

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL NO. 13 OF 2017-18

BETWEEN

M/S H.H. HILLAL AND COMPANY LTD.....APPELLANT

AND

MEDICAL STORES DEPARTMENT.....RESPONDENT

RULING

CORAM

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|----------------------------|---|-----------------|
| 1. Ms. Monica P. Otaru | - | Ag. Chairperson |
| 2. Eng. Francis T. Marmo | - | Member |
| 3. Eng. Aloys J. Mwamanga | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|------------------------|---|----------------------|
| 1. Ms. Florida Mapunda | - | Senior Legal Officer |
| 2. Ms. Violet Limilabo | - | Legal Officer |

FOR THE APPELLANT

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| 1. Mr. George Nyangusu | - | Advocate- Prime Attorney |
| 2. Mr. H.H. Hillal | - | Chairman-M/s H.H. Hillal & Co. Ltd |

FOR THE RESPONDENT

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|---------------------------|---|------------------------------|
| 1. Mr. Gabriel Malata | - | Principal State Attorney-AGC |
| 2. Mr. Laurian Bwanakungu | - | Director General- MSD |
| 3. Mr. Heri Mchungu | - | Director of Logistics-MSD |
| 4. Ms. Rehema Mtulya | - | State Attorney-AGC |
| 5. Ms. Maura Mwingira | - | AGC |

This Ruling was set for delivery today 6th October 2017, and we proceed to deliver it.

The Appeal was lodged by M/s H.H. Hillal and Company Ltd (hereinafter referred to as "the Appellant") against Medical Stores Department, commonly known by its acronym MSD (hereinafter referred to as "the Respondent"). The Appeal is in respect to Tender No.IE-009/2016-2017/HQ/G/164 for the Supply of Delivery Packs to MSD (hereinafter referred to as "the Tender").

After going through the records submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the facts of the Appeal can be summarized as follows:-

Way back in October 2016 the Respondent advertised the Tender whereby five (5) firms participated and award of the Tender was recommended to M/s Bahari Pharmacy Ltd. Dissatisfied by the proposed award, the Appellant lodged Appeal Case No. 22 of 2016-17 with the Appeals Authority. On 31st March 2017 the proposed award was nullified and the Respondent was ordered to proceed with award of the Tender in observance of the law and advice given by the Attorney General's Chambers (AGC) which was to the effect that the Appellant did not have a pending case against the Respondent.

It is on record that on 6th April 2017, the Tender Board deliberated on the Appeals Authority's decision whereby it was observed that the bid validity period for the Tender had expired since March 2017.

On 13th July 2017, the Respondent advertised the Tender through Daily News newspaper, the deadline for which was set on 15th August 2017, whereby eight (8) firms submitted tenders. The Appellant had purchased the Tender Document but did not submit his tender.

On 19th August 2017, the Appellant wrote a complaint letter to the Respondent, amongst other things, he requested to be informed if the advertised Tender was not similar with the subject matter of PPAA Appeal Case No. 22 of 2016-17.

On 31st August 2017, the Respondent informed the Appellant, among other things, that the bid validity period had expired thus the re-advertisement of the Tender. Dissatisfied with the Respondent's decision, the Appellant lodged this Appeal on 13th September 2017.

The Respondent upon service of the statement of Appeal filed a Notice of Preliminary Objection (PO) on points of law, to wit that;-

- a) The Appeal is not maintainable for being lodged out of time limit prescribed by the law;
- b) The Appeal is incompetent for want of attachment of mandatory decision sought to be challenged; and
- c) The Appellant has no *locus standi* to challenge the Respondent's decision.

The Appeals Authority deemed it proper to determine the first point raised in order to establish if the Appeal is properly before it thus hearing preceded on this ground.

SUBMISSIONS BY THE RESPONDENT ON THE PO

The Respondent argued that, by virtue of Section 97(1) and (2) of the Public Procurement Act No. 7 of 2011, as amended (the Act); the Appeal had to be filed within 7 working days from the day of advertisement. The Tender was advertised on 13th July 2017 and had already been opened since 15th August 2017. The Appellant lodged this Appeal with the Appeals Authority on 13th September 2017. Thus counting the date from Tender advertisement up to the date of filing this Appeal, it is almost two months which is clear that the Appeal has been lodged beyond the prescribed time limit.

The Respondent argued further that, even if the Appellant became aware of the Respondent's decision vide a letter issued to him on 31st August 2017, the 7 working days within which he ought to have lodged the Appeal expired on 12th September 2017. Filing the Appeal on 13th September 2017 is beyond the 7 working days preferred by the law. Hence this Appeal cannot be maintainable by any means.

The Respondent went on submitting on the destiny of the Appeal that has been filed out of time and without leave of the court to do so. Citing the case of *Hezron M. Nyachiya v. Tanzania Union of Industrial and Commercial Workers and Another*, Civil Appeal No. 79 of 2001 (CAT) (Unreported), the Respondent confidently stated that the Appeal filed out of time and without leave of the court deserves to be dismissed.

Finally, the Respondent prayed for dismissal of the Appeal with costs.

