

THE MUNICIPAL MANAGER'S Supervisory role OVER BID COMMITTEES



Ninham Shand (Pty) Limited v Municipal Manager City of Matlosana and Others (25911/2007) [2008] ZAGPHC 113

Bid committees can be described as the engine rooms that give effect to a municipalities' supply chain management policy. The work of these committees is integral to ensuring that procurement processes not only comply with the regulatory framework governing supply chain management, but also result in fair, equitable, transparent and cost effective procurement of goods and services. The three bid committees that are responsible for driving procurement processes include the Bid Specification Committee (BSC), Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC).

In addition, the municipal manager (MM) plays an important supervisory role in respect of each of these bid committees. Firstly, the MM must approve the bid specifications drafted by the Bid Specification Committee (BSC) prior to the publication of the invitation for bids. The MM, moreover, has a general supervisory role over the Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC) and may, at any stage of a bid process, refer a recommendation back to either committee for reconsideration or recommendation. All three committees are therefore under the supervisory control of the MM. What precisely, however, is the extent of the MM's supervisory role over the three committees? In particular, is the MM entitled to make changes to the specifications, conditions or the rules that have been laid down for conducting a bid process such as qualification, selection or adjudication criteria, or procedural rules relating to formalities for bids? Is the MM entitled to instruct the BEC and BAC to evaluate and adjudicate bids based on such changes?

key points

- The MM must approve bid specifications and the applicable point system before the advertisement for bids.
- Changes to bid specifications and the point system after bids have been received and evaluated is exceptional.
- Material changes mean bids must be re-advertised. An example is if the changes made are likely to attract new bidders.
- Non-material changes may be communicated to participating bidders only. An example is where the contract period is extended by a few days or a general request for proposals was advertised followed by a closed process.

Case law

In the unreported case of *Ninham Shand (Pty) Limited v Municipal Manager City of Matlosana and Others* (25911/2007) [2008] ZAGPHC 113 (25 April 2008) the MM instructed the BEC to use different evaluation criteria after the evaluation of bids and the identification of a preferred bidder. Whereas under the advertised bid 70 points were allocated for price, 20 for functionality and 10 for preference, the MM instructed the allocation of 30 points for specific project applicable expertise, 10 for approach and methodology, 30 for track record, 20 for price and 10 for empowerment. All participating bidders had to provide the necessary information to facilitate re-evaluation. This unforeseen complication was not well received by the 'preferred bidder', who voiced dissatisfaction. This factor, among others, led to the re-advertisement of bids, with the end result that the award of the bid was granted to other bidders. The initially 'preferred bidder' applied for the review and setting aside of the MM's decision to change the criteria and to re-advertise the bid. The Court, without deciding the merits of the case, refused to set aside the decision since performance under the new bid was almost completed.

Question flowing from the case law

Was the MM in *Ninham* entitled to instruct the BEC to re-evaluate the bids based on different adjudication criteria? Strictly speaking, the answer must be no. As noted, the MM must approve the bid specifications prior to publication, and this would include the adjudication criteria and point system. At the same time, there may be justifiable reasons for making such changes. A good example may be where new budgetary constraints necessitate a reduction in the scope of the project, or an important award criterion was omitted that could produce better value for money. Possibilities for changing award criteria may, however, result in abuse since the criteria may be changed to ensure that a 'favoured' bidder wins, or incorrect criteria may be advertised to discourage competition with the aim to change these after the receipt of bids.

Material and non-material changes

Neither the MFMA nor the Supply Chain Regulations deal explicitly with the opportunity to make changes to bid processes. This includes changes to specifications as well as conditions or rules for conducting the process, such as qualification, selection or adjudication criteria, or procedural rules about formalities for bids. It is submitted that a

distinction should be drawn between material changes and non-material changes. The former would refer to changes that are likely to have an impact on who can or cannot be a bidder. If a municipality recognises the need to make a material change, it must return to a point in the bid process where it is certain that no prospective bidder is excluded because of the change. This suggestion is directly tied to the constitutional requirements of fairness, equity, transparency, competitiveness and cost-effectiveness, which govern bid processes.

Changes made in *Ninham Shand (Pty) Limited*

In light of the nature and extent of the changes that were made to the advertised point system in *Ninham*, it is clear that the changes made were material. It is more likely than not that the new point system would have changed the identity of the participating bidders: new bidders may have participated and already participating bidders may have decided against participation. The MM in *Ninham*, of course, decided to re-advertise for bids. The decision to re-advertise was the correct approach, even though this decision was made only after the MM tried to change the point system by communicating only with the existing participating bidders. The decision to re-advertise ensured that new bidders were given a chance to participate and gave effect to the constitutional requirements in bid processes.

When is re-advertisement necessary?

Re-advertisement is not necessary in all cases. If the changes made are non-material in that they are not likely to have an impact on the identity of participating bidders, the changes may be communicated only to the participating bidders. An example may be where the original contract period advertised is extended by a few days. It is unlikely that such a change would affect a contractor's decision to participate. Another example is where a municipality advertises a general request for proposals and thereafter restricts its bid invitation to a limited number of bidders. In such a case, information that was not disclosed in the general request for proposals may be changed by communicating the changes only to the participating bidders.



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