

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM

APPEAL CASE NO. 151 OF 2013

BETWEEN

M/S BAOTOU BEIFANG  
CHUANGYE CO. LTD.....APPELLANT

AND

TANZANIA RAILWAYS LIMITED.....RESPONDENT

RULING

CORAM:

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

SECRETARIAT:

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

FOR THE APPELLANT:

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

FOR THE RESPONDENT:

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

OBSERVER

Mr. Viresh Patel – Advisor, Texmaco Rail & Engineering Ltd

This Ruling was scheduled for delivery today 3<sup>rd</sup> July, 2013 and we proceed to deliver it.

The Appeal at hand was lodged by M/s BAOTOU CHUANGYE CO. LIMITED (hereinafter referred to as "the Appellant") against the TANZANIA RAILWAYS LIMITED commonly known by its acronym TRL (hereinafter referred to as "the Respondent").

The said Appeal is in respect of Tender No. PA/113/2012-13/ME/G/OE/013 for Supply of 25 New Ballast Hopper Bogie Wagons (hereinafter referred to as "the tender").

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

The Respondent vide The Citizen newspaper dated Friday 9<sup>th</sup> November, 2012, invited tenderers to submit their tenders for the tender under Appeal.

The deadline for submission of tenders was set for 04<sup>th</sup> January, 2013, but was later extended to 28<sup>th</sup> January, 2013, whereby the following ten tenders were submitted;

| S/NO | Tenderers Name                                       | Quoted price in USD             |
|------|--|---------------------------------|
| 1.   | M/s Texmaco Rail & Engineering Ltd                   | 2,081,606/-                     |
| 2.   | M/s Transnet Rail Engineering                        | 3,108,687/-                     |
| 3.   | M/s DCD Rolling Stock                                | 5,496,775/-                     |
| 4.   | M/s CNR Import & Export Corporation Ltd              | 2,206,000/-                     |
| 5.   | M/s Hindusthan Engineering & Industries Ltd          | 2,561,187.50<br>Modified tender |
| 6.   | M/s Lucky Exports                                    | 3,155,927/-                     |
| 7.   | M/s Hunan Construction Engineering Group Corporation | 2,910,348/-                     |
| 8.   | M/s Baotou Beifang Chuangye Co. Ltd                  | 2,475,835/-                     |
| 9.   | M/s Modern Industries                                | 3,344,925/-                     |
| 10.  | M/s Catic Beijing Co. Ltd                            | 2,285,337/-                     |

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

During preliminary evaluation the remaining five tenders were found to be non responsive to the tender requirements. The said tenders were from the following firms; Texmaco Rail & Engineering Ltd, DCD Rolling Stock, CNR Import & Export Corporation Ltd, Hunan Construction Engineering Group Corporation and Catic Beijing Co. Ltd.

The remaining five tenders were found to be substantially responsive and were then subjected to detailed technical evaluation.

During detailed technical evaluation, the tender by M/s Baotou Beifang Chuangye Co. Ltd was disqualified on the reason that, they submitted helical coil suspension instead of rubber suspension spring contrary to Clauses 14.1 and 14.2 of the Instructions To Bidders (hereinafter referred to as ITB).

The remaining four tenders were considered for price comparison and were ranked as follows:

| S/No | Tenderers Name                              | Total price in USD | Rank |
|------|---|--------------------|------|
| 1    | M/s Hindusthan Engineering & Industries Ltd | 2,551,187.00       | 1    |
| 2    | M/s Lucky Exports                           | 3,155,927.00       | 2    |
| 3    | M/s Transnet Rail Engineering               | 3,198,536.47       | 3    |
| 4    | M/s Modern Industries                       | 3,388,541.00       | 4    |

Having completed the evaluation process, the Evaluation Committee recommended the award of tender to M/s Hindusthan Engineering & Industries Ltd at a contract price of USD 2,551,187.00.

The Respondent's Tender Board at its meeting held on 20<sup>th</sup> February, 2013, approved the recommendation of the Evaluation Committee.

On 26<sup>th</sup> February, 2013, the Respondent vide a letter referenced PA/113/2012-13/me/G/OE/013 communicated the award of tender to the successful

tenderer, namely, M/s Hindusthan Engineering & Industries Ltd.