APPELLANT'S REPLIES ON THE PO

In response to the Respondent's submissions, the Appellant submitted that, the PO raised includes matters that transpired in the Tender process. The Appellant's learned counsel argued that his client became aware of the Tender advertisement on 6th September 2017 after receiving the Respondents letter dated 31st August 2017 through the counsel's postal address. Thus filing the Appeal on 13th September 2017 was within the prescribed time.

The Appellant's learned counsel refuted that his client received the alleged letter from MSD prior to 6th September 2017 or ever signing any dispatch collecting the alleged letter. Thus relying on the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) E.A.L.R 196*, the counsel claimed that when a PO raised includes matters of law and facts, it fails to be a PO as matters of facts need to be proved. Claiming that since the date of receiving the alleged letter needs to be proved, then such matter can no longer be treated as a PO.

When asked the Appellant why he did not lodge the Appeal when the Respondent failed to respond within the prescribed time, the counsel claimed that they were used to the Respondent's trend of not responding timely.

Finally, the Appellant prayed that the PO raised be overruled and the Appeal be heard on merits.

ANALYSIS BY THE APPEALS AUTHORITY

Having gone through the filed documents together with the oral submissions by the parties, the Appeals Authority is of the firm view that there is one basic issue calling for determination, and that is, whether the Appeal is properly before it. After formulation of the main issue, the Appeals Authority proceeded to resolve it as hereunder;

It is not disputed that the Tender was advertised on 13th July 2017 and the Appellant purchased the Tender Document on 19th July 2017 but did not submit his bid on the deadline of the Tender on 15th August 2017. Instead, the Appellant lodged a complaint to the Respondent on 19th August 2017 a decision for which was issued on 31st August 2017. On 13th September 2017 the Appellant lodged this Appeal.

Section 96(4) of the Act provides as follows:-

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

From the above facts and law, the Appeals Authority is of the firm view that the Appellant became aware of the circumstances giving rise to the complaint on 19th July 2017 when the Tender Document was purchased. Counting 7 working days from that date, the Appellant ought to have lodged the complaint to the Respondent before or by 28th July 2017. The complaint was lodged on 19th August 2017 about 20 working days late.

The Appeals Authority observed further that, even if the Appellant's letter dated 19th August 2017 was to be treated as a proper complaint, the law requires the Respondent to issue a decision within 7 working days from the date he received the said complaint, the Respondent issued his decision on 31st August 2017, instead of 29th August 2017, a day after lapse of the mandatorily prescribed time.

Furthermore, the law states in clear terms that upon the Respondent's failure to issue a decision within the prescribed time, the Appellant ought to have lodged his complaint to the Appeals Authority. The deadline for submission of the Appeal was 8th September 2017. The modalities and submission requirements are pursuant to Sections 96(6) and 97(1) and (2) (a) of the Act which read as follows;

96(6) The accounting officer shall, within seven working days after the submission of the complaint or dispute deliver a written decision which shall:-

- (a) State the reason for the decision; and*
- (b) If the complaint or dispute is upheld in whole or in part indicate the corrective measures to be taken.*

S.97 (1) A tenderer who is aggrieved by the decision of the Accounting Officer may refer the matter to the Appeals Authority for review and administrative decision.

(2) Where

- (a) the accounting Officer does not make a decision within the period specified under this Act or;*
- (b) N/A*

the tenderer may make the complaint to the Appeals Authority within seven working days from the date of the communication of the decision by the accounting officer. (Emphasis supplied).

The above quoted provisions entail that, the Respondent was mandatorily required to issue the decision within 7 working days, failure of which would have caused the Appellant to lodge the complaint with the Appeals Authority. The Appellant's argument that, the Respondent has a tendency of not responding timely is not tenable. The law has clearly specified time limits within which the parties ought to have complied with. Therefore, the Appeals Authority is of the firm view that the Appeal was lodged beyond the prescribed time.

The Appeals Authority further considered the Respondent's argument on the effect of the Appeal filed out of time and without leave to do so. The Appeals Authority concurs with the Respondent that this Appeal was filed out of time and without leave to do so, contrary to Section 98 of the Act and has to be dismissed.

However, the Appeals Authority does not concur with the Appellant that the PO contains matters of facts that need to be proved; since the PO so raised involved matters of law that the Appellant ought to have filed his complaints to the Appeals Authority within 7 working days as required by the law thus the Case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) E.A.L.R. 169*, is not applicable in this Appeal.


The Appeals Authority concludes the issue that the Appeal is not properly before it in the affirmative.

In view of the above, the Appeals Authority agrees with the submissions by the Respondent that the Appeal was lodged out of time and without leave to do so. Consequently, the PO is hereby upheld and the Appeal is dismissed.

Each party to bear own costs. It is so ordered.

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

This Ruling is delivered in the presence of the Respondent and in absence of the Appellant, this 6th day of October 2017.


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Ms. MONICA P. OTARU
Ag: CHAIRPERSON

MEMBERS:

- 1. ENG. FRANCIS T. MARMO 
- 2. ENG. ALOYS J. MWAMANGA 