



How to challenge that tender awarded to a third party

GOVERNMENT entities are on a tender binge at the moment. With fresh budgets and post-electoral hype filling the corridors of the organs of state that run our country, there are an unusually high number of tenders being advertised and awarded. If one simply looks at any Sunday newspaper it almost seems as if government tenders have replaced the classified section.

If you trade in the public procurement sphere and tender to provide goods and services to government entities you will no doubt have both won and lost a few tenders along the way. Each time you would have spent an inordinate amount of time and money compiling your bid and there would have most certainly been the last-minute dash to get your tender into the designated tender submission box on time.

You would have then spent the date of the award of that tender eagerly awaiting the receipt of an e-mail from the relevant government entity congratulating you. But what if the e-mail advises you that you have been unsuccessful or what if you receive no correspondence?

Most tenderers do nothing be-

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cause they are unaware of their rights. This needs to change. Tenderers need to start holding government entities to account.

A decision taken to award a tender to a third party or not to award a tender is legally referred to as "administrative action". Section 33 of the constitution provides every person with the right to administrative action that is lawful, reasonable and procedurally fair. Section 33 also provides that if your rights have been adversely affected by administrative action you have the right to be given written reasons.

The legislature promulgated the Promotion of Administrative Justice Act, 2000 (PAJA) to give teeth to Section 33 of the constitution. Section 6 (2) of PAJA lists various grounds for when the award of a

tender can be challenged by an unsuccessful tenderer:

In order to challenge the award of the tender to the successful tenderer, one has to base their challenge on one or more of those grounds. In order to do so, you need to secure the necessary evidence. When you submit your tender to the relevant government entity, you need to insert the award date into your diary together with the contact person's name and contact details at the government entity who is dealing with that tender (all of this information will be in the tender).

On the award date, you need to start communicating with the government entity. Government entities often forget to send out letters of non-award to unsuccessful tenderers. You should also check their websites to see whether they have published the award of the tender on their websites. Government entities often disclose the name of the successful tenderer on their website so this is a great place to start.

Once you know that the tender has been awarded and that you have been unsuccessful you must exhaust all of the internal remedies avail-

able to you to challenge the award of that tender. In the letter of non-award, the government entity is obliged to inform you of your right to challenge the award of the tender.

The most common internal remedy takes the form of an appeal – to the government entity to which you tendered (it is not an appeal to court) and there are strict time limits within which to lodge your appeal. You must write to the government entity as soon as possible to notify them of your intention to appeal the award of the tender to the third party upon receipt of the letter of non-award.

In that correspondence ask the government entity to provide you with written reasons for why the tender was not awarded to you and why it was awarded to the successful tenderer. You must also ask the government entity for a full record of the decision. A record is all of the documents that the government entity used to make its decision.

The successful tenderer's tender document always forms a part of the record. During this period, the government entity ought not to proceed with the tender but you must ask for an undertaking. In the event

that they do, you will need to rush to court to stop them.

Once you have the record and the written reasons, you can evaluate your prospects of success on appeal and decide whether you want to challenge the award of the tender or not. Getting to this stage is relatively inexpensive and it does not take a long time. If your merits are good and you succeed on appeal to the government entity you can have the award of the tender set aside and even potentially awarded to you.

If you appeal and are unsuccessful, then your next step is to proceed to the high court and review the award of the tender before a judge.

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