

NOTIFYING THE

Correct bidder OF ITS SUCCESS

In a municipal bid process the preferred bidder is usually informed of its success by means of an award letter. The contract will then be implemented and performance will take place. It is important, however, for the *correct* bidder to be notified of its success. If an award letter is issued to the wrong bidder, a municipality runs the risk of a damages claim for any performance that took place under the contract.

John Ngwenya t/a Ngwenya Construction v Nkangala District Municipality (formerly known as Highveld District Council) in the High Court of South Africa Transvaal Provincial Division Case No. 19743/2002 (8 October 2008) unreported

the sum that the municipality owed it. The court, however, denied them an award of damages. On the facts of the case it was clear that the municipality advised Ngwenya Construction *not* to perform under the contract. They were furthermore warned that if they did perform under the contract they would not be compensated for any expenses incurred. Ngwenya Construction accepted the municipality's cancellation and did not perform under the contract. As such, they failed to provide the court with proof of any expenses incurred for performances rendered.

The facts, judgment and damages award in *Nkangala District Municipality*

The municipality called for bids for operating and maintaining services in respect of parks in four townships. The plaintiff, Ngwenya Construction, submitted a bid for this contract. Once all the bids were duly considered, the Municipal Council awarded the contract for the Rietkuil Township to Makhanya Construction. However, in error the municipality wrote to Ngwenya Construction informing it of its success. When the municipality attempted to correct the mistake, Ngwenya Construction took it to court, arguing that the municipality was bound by the award letter and therefore liable for damages.

The court found that the award letter was issued in good faith. The official who drafted it believed that Ngwenya Construction (to whom the letter was addressed) represented the preferred bidder (Makhanya Construction). On the signing of the letter, however, the court held that the Municipal Manager, who was the municipality's Chief Executive Officer at the time, had acted negligently. Before signing the letter, he should have verified that the recipient was the preferred bidder as decided upon by the Municipal Council. The preferred bidder was in fact Makhanya Construction and *not* Ngwenya Construction.

Ngwenya Construction argued that its bid for R279 264, 66, together with interest thereon at a rate of 15% per annum, was

Comment

The municipality in this case was successful and avoided paying damages to Ngwenya Construction. The judgment nevertheless serves as a warning to municipal managers who have authority to sign award letters. If, for example, the municipality in this case had overlooked the error and failed to inform Ngwenya Construction in due course, they may very well have commenced with performance under the contract. In such a case, the bidder could have succeeded in holding the municipality liable for payment in respect of performances already rendered on the basis of unjustified enrichment. The result would have been that the municipality would have spent taxpayers' money on a contractor who was not the preferred bidder in accordance with its internal evaluation processes. The bid process would, moreover, have failed the requirements of fairness, equity, transparency, competitiveness and cost-effectiveness as prescribed by section 217 of the Constitution.



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