

EXTENDING THE RULES

Rethinking Bid Validity in Municipal Procurement

Recent court rulings are reshaping how municipalities manage bid validity extensions, introducing new risks, legal complexities and the urgent need for stronger procurement safeguards, writes **CHARLES GREEN**, senior associate – Dispute Resolution practice at Cliffe Dekker Hofmeyr

The management of bid validity periods in public procurement remains one of the most challenging aspects of supply chain management for South African municipalities. A series of Supreme Court of Appeal (SCA) judgements has reshaped the legal landscape in this area, and municipalities that fail to keep pace with these developments risk either collapsing their own procurement processes or exposing themselves to costly and protracted litigation. This article examines the current state of the law and offers practical guidance on how municipalities can protect themselves.

THE FOUNDATION: WHY BID VALIDITY MATTERS

Bid validity, in the context of public procurement, refers to the period typically 90 or 120 days from the closing date within which a bidder's offer remains open for acceptance by the procuring organ of state. It serves two interrelated purposes: first, it affords the procuring entity sufficient time to evaluate, adjudicate and award the tender, and second, it provides certainty to all participants as to the timeframe within which the process must be concluded. When an organ of state cannot finalise a procurement process within this period, it may request bidders to extend their validity. National Treasury's *Supply Chain Management: A Guide for Accounting*

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Officers/Authorities makes clear that such an extension should be requested in writing from all bidders before the expiration date. If the validity period expires without an award and without a valid extension, the bids lapse and the procurement process ends.

THE TAKUBIZA JUDGMENT: A STARK WARNING

The SCA's judgement in *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others* (2023) brought this issue into sharp focus for municipalities. In that matter, the City of Ekurhuleni sent extension requests to all 24 bidders on the very last day of the bid validity period. Not all bidders responded in time; one did not respond at all, and others responded only after the deadline.

The SCA held, in unqualified terms, that the bid validity period is one of the fundamental "rules of the game" and that the **consent of all participants** to the tender process is required for a valid extension. Unless there is a timeous request and a favourable response from all tenderers before the expiry of the tender, the tender comes to an end. The municipality's argument that a bidder should be excluded only if it explicitly rejected the extension was firmly rejected. The mere absence of a response from even one bidder was sufficient to render the entire procurement process unlawful.

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The implications of this judgement for municipalities are significant. In practical terms, Takubiza means that any single bidder's refusal or nonresponse to an extension request could collapse a well-advanced procurement process, effectively conferring veto power upon each tenderer.

It should be noted that "all bidders" or "all participants" means all responsive, participating bidders, that is, those who remain in the race and have not been disqualified.

Charles Green



**THE AVENTINO JUDGEMENT:
A DIFFERENT APPROACH**

However, the SCA's more recent judgement in *Aventino Ecotroopers Joint Venture v MEC for the Department of Roads and Transport, Gauteng Province (2025)* introduced an important qualification. In *Aventino*, the Gauteng Department of Roads and Transport's supply chain management (SCM) policy contained what the Court termed an "exclusionary stipulation" – a provision stating that bidders who do not wish to extend the validity period would be regarded as nonresponsive and excluded from further assessment.

The SCA held that, where such an exclusionary stipulation exists within the applicable procurement framework, the procuring entity may lawfully continue the process with those bidders who have agreed to extend and exclude those who declined or failed to respond. Crucially, the Court held that the *Takubiza* line of authority "did not support" a challenge to the validity of extensions where such an exclusionary provision was present.

While the SCA did not expressly overrule *Takubiza*, the reconciliation of the two decisions lies in the particular regulatory framework applicable to each procurement. In *Takubiza*, there was no exclusionary stipulation; in *Aventino*, there was. The *Takubiza* principle, while remaining the default rule, is not immutable and may be displaced by a properly formulated procurement framework. Which, it seems, will be decided on a case-by-case basis.

WHAT SHOULD MUNICIPALITIES DO NOW?

Although *Aventino* offers a more flexible path, it would be unwise for municipalities to be complacent. The *Takubiza* judgement remains binding authority, and in the absence of a specific exclusionary provision, the default rule still requires that **all** responsive bidders consent to an

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extension, failing which the entire tender must be cancelled. To mitigate the very real risk that a single nonresponsive bidder could derail an entire procurement process, municipalities should take proactive steps to embed appropriate safeguards within their constitutional procurement frameworks, specifically, their SCM policies and tender documentation.

In practical terms, municipalities should ensure that:

- Their **SCM policies** expressly address the consequences of a bidder's failure to consent to an extension of bid validity, including a clear exclusionary stipulation that permits the municipality to treat nonresponsive bidders as excluded from further assessment.
- Their **tender documentation** incorporates a corresponding provision, so that bidders are placed on notice from the outset that a failure to accept an extension will result in their exclusion, not in the collapse of the process.
- **Extension requests** are sent to all participating bidders well in advance of the expiry of the validity period.
- **Written confirmations** are obtained from all responsive bidders before the expiry date.

The key lesson from the interplay between *Takubiza* and *Aventino* is that relying on ad hoc measures, such as including exclusionary language only in extension letters, rather than in the SCM policy or tender conditions, leaves municipalities in legally untested territory. The safer and more defensible approach is to ensure that the exclusionary mechanism is a pre-existing feature of

the municipality's formal procurement framework, not an afterthought introduced mid-process.

Municipalities must remain mindful of the principles of section 217 of the Constitution when making amendments to their SCM policies to ensure that the "exclusionary stipulation" remains within the scope of section 217.

CONCLUSION

Bid validity is not a mere administrative formality. It is a constitutional compliance issue with the potential to invalidate entire procurement processes. Municipalities that take the time now to review and update their SCM policies and tender documentation will be far better positioned to manage this risk and to ensure that essential service delivery is not held hostage to the non-response of a single bidder. ■

For further guidance on updating your municipality's SCM policy to address bid validity extensions, please contact Cliffe Dekker Hofmeyr: Charles Green



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