



## ***Masilonyana Local Municipality: DISPUTE PROCESS***

### ***1. The bid committee system***

The Supply Chain Regulations, enacted under the *Municipal Finance Management Act*, stipulate that each municipality and each municipal entity must have and implement a supply chain management policy. Such policy must, *inter alia*, provide for a committee system for competitive bids consisting of at least a bid specification committee, a bid evaluation committee (BEC) and a BAC. The bid specification committee is responsible for the drafting of specifications, and evaluation of submitted tenders must take place by the BEC. The BEC must evaluate the tenders in accordance with the specifications for each procurement, as well as the applicable points system. It must evaluate the ability of each bidder to execute the contract and ensure that the recommended bidder's municipal rates and taxes and municipal service charges are not in

arrears. The BEC must then submit a report and recommendations to the BAC for the award of the tender. A municipality's system of delegations generally determines whether it is the BAC or the municipal manager of the municipality who makes the final award. In particular, a distinction can be drawn between the following two scenarios.

### ***2. The bid adjudication committee recommends a bidder***

In terms of the municipality's system of delegations the BAC, after having considered the report and recommendations of the BEC, may be required to make a recommendation to the municipal manager for the award of a tender. Once the municipal manager receives a recommendation, he/she

may do one of three things. Agreement with the recommendation of the BAC would usually mean that the municipal manager makes the final award. If, on the other hand, the municipal manager does not agree with the recommendation, he/she could refer the recommendation back to the BAC for reconsideration. Alternatively, the municipal manager could 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, he/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.

The municipal manager has, however, no duty to report if he/she rejects the recommendation of the BAC in order to rectify an irregularity in the process.<sup>1</sup>

### ***3. The bid adjudication committee makes a final award***

In terms of the municipality's system of delegations, the municipal manager may delegate the power to make the final award of a contract to the BAC. In other words, instead of making a recommendation to the municipal manager, the BAC may be delegated the power to make the final award. Regulation 29(6) provides that:

[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.

Regulation 5(3) of the Supply Chain Regulations requires the BAC to submit a written report on each final award made during that month within five days after the end of the month, specifying the amount of the award, the

name of the successful bidder and the reason for the decision. If the chief financial officer or a senior manager is not a member of the BAC, the BAC must report to the chief financial officer or the senior manager responsible for the tender.<sup>14</sup>

Regulation 38(1)(b) of the Supply Chain Regulations further stipulates that a municipality's supply chain management policy must enable the municipal manager to investigate any allegations against an official or other role-player of fraud, corruption, favouritism, unfair and irregular practices or a failure to comply with the supply chain management system of the municipality. 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.

In the light of these provisions, therefore, it is possible for the municipal manager to interfere with the BAC's award decision, but only in cases in which allegations of fraud, corruption, favouritism, unfair and irregular practices or a failure to comply with the municipality's supply chain management system are made against an official or other role-player.

#### **4. Internal appeals against awards: Section 62 of the *Municipal Systems Act***

Legislation does however make provision (also) for the internal resolution of disputes. In the local government context, it is particularly Section 62 of the *Municipal Systems Act* that has in recent times attracted attention. Section 62, in so far as is relevant for current purposes, provides as follows:

- (1) A 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.

(2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).

(3) The 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.

(4) When the appeal is against a decision taken by–

(a) a staff member other than the municipal manager, the municipal manager is the appeal authority.

#### **4.1 The nature of an appeal under Section 62**

As a rule, and in the context of tender processes, the municipal manager of the municipality is the appeal authority for purposes of Section 62. The role of the municipal manager as appeal authority under Section 62 should however be distinguished from the role he/she plays during the bid

process itself, that is, the process that precedes an appeal.

#### **4.2 Objections and complaints under the Supply Chain Regulations**

It is important to note that whereas Section 62 of the *Municipal Systems Act* is a general appeal provision, the Supply Chain Regulations, enacted under the *Municipal Finance Management Act*, make specific provision for the internal resolution of disputes. Regulation 49 stipulates that a municipality's supply chain management policy must allow persons aggrieved by decisions or actions taken in the implementation of a municipality or municipal entity's supply chain management system, to lodge a written objection or complaint against the decision or action within

14 days. A supply chain management policy must, in terms of Regulation 50(1), provide for the appointment of:

an independent and impartial person not directly involved in the supply chain management processes of the municipality or municipal entity –

(a) to assist in the resolution of disputes between the municipality or municipal entity and other persons regarding –

i. any decisions or actions taken by the municipality or municipal entity in the implementation of its supply chain management system; or

(ii) any matter arising from a contract awarded in the course of its supply chain management system; or

(b) to deal with objections, complaints or queries regarding any such decisions or actions or any matters arising from such contract.

The accounting officer (municipal manager) or an official designated by him or her must assist the person appointed to ensure that his or her functions are performed effectively. The appointed person must also strive to resolve all disputes, objections, complaints or queries received promptly and must report to the accounting officer on disputes received, attended to and resolved on a monthly basis. If, after sixty days, the dispute remains unresolved, or the municipality or municipal entity provides no response, the dispute may be referred to the relevant provincial treasury. If the latter cannot resolve the dispute, it may be referred to the National Treasury for resolution. A person affected is however entitled to approach a court of law at any time for the resolution

of the dispute.

In the light of the above provisions, it is clear that the person who is required to deal with disputes should be "independent and impartial", and he/she should not be "directly involved in the [municipality's] supply chain management processes". It stands to reason therefore that even though the municipal manager of the municipality (or an official designated by him or her) is required to "assist" the person appointed to ensure the effective performance of his or her functions, it is not permissible for the municipal manager to perform the functions himself or herself.

**FOR ANY ENQUIRIES PLEASE CONTACT:**

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