

Tender awards in the spotlight

Section 62 of the Municipal Systems Act provides that any person 'whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision'.

While section 62 provides an opportunity for people to appeal municipal decisions, there are limits on how and when that process can be used. This article looks at the key aspects regulating section 62 appeals, especially in the context of tender awards.

The appeal authority

Once an appeal has been submitted to the municipal manager, s/he must 'promptly submit the appeal to the appropriate appeal authority'. The appeal authority must then 'consider the appeal, and either confirm, vary or revoke the decision'. Importantly, 'no such variation or revocation of a decision may undermine or diminish any rights that may have accrued as a result of the decision'. This limits the impact that an appeal can have.

As this article explains, the use of section 62 has been particularly contentious in the reviewing of tender awards. The municipal manager is the appropriate appeal authority for tender awards if 'the appeal is against a decision taken by a staff member other than the municipal manager'. From the wording of section 62, it is clear that the availability or opportunity to use the appeal mechanism is limited, particularly in the context of tender awards.

The exercise of a delegated power

The wording of section 62 makes it clear that an appeal can only be

applied to decisions made in terms of delegated and subdelegated powers. So if, for example, the final award of a tender was made by the bid adjudication committee of a municipality (which makes decisions in terms of a delegated power), an unsuccessful bidder would be able to appeal the decision to the municipal manager, who is the final decision-maker in respect of tender awards. If, however, the decision was made by the municipal manager, an unsuccessful bidder cannot appeal under section 62, but must rather approach a court of law to review the award. (*Lohan Civil-Tebogo Joint Venture and Others v Mangaung Plaaslike Munisipaliteit and Others*, Case No 508/2009 (O) (unreported) (27 February 2009)).

The appeal authority is confined to the subject matter of the appeal

Where an unsuccessful bidder is able to use section 62, in the sense that the appeal is against the award of a tender by the bid adjudication committee and not the municipal manager, the municipal manager will act as appeal authority. In such instances, the municipal manager is confined to the subject matter of the appeal. Even though an appeal under section 62 is a 'wide appeal' in the sense of a rehearing of the issues, the municipal manager is not in a position to re-evaluate all the tenders and to award the tender to a bidder who did not appeal the decision. The municipal

manager is entitled to 'confirm, vary or revoke the decision' and this does not include referring the award decision back to the relevant committee for reconsideration (*CC Groenewald and Others v M5 Developments* (283/09) [2010] ZASCA 47 (31 March 2010)).

No accrual of rights to the successful bidder

In hearing the appeal the municipal manager, as appeal authority, 'must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision'. Thus, if the successful bidder was awarded the tender and such award was not subject to or conditional upon the filing of possible appeals by unsuccessful or aggrieved bidders, the only recourse for an unsuccessful bidder may be to approach a court of law for the review of the award. The same applies where an unconditional contract was concluded with the successful bidder or the successful bidder commenced performance under the contract (*Loghdey v Advanced Parking Solutions CC and Others*, Case No 20766/2008 (W) (unreported) (25 February 2009)).

Comment

The availability of section 62 in tender cases is significantly constrained. In practice, aggrieved or unsuccessful bidders may in

certain instances find an effective remedy in section 62, but in many cases they may have no option but to approach a court of law for the judicial review of a tender award. The Municipal Supply Chain Management Regulations enacted under the Municipal Finance Management Act are of little assistance. Provision is made in regulations 49 and 50 for internal dispute resolution procedures in the supply chain management policies of municipalities. From a reading of the regulations, however, it is clear that the procedures envisaged are primarily aimed at the settlement of disputes as opposed to remedial action. The 'independent and impartial' third party who is supposed to deal with 'complaints and objections' is not afforded any express remedial powers. It is not clear from the regulations whether the independent and impartial third party has the power to reverse an award decision or refer the matter back to the relevant committee or the municipal manager for reconsideration. For now, it would seem that unsuccessful bidders who cannot make use of section 62 will have to revert to the courts to enforce their rights.



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