The Appellant vide a letter dated 4<sup>th</sup> April 2013 sought for guidance from the Respondent on whether they should extend their Bid Validity period which was to expire on 9<sup>th</sup> April, 2013.

On 10<sup>th</sup> April, 2013, the Respondent vide a letter referenced TRL-PA/113/2012-13/ME/G/OE/013 informed the Appellant that their tender was unsuccessful.

Being dissatisfied with the award of tender to the successful tenderer, the Appellant vide a letter referenced PA/113/2012-13/G/OE/014/TRL/TZ dated 20<sup>th</sup> April, 2013, sought for an administrative review to the Respondent on the following grounds;

- (a) The Tender by the successful tenderer was modified during tender opening without a notice of modification contrary to ITB Clause 24.1

- (b) The successful tenderer deprived other tenderers rights contrary to Section 43(a) and (b) of the Public Procurement Act No. 21 of 2004 (hereinafter referred to as the Act)
- (c) The successful tenderer submitted an alternative bid contrary to ITB Clause 19.1, that made the Appellant to think that the successful tenderer had an inside information on the tender from the Respondent.
- (d) The successful tenderer submitted an original bid and modified bid contrary to ITB Clauses 24.1 and 24.3.
- (e) They requested the Respondent to read the two tender prices by the successful tenderer so as to allow their bid to be considered further as per ITB Clauses 25, and 25.4, but the Respondent did not accept their plea.



- (f) The tenderers required the Respondent to read out the price of modified tender and the original tender submitted by the successful tenderer as per the requirement of ITB Clauses 25 and 25.4.
- (g) Contrary to ITB Clauses 24.1 and 24.4, the modified tender by the successful tenderer was read out while the original tender price was not read out.
- (h) The price by the successful tenderer was higher compared to that of the Appellant. The award to them leaves doubts and contravenes Section 43 (c) of the Act.

The Respondent replied to the Appellant's concerns vide a letter referenced TRL-PA/113/2012-2013 dated 7<sup>th</sup> May, 2013. The Respondent's letter was received by the Appellant on 21<sup>st</sup> May 2013. The letter indicated that:

- (a) Tenderers who attended the tender opening ceremony were informed of the notice and the

modified tender by the successful tenderer and they accepted it before reading out the tender price. Also, Clause 24(1) of the ITB allows modification of the tender. Further that, there was no tenderer who demanded to be given a copy of the notice for modification of the successful tenderer's tender.

- (b) The letter and modified tender were submitted by the successful tenderer prior to the time of tender opening. Furthermore tenderers could have been deprived of their right to participate fairly if at all the modified tender was submitted after tender opening.
- (c) The successful tenderer submitted one tender which was modified by submitting another document, therefore, this cannot be taken as an alternative tender since the first tender was cancelled by the modified tender.

- (d) Tenderers requested the Chairman to read out the price of the withdrawn tender but the chairman insisted that the tender price to be taken into account was the one in the modified tender.
  
- (e) The Appellant's complaint had arisen from the tender opening day that took place on 28<sup>th</sup> January, 2013. They ought to have submitted their complaint within 28 days from that date when they became aware of circumstances giving rise to their complaint as per Section 80(2) and (3) of the Act and Regulation 110 of the Government Notice No.97 of 2005.

Upon being dissatisfied with the Respondent's decision, the Appellant on 31<sup>st</sup> May, 2013, lodged their Appeal to the Public Procurement Appeals Authority (hereinafter referred to as "the Authority")

On receiving notification of the Appeal, the Respondent raised six points of Preliminary Objections.

As a matter of procedure, the Authority was obliged to first resolve the Preliminary Objections raised before addressing the merits of the Appeal.

## THE RESPONDENT'S SUBMISSION ON THE PRELIMINARY OBJECTIONS.

The Respondent's Preliminary Objections were that:

- a) The Appeal is time barred
- b) The person who moved the Authority is not legally authorized in terms of the Act
- c) The Appeal was premature as no notice was issued as per Rules 6 (1) (3) and 8(2) (a) of the Public Procurement Appeals Rules of 2005 (hereinafter referred to as "Appeals Rules").
- d) No declaration has been made in the Statement of Appeal by the Appellant in terms of Section 84(1) of the Act.

