (Emphasis added)
>
> *Reg. 103(1) " A tenderer who is dissatisfied with the debarment decision made by the Authority under these Regulations,* ***may appeal against the decision to the Appeals Authority within twenty one days from the date of becoming aware of such decision.***
>
> (Emphasis added)

The above quoted provisions indicate that a tenderer dissatisfied with a blacklisting decision issued by the 2nd Respondent may appeal to the Appeals Authority within twenty one days (21) of becoming aware or ought to have become aware of such a decision.

According to the record of Appeal, the 2nd Respondent communicated the debarment decision issued on 21st February 2022 through a letter dated

23rd February 2022. The said letter was sent to the Appellant on the same date through email chelesimark@yahoo.com. Also, the same decision was posted to the Appellant's postal address on 25th February 2022. The 2nd Respondent claimed that the Appellant ought to have lodged its Appeal within 21 days from the date of receipt of the debarment decision. Instead, the Appeal was lodged after lapse of 45 days.

The Appellant on its part denied to have received the debarment decision on 23rd February 2022. The Appellant claimed to have received the said decision on 23rd March 2022 through postal address and the Appeal was filed on 4th April 2022, well within the stipulated time limit.

During the hearing the 2nd Respondent was required to clarify the mode of service used to communicate the debarment decision. In response thereto, the 2nd Respondent stated that its decision was communicated to the Appellant on 23rd February 2022 through the email address of chelesimark@yahoo.com sent at 16:31:52 EAT. Then on 25th February 2022, the said decision was posted to the Appellant through its postal address.

The Members of the Appeals Authority asked the Appellant to clarify if it received the said email from the 2nd Respondent. In its reply the Appellant submitted that, the used email address much as it belongs to them, it is not working since November 2021. The current email in use is chelesimark@gmail.com. The Appellant was required to clarify further if the malfunctioning of yahoo mail and the new email address was known to the

2nd Respondent. In response thereof, the Appellant conceded to have not informed the 2nd Respondent about the malfunctioning of the Yahoo mail and the existence of the Gmail account. The Appellant further failed to clarify why the yahoo mail which is not functioning still appears on its letterhead in a letter dated 19th January 2022 addressed to the 2nd Respondent and in the Statement of Appeal.

The Appeals Authority revisited Section 14 of the Electronic Transaction Act No. 13 of 2015 which provides guidance on service by electronic means. The said provision reads as follows: -

> *Sec. 14(1) "Where the law requires a document to be served, that requirement is met if the document is served in an electronic form.*
>
> *(2) Subsection (1) shall apply where there is an information processing system which can-*
>
> *(a) Identify the origin, destination, time and date of service, sending or delivery; and*
>
> *(b) Acknowledge receipt of the document."*

According to the above quoted provision service of a document sent electronically becomes effective where there is an information processing system which can identify *"the origin, destination, time and date of service, sending or delivery"* and which can *"Acknowledge receipt of the document".*

In this Appeal, it is evident that the debarment decision was sent by the 2nd Respondent to the Appellant electronically. The 2nd Respondent used its official email, ceo@ppra.go.tz through the Appellant's email, chelesimark@yahoo.com. The email was sent on Wednesday, 23rd February 2022 at (16:31:52 EAT). Therefore, the information processing system has identified the origin and destination of the document. It has also shown the time and date of sending the document. However, the time and date of service or delivery has not been identified.

There is also another requirement under section 14 (1) & (2)(b) of the Electronic Transaction Act No. 13 of 2015. This is the requirement that the information processing system used must also show that receipt of the document has been acknowledged by the recipient. The Appellant denies receipt of the same due to allegedly malfunctioning of its email address. Therefore, there is no acknowledgement of receipt.

The Appeals Authority observed further that, there was no proof as to when a copy of the debarment decision sent to the Appellant via postal address was received. During the hearing the 2nd Respondent presented a dispatch book which indicates that the said decision was posted with a stamp. The 2nd Respondent also confirmed that they used ordinary post and not registered post. Thus, it was difficult to establish as to when the Appellant received such a letter since the post mode used by the 2nd Respondent do not provide proof of service.

