

TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS ALERT

GOVERNMENT PROCUREMENT – THE MEANS JUSTIFY THE END!

The recent Supreme Court of Appeal (SCA) decision in *MEC for Health, Gauteng v 3P Consulting (Proprietary) Limited 2012 (2) SA 542 (SCA)* has served to highlight the need for role players involved in government procurement projects to be critically aware that each step of the procurement process may impact on the eventual outcome.

In 2007, the Gauteng Department of Health (GDH) issued advertisements calling on suppliers to submit proposals for a turnaround strategy project. It did not stipulate a prescribed duration for the project. 3P Consulting (Pty) Ltd (3P) submitted a response in which it proposed an initial project duration of two years that would be renewable for a further two year period (for purposes of skill transfer, protection of intellectual property and continuity). 3P's proposal was accepted and approved by the GDH, subject to the conclusion of a service level agreement. The services agreement was concluded between 3P and the GDH in July 2007 and specifically made provision for an initial term of two years and a further two year renewal period on substantially the same terms, subject to the parties affording each other an opportunity to negotiate 'any matters' relating to the renewal (other than the renewal itself).

The parties entered into renewal negotiations during October and November 2008, resulting in 3P's submission of a renewal proposal for the extension of the services agreement for a period of three years in order to complete a number of projects. Although 3P's proposal was accepted by the GDH (according to a letter issued by the GDH during March 2009), 3P was denied access to the premises of the GDH during June 2009 and was unable to perform in accordance with the renewed service arrangement. After a number of failed attempts by 3P to procure reasons for the GDH refusing access, it finally received a reply on 1 July 2011. The GDH informed 3P that it would not honour the 'purported' extended agreement as, in its view, the original tender was only issued for an intended service term of two years and accordingly that the decision by the GDH to extend the agreement for three years was an arbitrary act that did not take the law or the interests of other service providers into account, resulting in the decision being wrongful, irregular and reviewable by a court of competent

jurisdiction. The GDH subsequently retracted its position that the original tender was issued for a period of two years but maintained that irregularities had occurred in the tender process before and after conclusion of the services agreement.

In an application brought by 3P to the South Gauteng High Court, the GDH, in support of its argument that the services agreement was void, relied on the provisions of s217(1) of the Constitution and s38(1)(a)(iii) of the Public Finance Management Act, No 1 of 1999 (PFMA) which provide for principles of fairness, equitability, transparency, competitiveness and cost efficiency applicable to organs of State contracting for goods and services; and s76(4)(c) of the PFMA, which allows the National Treasury to determine a framework for appropriate procurement systems based on these principles. The GDH averred that any procurement that does not comply with these principles is void with the result that a court does not have discretion whether or not to enforce a contract concluded as a result of such procurement. In particular, the GDH was of the view that the procurement process was flawed in that as it had only approved a contract with a term of two years, any attempt to conclude the agreement for a longer period was unlawful. The GDH also stated that the renewal was unlawful in that it had not followed from a public bidding process or in a manner that was 'fair, equitable, transparent, competitive and cost effective' and relied on the same provisions of the Constitution and PFMA in support of this averment.

3P contended that the actions taken by the GDH amounted to administrative action which would need to be reviewed by a court in order to have it set aside; and also that the review by the department itself was in breach of the provisions of the Promotion of Administrative Justice Act, No 2 of 2000, having been undertaken more than two years after conclusion of the services agreement and one hundred and eighty days after its renewal. The supporting documentation submitted as evidence, including a clarification note contained in the minutes of a meeting held by the GDH's procurement decision making body (which made reference to a four year project period), the appointment letter and the services agreement, all supported a four year service term.

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In reaching its finding, the High Court relied, inter alia, on Treasury Regulation 16A6.4 published under the PFMA which allows for exemptions from the competitive bidding process, and held that, due to 3P's integral involvement in the project and the impracticality of compliance, the exemption would apply. The High Court granted a declaratory order that the agreement was valid and had been legitimately renewed by mutual agreement and further ordered the GDH to implement the renewed services agreement. The GDH appealed this decision.

The SCA supported the findings of the High Court. In particular, the validity of the original services agreement and its renewal; that there was no failure by the GDH to comply with Constitutional and other legislative requirements; and that the services agreement reflected the parties understanding. In addition, the SCA held that it was clear that the renewal did not result in a new agreement between the parties, rather an extension of the terms of the existing agreement.

The fact that the parties agreed to a renewal term of three years as opposed to two fell within the provisions of the renewal clause which allowed for amendments 'negotiated and agreed' between the parties and, as there was no new services agreement, it was not necessary to follow a competitive public bidding process for the renewal. GDH's appeal was accordingly dismissed.

It is clear from these judgments that it is essential for all parties involved in public procurement to ensure that their intention is clearly set out in any request for proposal or agreement which may be concluded pursuant thereto and to define the nature of the services as clearly as possible. Any renewal or extension of services or terms which cannot be said to form part of the original intent or scope may be held to be void or subject to a new procurement process.

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