- e) Form No. 2 is incomplete as it does not reflect the recipient of copy of service as required by the law and the said Form No. 2 of the Public Procurement Appeals Rules of 2005.
- f) The Respondent certified that the goods to be procured are for the revival of the ailing Tanzania Railways Limited and hence for the public interest in terms of Section 84 (4) of the Act.

Having stated their Preliminary Objections, the Respondent proceeded to expand them as follows;

With regard to the first point of preliminary objection the Respondent submitted as follows;

- a) That, the Appeal before this Authority is time barred contrary to Sections 79(1) of the Act and Regulations 109 and 110 of the Public Procurement (Goods, Works, Non Consultant Services and Disposal of Public Assets by Tender) Regulations, Government

Notice No. 97 of 2005 and Rule 13 of the Public Procurement Appeals Rules Government Notice No. 205 of 2005 (hereinafter referred to as "the GN. No. 205/2005").

- b) That, the Appellant's complaint originated from the tender opening date, that is, on 28<sup>th</sup> January, 2013. Thus they were required to lodge their complaints to the Respondent within 28 days in accordance with the above cited provision of the law. To the contrary, the Appellant lodged their complaint to the Respondent on 20<sup>th</sup> April, 2013. On 7<sup>th</sup> May 2013, they were informed that their complaint had been filed out of time but still they opted to lodge an appeal before this Authority on 31<sup>st</sup> May, 2013.
  
- c) That, the Appeal before this Authority ought to have been filed within 14 days from the date when they became aware of the circumstances which gave rise to the dispute pursuant to Rule 7 of the Appeals Rules.

d) That, the Appellant did not comply with the requirements of law in lodging their Appeal. Thus, their Appeal should be rejected by the Authority through the powers vested unto it by Rule 13(1) of the GN. No 205 of 2005.

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

a) That, there were no records indicating that, the person who lodged this Appeal was dully authorized by the Appellant to do so.

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

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

On the third point of Preliminary Objection the Respondent submitted that;

- a) The Appeal is premature for being filed without issuing a Notice of Intention to Appeal to the Respondent contrary to the requirement of Rules 6 (1) (3) and 8(2) (a) of GN No. 205 of 2005.
- b) Rule 8 of the Appeals Rules provides for a list of supporting documents to be attached to the Statement of Appeal when filing an Appeal and among them is the notice of intention to appeal.
- c) The Appellant had contravened the requirement of the law hence their appeal should be rejected.



In relation to the fourth point of Preliminary Objection the Respondent submitted that,

- a) There was no declaration in the Statement of Appeal lodged by the Appellant in terms of Section 84(1) of the Act.
- b) The Appellant has failed to declare in their Statement of Appeal how they will suffer loss in terms of the above cited provision.
- c) The Appellant's failure to declare such an injury contravenes the law and renders their Appeal to be untenable in law.

With regards to fifth point of Preliminary Objection, the Respondent submitted that, the Application by the Appellant does not indicate the recipient of a copy of the Statement of Appeal as required under Form No. 2 of the Appeals Rules. Thus, in the eyes of the law their appeal is incomplete.

In relation to the six point of Preliminary Objection the Respondent submitted that, the certificate of public interest has been issued in terms of Section 84(4) of the Act, since the goods to be procured are for public interest for the revival of Tanzania Railways Ltd. Hence, suspension or annulment of the award of tender would affect the public at large.

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

## THE APPELLANT'S REPLIES ON THE PRELIMINARY OBJECTIONS

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

That, their Appeal has been lodged within time on 31<sup>st</sup> May, 2013 after receiving the Respondent's letter rejecting their application for review dated 7<sup>th</sup> May, 2013, and received by the Appellant on 21<sup>st</sup> May 2013. The Appeal to this Authority has been lodged pursuant to

Regulations 113 and 114 of GN No. 97/2005. Therefore their Appeal is within time as prescribed by the law.

The Appellant further submitted that, their Appeal is not pre-maturely lodged as contended by the Respondent because they wrote to the Respondent before, in which they indicated their dissatisfaction for the award of tender to the successful tenderer and requested them to review the tender process but they rejected their application. It is on those grounds that they opted to seek for their rights before this Authority.

