

Checks and balances

SERVICE DELIVERY BY EXTERNAL PROVIDERS

Municipal Manager: Qaukeni Local Municipality v FV General Trading
CC 2009 JDR 0522 (SCA)

The delivery of municipal services by external providers is strictly regulated. Not only do the general constitutional requirements for procurement apply, but other, more specific rules, also govern these relationships. The Municipal Systems Act, read with the Municipal Finance Management Act, for example, says that to make use of an external provider for the delivery of a municipal service, a municipality must use competitive bidding as a procurement method, comply with a process of community consultation and ensure that the entire process is fair, equitable, transparent, competitive and cost-effective.

key points

- When a municipality decides to make use of an external provider for the delivery of a municipal service, it must
 - use competitive bidding as a procurement method;
 - comply with a process of community consultation; and
 - ensure that the entire process is fair, equitable, transparent, competitive and cost-effective.
- Failure to fulfil these requirements *before* concluding a service delivery contract can render the contract invalid and incapable of being extended.
- Making use of automatic renewal clauses in service delivery contracts can put the municipality at risk of not complying with prescribed procurement processes.
- Only in very limited circumstances will a court be willing to uphold an 'automatic renewal' clause in a contract.

Facts and judgment

In this case the Qaukeni Local Municipality (the municipality) concluded a contract with FV General Trading for the provision of refuse collection services. The contract, while concluded for a particular time period, included a condition that allowed for it to be automatically renewed unless the municipality gave notice, six months prior to the termination of the contract, of its intention *not* to renew the contract. In this case, the municipality failed to give the six months' prior notice. However, shortly before the expiration of the contract and the automatic renewal, the municipality gave notice of its intention *not* to renew the contract. The municipality argued that the contract initially concluded with FV General Trading had been invalid from the start because the prescribed tender procedures had not been followed. It argued that FV General Trading had been awarded the contract without having competed with other bidders. The contract could, accordingly, not be validly renewed. The municipality stated that on these grounds it would therefore call for tenders and FV General Trading would be at liberty to participate in the bidding process.

FV General Trading then approached the High Court in Mthatha to obtain an order declaring that the existing contract with the municipality was valid and directing the municipality to perform under the contract until it was lawfully terminated. The municipality, in a counter-application, unsuccessfully sought an order declaring the contract invalid. On appeal to the Supreme Court of Appeal, however, the municipality succeeded and the contract was declared invalid.

The Court confirmed the strict rules that apply to municipal service delivery by external providers. It held that where a contract for the delivery of a municipal service was concluded in the absence of a transparent, competitive and cost-effective tender process, and without any programme involving community consultation and information dissemination, such contract was invalid and incapable of being validly extended. The Court further noted that the municipality in this case was not only entitled, but also duty-bound, to approach the court to set aside the contract, even though this situation had arisen because of the municipality's own irregular processes.

Comment

The judgment serves as a reminder to municipalities to follow proper procedures when making use of external providers for municipal service delivery. The conclusion of a contract with an external provider must be preceded by a tender process, and due account should be given to the constitutional requirements of fairness, equity, transparency, competitiveness and cost-effectiveness. Municipalities should further exercise caution when drafting contracts, whether the contract is for the delivery of a municipal service or other goods or services. In particular, making provision for the *automatic* renewal of a contract when it expires can put the municipality at risk of not complying with the prescribed procurement processes. It is only in very limited circumstances that a court would be willing to uphold an 'automatic renewal' clause. One example may be where the goods or services in question can only be obtained from one contractor. Even in such instances, the municipality would have to convince the court of this fact.



Phoebe Bolton
Professor of Law
Stellenbosch University