Section 62 Appeals

A Tender Process

Many people aggrieved by decisions made by municipalities have latched on to the fact that they have the right to appeal in terms of section 62 of the Municipal Systems Act. Municipalities have recently experienced a significant increase in the number of appeals lodged in terms of section 62. This has led to municipalities having to grapple with the parameters and practical implications of section 62. This is particularly so in the context of the adjudication of tenders. This article highlights a few of the difficulties in this regard.

Process of appeals

Section 62(1) states that a person whose rights are affected by a decision taken by a municipality 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. Section 62(3) provides that the appeal authority "must consider the appeal" and then it should "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".

This means that where an appeal has been lodged in the prescribed manner, the appeal authority is obliged to consider it. The fact that the original decision may have been implemented in a manner resulting in rights accruing to a third party (for example, an originally successful tenderer) does not absolve the appeal authority from its obligation to consider the appeal.

Powers of appeal authority

The most disturbing part of section 62(3) is the precise meaning of the limitation provision ("but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision"). The limitation provision is clearly intended to limit the legal effect of any variation or revocation of the original decision in circumstances where rights have indeed accrued to a third party. This would be the case where a successful tenderer

key points

When dealing with tenders, municipalities should:

- **avoid concluding agreements with successful tenderers while internal appeals are pending;**
- **inform all tenderers that the award is subject to an appeal process; and**
- **take into account and make provision for the possible delay in the implementation of a project resulting from appeals.**

Municipalities have recently experienced a significant increase in the number of appeals lodged in terms of section 62

immediately signs a contract with the municipality upon award and begins providing the relevant service to the municipality despite a pending appeal in terms of section 62.

In these circumstances, rights will have accrued to the successful tenderer, particularly where services have already been provided.

However, such rights and obligations are always subject to the outcome of an appeal process that may be initiated by an unsuccessful tenderer. If not, then it would effectively mean that a contract that is entered into between a municipality and a successful tenderer, despite a pending valid appeal, would make the appeal meaningless in such circumstances.

This could not have been the intention informing the legislation.

The limitation provision makes immediate sense if it is understood as protecting rights of the originally successful tenderer, which would be left unaffected by any outcome of the appeal. Where the successful tenderer provides services to the municipality it would incur costs in doing so and these services would enrich the municipality.

Accordingly, section 62(3) ensures that any revocation or variation of the original decision will not affect such common law rights.

The more difficult aspect is whether the originally successful tenderer is able to sue for damages, which would include its loss of profits.

The argument would be that signature of the original contract with the tenderer would give the tenderer an accrued right to the profits the contract would have yielded.

The Promotion of Administrative Justice Act of 2000 empowers a court to award compensation in exceptional cases and this may well include loss of profits. The courts have not fully described which circumstances would be exceptional.

However, in light of the Supreme Court of Appeal decision of *Faircape Property Developers v Transnet*, it appears that a mere incorrect exercise of a discretion would not be enough to warrant a claim for loss of profits. Rather, the unsuccessful tenderer would have to show a higher level of impropriety on the part of the decision-maker, such as negligence or fraud.

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This would be a much harder claim to prove in terms of section 62(3) as opposed to the out-of-pocket claim. The award of damages would therefore have to be assessed on a case-by-case basis.

Comment

Municipalities must act prudently when dealing with tenders. Most notably, they should:

- avoid concluding agreements with successful tenderers while internal appeals are pending;
- inform all tenderers that the award is subject to an appeal process; and
- take into account and make provision for the possible delay in the implementation of a project resulting from appeals.

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