

# THE Different hats worn by the municipal manager

## IN THE TENDER/BID PROCESS

In a recent Supreme Court of Appeal decision, *CC Groenewald v M5 Developments*, the court held that the unsuccessful bidders had a right, under section 62 of the Municipal Systems Act, to appeal against the municipality's decision to award a tender. The court cautioned, however, that even though an appeal under this provision was a 'wide appeal', involving a rehearing of the issues, it did not allow the appeal authority to revisit all tenders and to award the tender to a bidder who had not appealed or, as in this case, whose appeal was out of time. Once the municipal manager, as appeal authority, had come to the conclusion that the appeal by the unsuccessful bidder (whose appeal was in time) was without merit, the only course of action was to dismiss the appeal.

*CC Groenewald v M5 Developments* (283/09) [2010]  
ZASCA 47 (31 March 2010)



This judgment is generally sound and can be supported. However, since the appeal authority in this case was the municipal manager, it seems necessary to clarify his or her role in bid processes.

## The municipal manager and bid committees

Legislation makes provision for a committee system for the award of bids at local government level. A bid specification committee is responsible for the drafting of specifications. On the submission of bids, evaluation is carried out by a bid evaluation committee, which submits a report and recommendations to a bid adjudication committee (BAC). A municipality's system of delegations generally determines whether it is the BAC or the municipal manager that makes the final award. In particular, a distinction can be drawn between two scenarios.

### *The BAC recommends a bidder*

The municipality's system of delegations may require the BAC, having considered the report and recommendations of the bid evaluation committee, to make a recommendation to the municipal manager for the award of the tender. Once a recommendation is received, the municipal manager has the following options:

- The municipal manager may agree with the recommendation of the BAC, which would usually mean that he or she makes the final award.
- If the municipal manager does not agree with the recommendation, he or she can refer the recommendation back to the BAC for reconsideration.
- The municipal manager can reject the BAC's recommendation and award the tender to another bidder.

If the municipal manager awards the tender to a bidder other than the one recommended by the BAC, he or she must in writing, within ten working days, notify the Auditor-General, the relevant provincial treasury and the National Treasury, and, in the case of a municipal entity, also the parent municipality, of the reasons for deviating from the decision of the BAC. There is, however, no duty to report if the recommendation of the BAC is rejected to rectify an irregularity in the process.

### *The BAC makes a final award*

The municipality's system of delegations may enable the BAC to make the final award of the contract. Thus, instead of making a recommendation to the municipal manager, the BAC makes the final award. A question that arises is whether the

## key points

- The municipal manager's role as appeal authority differs from his or her supervisory role over bid committees.
- If a municipality's bid adjudication committee recommends a bidder to the municipal manager for final award, the municipal manager may, on good reason, decide to award the tender to a different bidder.
- An appeal under section 62 of the Municipal Systems Act does not entitle the municipal manager to revisit all the tenders and to award the tender to a bidder who is not a party to the appeal.
- An appeal without merit should be dismissed and cannot be referred back to the bid adjudication committee for reconsideration.

municipal manager has the power to interfere with such an award decision.

The wording of Regulation 29(6) of the Municipal Supply Chain Management Regulations suggests that the answer is no. In terms of Regulation 29(6),

[t]he accounting officer [municipal manager] may at any stage of a bidding process, refer any recommendation made by the evaluation committee or the adjudication committee back to that committee for reconsideration of the recommendation.

It could be argued that where no 'recommendation' was made by the BAC but a final award, the municipal manager has no power to direct the BAC to reconsider the award. Regulation 29(6) makes specific reference to the making of a 'recommendation' and not the final award of a tender.

Regulation 5(3) of the Municipal Supply Chain Management Regulations does, however, require the BAC to report on each final award made during a particular month, specifying the amount of the award, the name of the successful bidder and the reason for the decision. Depending on the system in place, the BAC can be required to report to the municipal manager if the chief financial officer or a senior manager is a member of the BAC. Where this is not the case, the BAC must report to the chief financial officer or the senior manager responsible for the tender.

The Municipal Supply Chain Management Regulations further state that a municipality's supply chain management policy must enable the municipal manager to investigate any allegations of fraud, corruption, favouritism, unfair and irregular practices or of failure to comply with the supply chain management system of the municipality against an official or other role player. The municipal manager must also be able, when justified, to take appropriate steps against an official or role player, or report any alleged criminal conduct to the South African Police Service. It would seem then that interference with the BAC's award decision is possible on these grounds.

## The municipal manager and internal appeals

The role of the municipal manager as appeal authority under section 62 of the Systems Act differs from his or her general supervisory powers over bid committees. The case of *CC Groenewald v M5 Developments* confirms this.

In this case, two unsuccessful bidders lodged appeals under section 62 of the Systems Act. However, only one bidder's appeal was in time and considered by the municipal manager, who acted as appeal authority. Based on the facts disclosed in the judgment, it would appear that the BAC had the power to make the final decision regarding the award of the tender. The appeal could accordingly be heard by the municipal manager in his or her capacity as the appeal authority.

In considering the appeal, the municipal manager came to the conclusion that the appeal that was lodged in time was without merit as it had no prospects of success; the bidder in question had scored the lowest of all the participating bidders. Instead of dismissing the appeal, however, the municipal manager re-evaluated the tenders submitted. He reasoned that the tenders had been incorrectly scored and awarded the tender to another bidder. (That bidder happened to be the one that had lodged a separate appeal, but whose appeal was out of time. The municipal manager had also, in fact, been of the view that under the circumstances the bidder's appeal could not be considered.)

In court it was argued on behalf of the municipal manager (and the other appellants) that an appeal under section 62 of the Systems Act was a 'wide appeal'. In rehearing the issues, the municipal manager was therefore entitled to award the tender to the party that should have been awarded the tender in the first place, even if that party was not a party to the appeal. The Court disagreed and held that under the circumstances the appeal was without merit and the municipal manager was obliged to simply dismiss the appeal. The

municipal manager was confined to the subject matter of the appeal: that is, whether the tender should have been awarded to the party that had appealed as opposed to the successful bidder. He was not entitled to re-evaluate each tender and he also had no power (as suggested by the municipality) to refer the matter back to the BAC for reconsideration.

## Comment

A lesson to learn from this case is that it is important for municipal managers to distinguish between their different roles in bid processes. They should not confuse their role as appeal authority under section 62 of the Systems Act with the supervisory role they have over bid committees, particularly the BAC.

It is only where the BAC is required, by the system of delegations in place in the municipality, to make a 'recommendation' to the municipal manager for the award of a tender, that the municipal manager can choose whether to award the tender to a different bidder or to refer the matter back to the BAC for reconsideration, where he or she does not agree with the recommendation. Where the system of delegations allows the BAC to make the final award, an argument could be made that the municipal manager is not entitled, under Municipal Supply Chain Management Regulation 29(6), to interfere with such award. The exception may be where allegations of fraud, corruption, favouritism, unfair and irregular practices or of failure to comply with the municipality's supply chain management policy are made against an official or other role player. In such instances the municipal manager could arguably suspend the award, conclusion and/or implementation of the tender or contract pending an investigation.

When the municipal manager acts as appeal authority under section 62 of the Systems Act, he or she is confined to the subject matter of the appeal. He or she is not at liberty to revisit all the tenders and to award the tender to a bidder who is not a party to the appeal. On finding that an appeal is without merit, he or she must dismiss the appeal and is not in a position to refer the matter back to the BAC for reconsideration.



Phoebe Bolton  
Professor of Law  
Stellenbosch University