Based on the above facts, the Appeals Authority is of the view that the 2nd Respondent has failed to provide proof of the date and time the

debarment decision was served upon and or delivered to the Appellant electronically. Neither did the 2nd Respondent prove that receipt of the decision in an electronic form was acknowledged by the Appellant. There is also no proof as to the date when the service by post was made.

The 2nd Respondent's proposition that the Appellant should have received the letter by post within three days of posting is, with due respect, declined. The Appeals Authority also declines the 2nd Respondent's proposition that since the email sent on the 23rd February, 2022 did not bounce back it should be taken that the Appellant received it on the same date.

The Appellant alleges that it collected the debarment decision from its post address on 23rd March 2022. Therefore, the 23rd March 2022 is a time of reckoning. Since there is no any other proof that the Appellant received the debarment decision earlier than 23rd March 2022, it becomes difficult to establish any other date as to when the Appellant became aware of the debarment decision. Under the circumstances the Appeals Authority recognizes 23rd March 2022 as the date the Appellant became aware of the 2nd Respondent's debarment decision. Counting from 23rd March 2022, the twenty one (21) days within which the Appellant ought to have filed its Appeal lapsed on 13th April 2022. The Appellant lodged its Appeal on 4th April 2022 and amended statement of appeal on 8th April 2022. Therefore, the Appellant's Appeal was lodged within the stipulated time.

In relation to the 2nd Respondent's contention that the Statement of Appeal was not signed by the Appellant's authorized person, the Appeals Authority

is of the firm view that to determine this point one needs to ascertain facts as who signed the Statement of Appeal. It is therefore, not a pure point of law in view of the position of the law as stated in ***Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd.*** **(1969) EA 696.** In the said case it was stated that: -

> *"A preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct it cannot be raised if any fact has to be ascertained."*

Based on the above findings, the preliminary objection fails and is hereby overruled. The Appeals Authority now proceeds to determine the Appeal on its merits.

SUBMISSIONS BY THE APPELLANT ON MERITS

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

1. That, there was no proper service to the Appellant on the reminder letters to submit Performance Security. According to the Appellant, after the site was handed over to it on 5th October 2022, it started execution of works. Thus, the 1st Respondent was aware of its existence on the site and therefore it ought to have served all the reminder letters to submit performance security physically to it. To the contrary, the 1st Respondent alleged to have sent the reminder letters through email which was not

working and therefore, the same were not received. The 1st Respondent ought to have contacted the Appellant physically as it was on the site before terminating the contract. Thus, the 1st Respondent had no mandate to terminate the contract without according the Appellant the right to be heard.

2. That, the Appellant has been condemned on the misdeed beyond its control. According to it, it submitted a request for a bank guarantee on around November 2021. At the time it was waiting for bank's response, the 1st Respondent terminated the contract. The Appellant expounded further that, before the 1st Respondent terminated the contract, it ought to have inquired from the bank on the Appellant's performance guarantee status. Had the 1st Respondent requested for such information from the bank, it could not have terminated the contract.

   The Appellant expounded further that, the 1st Respondent failed to apply waiver doctrine as per Clause 3.3 of the GCC. According to the said clause where the employer hands over the site to the contractor it indicates that other conditions precedent have been waived. The Appellant was handed over the site on 5th October 2021. After the site handover, the Appellant started executing the works. Thus, the handing over of the site and issuance of Site Possession Certificate implies that the 1st Respondent waived the requirement of submitting performance security. Therefore, the 1st Respondent ought to have not terminated the contract.

Furthermore, the Appellant added that, it has executed several works under the supervision of the 1st Respondent. Photographs of the works on progress have been attached to the Appellant's Statement of Appeal. Thus, there is contractual guarantee on the amount of money held by the 1st Respondent for the works executed by the Appellant. The 1st Respondent ought to have held the money to be paid to the Appellant as a performance security instead of terminating the contract.

