

Who excludes bidders from future contracts?



Entsha Henra BK v Hessequa Munisipaliteit 2008 JDR 0455 (C)

The duty to create and maintain a sound supply chain management (SCM) system is an essential component of the good governance of any municipality. While the Municipal Finance Management Act (MFMA) clearly outlines the type of relationship that should exist between the municipality and those bidding to supply services, it is difficult at times to determine how acts of bribery, for example, should be dealt with and the appropriate procedures to be followed when these matters arise. In the case of *Entsha Henra BK v Hessequa Munisipaliteit*, the Cape High Court had to review the decision of the executive mayoral committee of the Hessequa Municipality to exclude a bidder from future contractual opportunities. More importantly, it had to evaluate whether this responsibility fell within the powers of the mayoral committee or the municipal manager.

Facts

The applicant, Entsha Henra BK, is a close corporation (CC) that conducts a civil engineering business. Over the years it developed good business relations with the Hessequa Municipality and a number of contracts were successfully tendered for and executed. The applicant's contracts manager (Mr M) had

key points

- Bidders can be excluded from future contracts for acts of bribery.
- A mayoral committee has no power to make such an exclusion decision.
- The power to exclude lies with the municipal manager.
- Proper procedures must still be followed.
- Adequate notice must be given to the bidder of the intention to exclude.
- Information on the underlying reasons for possible exclusion must be provided.
- The bidder must be allowed to present arguments and evidence in response to the allegations.
- The bidder must be informed that it can approach a court of law to review the decision.

regular contact and a good business relationship with one of the managers of the municipality (Mr S). Their relationship developed into a friendship of the kind that involved the exchange of e-mails and, in the execution of projects, occasional lunches and drinks together with other people and the advisory engineers.

The friendship between Mr M and Mr S turned sour, however, when Mr M attempted to give Mr S a 'gift' for his upcoming trip to France. The gift took the form of R600, which Mr M said Mr S should use to "buy beers". Mr S refused the gift, saying that he was not a "corrupt official" and was offended by Mr M's actions. In a chance meeting later, Mr M asked Mr S if he would feel better if they (the CC) instead bought him a travel bag or a jacket, but Mr S replied that he wanted nothing from the CC. He further told Mr M that his behaviour was unacceptable and communicated the events to his municipal manager in a written report.

It is important to note that the parties by and large agreed on the facts of the events in question. The explanation of the CC was simply that the members had decided that in light of Mr S's upcoming overseas holiday they would give him a cash amount of R600 as a token of appreciation for their good working relationship. However, the fact that Mr S had laid a complaint with his municipal manager regarding Mr M's actions was not communicated to the applicant. It would also appear that neither the municipal manager nor Mr S took the matter further until six months later, when it was raised at a special meeting of the mayoral committee. In the meantime, further tenders had been accepted by the tender committee of the municipality, one of which was awarded to the applicant.

At the meeting of the mayoral committee, which was attended by the municipal manager and Mr S, a decision was taken that "weens die poging van omkoper van 'n werkgewer van Hessequa Munisipaliteit deur 'n werknemer van Entsha Henra, die Raad geen verdere sake met the voormelde firma sal doen nie". Later that day the municipality's tender committee had a meeting (also attended by the municipal manager and Mr S) to decide on the award of a particular tender. In light of the decision of the mayoral committee regarding the applicant, the tender committee decided to award the tender in question to another bidder, even though its tender was higher than that of the applicant.

When the applicant learned of the tender award, it objected and asked for reasons for the award. The applicant was then informed of the decision of the mayoral committee – the first time that this decision had been communicated to the applicant. One of the members of the CC then had a

conversation with the municipal manager, after which a letter was written in which the applicant assured the municipal manager that the "welwillendheidsgebaar" to Mr S should be seen as having been done in good faith and with no corrupt intentions. The letter further requested the council to reconsider and withdraw its decision. The letter came before the mayoral committee, which considered it but decided to stand by its earlier decision. The CC then made an urgent application to the court for the review and setting aside of decisions made by the council to the effect that the municipality would not have further contractual dealings with it.

Issue and arguments

The applicant argued that the decisions of the mayoral committee were illegal and invalid in that the committee had no statutory power to take the decisions in question. Section 3(2) of the MFMA provides that "[i]n the event of any inconsistency between a provision of this Act and any other legislation in force when this Act takes effect and which regulates any aspect of the fiscal and financial affairs of municipalities or municipal entities, the provision of this Act prevails". Section 111 further provides that "[e]ach municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of this Part" and, in terms of section 112, the supply chain management policy (SCMP) must be "fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management" covering a variety of subjects.

The regulatory framework referred to in section 112 has taken the form of the *Local Government: Municipal Finance Management Act (56/2003): Municipal Supply Chain Management Regulations* released in 2005. The Hessequa Municipality's SCMP took effect in January 2006 and follows the regulations almost word for word. In terms of the SCMP, the accounting officer, who, for the purposes of the municipality, was the municipal manager, possessed wide powers and duties, which included the award and handling of tenders. Paragraph 38, for example, deals with the combating of abuse of the SCM system and vests in the municipal manager a range of powers, which include:

- taking all reasonable steps to prevent abuse of the SCM system;
- investigating allegations against officials or other role players of fraud, corruption, favouritism, unfair or irregular practices or failure to comply with the SCM policy, and even, where justified, taking steps against such officials or role players;



- reporting alleged criminal conduct to the SAPS; and
- checking the National Treasury's database to ensure that tenders are not awarded to bidders who are listed as non-preferred suppliers.