That, their company has been legally authorized to sign and represent the Appellant as per the letter dated 11<sup>th</sup> November, 2012 titled "Manufacturer's Authorization letter for tender No. PA/113/2012-13/ME/G/OE/014 &PA/113/2012-13/ME/G/OE/013" which was also submitted to the Respondent. Thus, they had the authorization to represent the Appellant.

With regard to the issues of lack declaration contrary to Section 84(1) of the Act, PPAA Form No. 2 being incomplete and the certificate of public interest, the

Appellant submitted that, these were not legal points to be determined under preliminary objections.

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

#### ANALYSIS BY THE AUTHORITY AND RULING ON THE PRELIMINARY OBJECTIONS.

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

- Whether the Appeal is incompetent for being lodged out of time
- Whether the Appeal had been lodged by a legally authorized person

- Whether the Appeal is premature for failure to comply with Rules 6(1) and (3) of the Appeals Rules
- Whether the absence of a declaration in terms of Section 84(1) of the Act amounts to a ground for a preliminary objection
- Whether the Statement of Appeal was incomplete for failure to comply with the requirement of Form PPAA No. 2
- Whether the issuance of a certificate of public interest in terms of Section 84(4) amounts to a ground for a preliminary objection

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

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

In resolving this sub issue, the Authority deemed it necessary to revisit Section 79(1) of the Act, read together with Regulations 109 and 110 of GN No. 97/2005 relied by the Respondent in that were not complied with by the Appellant when lodging their Appeal. The said provisions provide as follows;

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

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

Regulations may seek a review in accordance with Section 79 of the Act". (Emphasis supplied)

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

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

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

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

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

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



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

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

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

since it ought to have been raised within 28 days from the date of the tender opening.

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

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

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

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

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

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

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

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

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

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

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

The Authority noted further that, in the Statement of Appeal, Mr. Li Jianguo named the Director General of Masindiko Company Limited to be their representative. However, there was no legally accepted document to that effect.

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

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

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

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

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

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

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

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

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

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

With respect to the issue of signing the Appeal documents by the person who signed the tender documents or his legally authorized representative



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

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

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

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

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

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

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

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

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

The Authority is of the view that, the aim of item 6 of the PPAA Form No. 2 is to notify the other parties about the

existence of such a dispute or Appeal. The law has vested such a responsibility to the Authority and in relation to this Appeal the Respondent was duly notified and they were able to file their replies within time.

The Authority is of the firm view that, nothing wrong has been occasioned by the Appellant for failure to indicate where the copy of their Appeal was to be served since the name of the Respondent was already identified in terms of Rule 8(1) (a) of GN No. 205 of 2005.

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

#### 6.0 Whether the issuance of a certificate of public interest in terms of Section 84(4) amounts to a ground for a Preliminary Objection

In resolving this sub issue the Authority considered the Respondent's argument that, a certificate of Public interest has been issued in terms of Section 84(4) of the

Act indicating that the goods to be procured are for the revival of the ailing Tanzania Railways Limited, thus, suspension or annulment of the tender would affect the public at large. On the hand, the Appellant contended that, the certification of public interest in terms of Section 84(4) of the Act was a factual matter and not a point of law. Thus, it should not be considered as a ground of Preliminary Objection.

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

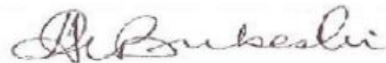
Accordingly, the Authority's conclusion on sub issue six is that, the issue of certification for public interest in terms of Section 84(4) of the Act does not amount to a ground for preliminary objection.

Having resolved the above sub-issues with respect to the main issue of whether the Appeal is properly before this Authority, the Authority's conclusion is that, the Appeal is not properly before it as it was filed out of time and by the person not legally authorized to do so.

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

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

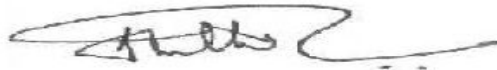
This ruling is delivered in the presence of the Appellant and the Respondent this 3<sup>rd</sup> July, 2013.



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

MEMBERS:

1. Mr. K.M. Msita



2. Mr. F.T. Marmo



3. Mrs. R.A. Lulabuka