3. That, the 2nd Respondent has misinterpreted the requirement of the law when effecting the Appellant's debarment. According to Regulation 94(1) of the Regulations, in order for the debarment proposal to be valid the same ought to have been submitted within twenty eight (28) days of becoming aware of the circumstances giving rise to the debarment. In this Appeal, the 1st Respondent was aware of the Appellant's breach from 28th October 2021 when it failed to submit performance security. The 1st Respondent had 28 days of submitting the debarment proposal to the 2nd Respondent. Counting from 28th October 2021, the twenty eight (28) days within which the 1st Respondent ought to have applied for debarment lapsed on 28th November 2021. To the contrary, the 1st Respondent submitted the debarment proposal on 29th December 2021.

The Appellant expounded that, the 2nd Respondent when entertaining the 1st Respondent's debarment proposal ought to have taken into consideration the requirement of Regulation 94(1) of the Regulations which provides time limit for submission of debarment proposal. If the

2nd Respondent had been keen enough, it would not have debarred the Appellant as the proposal to do so was filed beyond the stipulated time limit. Thus, the 2nd Respondent's decision to debar the Appellant is not justified as the debarment proposal was submitted out of time.

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

   i. The 1st Respondent's decision issued on 17th December 2021 be quashed;

   ii. The debarment decision made by the 2nd Respondent on the 23rd February 2022 be nullified and subsequent to such nullification issue an order to the effect that the Appellant is allowed to participate in public procurement proceedings;

   iii. The 2nd Respondent be compelled to notify all procuring entities that the Appellant is free and it is entitled to participate in public procurement proceedings;

   iv. The Respondents be ordered to pay the costs of this Appeal; and

   v. Any other relief which the Appeals Authority may deem fit to grant.

SUBMISSIONS BY THE 1ST RESPONDENT

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

1. That, the Appellant's debarment proposal was initiated after termination of the contract for failure to submit performance security. The Appellant was served with several reminder letters to submit performance security and was invited to attend management meetings. The letters were sent through physical address and the Appellant's email chelesimark@yahoo.com. However, the Appellant neither replied to the letters nor attended the management meetings. Thus, the allegation that the said letters were not received by the Appellant is not true but intends to mislead the Appeals Authority.

2. That, the Appellant was not condemned on the misdeed beyond its control. According to the letter from the bank, the Appellant applied for performance guarantee after expiry of 28 days within which it ought to have submitted the performance security to the 1st Respondent.

   The 1st Respondent submitted further that, according to Clause 3.1 and 3.2 of the GCC modified by Clause 4 of the SCC, the contract would come into effect upon fulfillment of all the conditions precedent that have been specified. According to the sequence of events, the contract was signed on 24th September 2021. The site was handed over to the Appellant on 30th September 2021 and it was required to submit performance security within twenty eight (28) days from the date of site hand over. Counting from 30th September 2021, the 28 days within which the Appellant ought to have submitted the performance security lapsed on 28th October 2021. However, the Appellant failed to comply with such requirement.

The 1st Respondent used several ways like issuing reminder letters and inviting the Appellant to attend management meetings all aiming at reminding it to submit performance security. However, the efforts ended in vein. Thus, on 17th December 2021, the 1st Respondent terminated the contract pursuant to Clause 69(2)(c) of the GCC. After termination of the contract, the 1st Respondent submitted a debarment proposal to the 2nd Respondent on 29th December 2021 within 28 days as required by the law.

The 1st Respondent adhered to the principles and best practices of contract management which requires termination of the contract to be the last option after exhausting all other available means. Apart from that, the principle of value for money requires the employer to apply best efforts to rescue the contract before terminating the same. The 1st Respondent also being an employer its duty is not only entering into contracts but also to ensure that execution is undertaken. The 1st Respondent invoked several ways including the issuance of several reminders to furnish performance security. The 1st Respondent also invited the Appellant to attend management meetings so as to rescue the situation. All these effort proved futile and therefore the 1st Respondent had no other option than terminating the contract.