The municipal manager further, in terms of paragraph 38, has the power to reject any tender for the non-payment of municipal rates, taxes and service charges, or for unsatisfactory performance under a previous contract with the municipality or other state organ, etc. In specified instances the municipal manager has to inform the National Treasury and the provincial treasury concerned of his/her actions and decisions.

Paragraph 47 of the SCMP deals with “[i]nducements, rewards, gifts and favours to municipalities, officials and other role players” and prohibitions on offering these to any official or other role player involved in the implementation of the SCMP. Paragraph 47(2) also prescribes the procedure that should be followed by the municipal manager in the event of such a breach. Paragraphs 49 and 50 further provide for the handling of complaints and state that any person aggrieved by a decision taken in the implementation of the municipality's SCMP should lodge a complaint within 14 days, in which event the municipal manager must appoint an independent and impartial person to assist in the resolution of the dispute, who must try to resolve it promptly.

Section 114(1) of the MFMA deals with the approval of tenders, in a way similar to paragraph 38 of the municipality's SCMP, and provides that “[i]f a tender other than the one recommended in the normal course of implementing the supply

chain management policy of a municipality or municipal entity is approved, the accounting officer of the municipality or municipal entity must, in writing, 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 such recommendation” unless the different tender was approved in order to rectify an irregularity.

In light of the above provisions in the MFMA, read together with the relevant regulations, including the municipality's SCMP, the applicant argued that the responsibility for the handling and consideration of tenders in the first instance rested with the municipal manager, and that the mayoral committee (and also the council) had no power to exclude the applicant from future contract opportunities.

Judgment

The court agreed with the applicant's arguments and in doing so referred to Steytler and De Visser's *Local Government Law of South Africa* (LexisNexis, 2007), which points out that section 114 of the MFMA “signals the ultimate distrust in the participation of the political organ of the municipality in the procurement process; the council is totally excluded from the decision-making and the municipal manager's decision is not subject to the review of the council. Oversight is then effected by external organs of state.” The court also referred to sections 117 and 118 of the MFMA, which forbid councillors from being members of municipal bid committees or any other committees evaluating

or approving tenders, quotations, contracts or other bids and from attending any such meeting as observers. Persons are also prohibited from interfering with the SCM system of a municipality or municipal entity and from amending or tampering with tenders, quotations, contracts and bids after their submission.

The court further noted that the municipality failed to refer the court to any paragraph in the SCMP which vested the council or any of its committees with the power to usurp the powers of the municipal manager to decide on the award of tenders or to disqualify certain bidders. Paragraph 6(1), on which the municipality relied, indeed provides that “[t]he council reserves its right to maintain oversight over the implementation of this Policy”. The court, however, referred to *Steytler and De Visser*, where the writers point out that the council’s oversight role is restricted:

Such oversight is effected, firstly, by the municipal manager submitting within 10 days of the end of each quarter to the mayor a report on the implementation of the policy. Secondly, the council must receive within 30 days after the year-end a report from the municipal manager on the implementation of the policy of the municipality and of any municipal entity under its sole or shared control. Thirdly, whenever there are “serious and material problems” in the implementation of the policy, the manager must immediately report the matter to the council.

Moreover, the court reiterated that direct oversight over tender irregularities is entrusted to external organs of state.

The court concluded that the decision to consider the applicant’s tenders and the decision to award tenders to the applicant were exclusively those of the municipal manager. The mayoral committee had no power to take these decisions, and doing so was contrary to the principle of legality and accordingly invalid.

The court did not consider the appropriateness of the applicant’s conduct which led to the mayoral committee’s decision and emphasised that its decision should not be interpreted as either supporting the applicant’s actions or not. All its decision meant was that the applicant could in principle continue to tender for future contracts with the municipality and that the municipal manager had the power to deal with such submissions within the framework of the relevant legislation and the municipality’s SCMP. The decisions of the executive mayoral committee to the effect that the council would no longer have any dealings with the applicant were set aside.

Comment

This case concerned the decision of a mayoral committee to exclude a bidder from future contract opportunities on the ground of bribery. The issue before the court was not whether the bidder did in fact commit the bribery act in question, but rather whether the exclusion of the bidder was a matter that fell within the powers of the mayoral committee. It is important to note therefore that if the municipal manager had taken responsibility for the exclusion decision, the decision may well have been valid and justified. Proper procedures before the making of the decision would nevertheless have been imperative.

The decision to exclude a bidder from future contract opportunities amounts to “administrative action” in South African law – the decision would, in accordance with section 1(b) of the Promotion of Administrative Justice Act “adversely [affect] the rights [of the bidder]” and have “a direct, external legal effect”. An exclusion decision is accordingly subject to the requirements of lawfulness, reasonableness and procedural fairness, and a bidder is entitled to reasons for an exclusion decision.

A bidder who is dissatisfied with the decision made has *locus standi* to challenge the decision by means of an application for judicial review. The bidder is also entitled to have access to the necessary and relevant information from the public body to enable it to enforce its right to just administrative action. In the present case therefore, bearing in mind that the applicant had not been convicted in a court of law for its questionable conduct, the applicant would have been entitled to at least the following: (1) adequate notice of the municipality’s intention to exclude it; (2) information relating to the proposed decision; (3) an opportunity to present arguments and evidence in response to the allegations against it; and (4) to be informed that it has the right to approach a court of law for a review of the decision.

These entitlements would admittedly have given rise to costs in the form of time and resources and a general disruption of the municipality’s administrative processes. The costs involved can, however, be regarded as a necessary expenditure to ensure compliance with the fundamental principles applicable to public procurement processes, in particular the principle of fairness.