3. That, the 2nd Respondent's decision to debar the Appellant was proper and it complied with the Act and its Regulations. The 1st Respondent applied for debarment after termination of the contract. The 1st Respondent could have not applied for debarment earlier than after

termination of contract as it was expected that the Appellant would furnish the performance security.

4. That, since the site hand over the Appellant had not executed any work. Neither has it been issued with approved Interim Payment Certificate. The contention that the Appellant had executed several works after the site hand over intends to mislead this Appeals Authority.

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

    i. The Appellant's remedies sought under item 5 (i), (ii), (iii), (iv) and (v) are baseless and unfounded in law. The same should be dismissed in its entirety with costs; and

    ii. As the remedy sought in paragraph 5(iv), the 1st Respondent avers that, the Appellant does not deserve the purported filing fees for this appeal and advocate fees on the ground that the Appeal has no merits and founded on misconception of facts and law on the subject.

SUBMISSIONS BY THE 2nd RESPONDENT

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

1. That, the decision to debar the Appellant was legally and properly delivered on founded and justifiable ground pursuant to Section 62(1) and (3)(b) of the Act and Regulation 96(4) of the Regulations.

2. That, the debarment proposal was submitted pursuant to Regulation 94(1) of the Regulations. According to the 2nd Respondent the cause of action which led to Appellant's debarment arose on 17th December 2021 when the 1st Respondent terminated the contract. The 1st Respondent could not have submitted a debarment proposal prior to termination of the contract as the parties (1st Respondent and the Appellant) were trying to settle the matter amicably.

   Regulation 94(1) of the Regulations requires debarment proposal to be submitted within 21 days of becoming aware of the circumstances giving rise to a debarment. As per the sequence of events, the 1st Respondent terminated the contract on 17th December 2021 and the debarment proposal was submitted on 29th December 2021. Thus, the debarment proposal was submitted within 21 days as required by the law.

3. Finally, the 2nd Respondent generally prayed that, all prayers for remedies by the Appellant be quashed; and in specific prayed that, the Appeals Authority may: -

   i. Refrain from lifting up the debarment decision made by the 2nd Respondent;

   ii. costs of this Appeal to be borne by the Appellant; and

   iii. Any other relief as may be deemed fit to grant.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority's analysis is based on the issues agreed upon by the parties, records of Appeal, the arguments by the parties during the hearing as well as the applicable law. The Appeals Authority took cognizance of the fact that the first issue has been dealt with hereinabove, thus, it proceeds to determine the second and third issues: -

2.0 Whether the debarment of the Appellant by the 2nd Respondent was justified

In resolving this issue, the Appeals Authority reviewed the record of Appeal and observed that the Appellant and the 1st Respondent signed the contract on 24th September 2021. The site was handed over to the Appellant on 5th October, 2021 and site possession certificate was issued on the same date. The 1st Respondent contention that the site possession was handed over on 30th September is not correct.

Pursuant to Clause 3.1 (a) & 3.2 of the GCC and Clause 4 of the SCC the Appellant was required to submit performance security in the form of Unconditional Bank Guarantee within twenty eight (28) days of the date of site possession. Clause 4 of the SCC reads:

> 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 added)

The record of appeal indicates further that the 1st Respondent became aware of the breach on 2nd November 2021 when the Appellant failed to submit performance security. The 1st Respondent issued several reminders to the Appellant to furnish the security but ended in vain. As a result, on 17th December 2021 the 1st Respondent terminated the contract. Thereafter, the 1st Respondent on 29th December 2021 submitted a debarment proposal to the 2nd Respondent.

Regulation 94 (1) of the Regulations provides guidance on submission of debarment proposals. 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 1st Respondent became aware of the ground giving rise to a debarment on 17th December 2021 when it terminated the contract for failure to submit Performance Security.

The reason for debarment is the Appellant's failure to submit performance security within twenty-eight (28) days of the site handing over date. The site handing over date was 5th October, 2021. Counting from 5th October 2021 when the site was handed over to the Appellant, the 28 days within which the Appellant ought to have submitted performance security to the 1st Respondent lapsed on 2nd November 2021.

Counting from 2nd November 2021, the 28 days within which the 1st Respondent ought to have submitted a debarment proposal lapsed on 30th November 2021. It is apparent that the 1st Respondent instead of initiating the debarment proceedings went on issuing reminders and extensions for the Appellant to submit performance security. Apparently, the 1st Respondent submitted a debarment proposal on 29th December 2021 which is twenty nine (29) days after the lapse of the stipulated time limit.

The Appeals Authority considered the 1st Respondent's argument that, principles and best practices of contract management require that prior to termination of the contract other means should be invoked for rescuing the contract from termination. The Appeals Authority agrees with the 1st Respondent in principle that the principles and best practices of contract

management should be observed in execution of contracts. The Appeals Authority is however, of the view that observance of the principles and best practices of contract management should not contravene other laws.

The Appeals Authority finds that principles and best practices of contract management cannot override the provisions of Regulation 94(1) of the Regulations which requires that a proposal for debarment should be submitted within 28 days of becoming aware of the circumstances giving rise to the debarment. The 1st Respondent became aware of the reason for debarment on 2nd November 2021 when the Appellant failed to furnish the performance security as per Clause 4 of the SCC.

Therefore, the Appeals Authority is of the settled view that, the proposal for debarment was submitted beyond the prescribed time limit contrary to Regulation 94(1) of the Regulations. Thus, the 1st Respondent's delay in submitting the debarment proposal rendered all subsequent debarment proceedings invalid.

The Appeals Authority further observed that, Clause 4 of SCC relied upon by the 1st Respondent requires submission of the performance security after signing of the contract and site hand over. That requirement contravenes Section 58 (2) of the Act read together with Regulations 29(3) and 233(1) & (4) of the Regulations. The above provisions of the law require the successful tenderer to submit the performance security before signing of the contract. The provisions read as follows: -

Sec. 58(2) *"**A successful tenderer shall be required to submit performance guarantees, subject to the conditions specified in the regulations.**"* (Emphasis added)

Reg. 29(3) *"Within a period prescribed in the tender documents, **the successful tenderer shall, after receipt of the notice of acceptance, furnish the procuring entity with the performance security in accordance with conditions of contract and in form prescribed in the tender documents.**"*

Reg. 233(1) *"without prejudice the provisions relating to vetting of the contract, **where a tender is accepted by the accounting officer, the procuring entity and the person whose tender is accepted shall enter into formal contract for supply of goods, provision of services or undertaking of works within fourteen working days after fulfilling conditions prior to the signing of the contract.**"*

(4) ***Where a successful tenderer fails** to sign a written contract as required, or **to provide any required security for the performance of the***

contract, the procuring entity shall, on the recommendation of the tender board, select a competitive tender from among the remaining tenders that are in force, subject to the right of the procuring entity, to reject all remaining tenders."

(Emphasis added)

Based on the above findings, the Appeals Authority concludes the second issue in the negative that the debarment of the Appellant was not justified, hence it would not delve on other grounds as submitted by the Appellant.

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

Taking cognizance of the findings on the second issue herein above, the Appeals Authority hereby allow the Appeal and nullifies the 2nd Respondent's decision to debar the Appellant from participating in public procurement for a period of one (1) year effective from 21st February 2022 up to 20th February 2023. The Appeals Authority hereby uplifts the debarment and orders the 2nd Respondent to communicate this decision in the same manner the debarment was communicated.

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 17th day of May 2022.

.....

ADVOCATE ROSAN S. MBWAMBO

Ag. CHAIRPERSON

MEMBERS:

1. **DR. WILLIAM M. KAZUNGU**.....

2. **MR. PIUS M. MPONZI**.....