

# SCOPE FOR NEGOTIATING AND/OR VARYING THE TERMS OF GOVERNMENT CONTRACTS\* AWARDED BY WAY OF A TENDER PROCESS\*\*

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## 1 Introduction

Both public and private bodies need goods and services in order to function. In many instances, depending on the nature and value of a particular contract, a public or private body may choose to meet its needs by means of a public call for tenders.<sup>1</sup> Thus, the general public is invited to tender or bid for the provision of goods or services.<sup>2</sup> Detailed specifications of the goods or services needed are drawn up and advertised in, for example, newspapers, trade journals and/or electronic media inviting interested parties to submit written tenders setting out the price and other terms on which they can supply the goods or services needed. A closing date, a time and details as to where tender documents can be obtained and when they should be submitted are provided. All tenders are also opened together and this is usually done in public. This is done to ensure the effective functioning of the tendering process and to prevent tenderers from having an opportunity to adjust their tenders to take account of the tenders of their competitors. Late tenders (tenders received after the closing date for submission of tenders) are, as a general

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\* “Government contracts” will, for purposes of this article, include contracts concluded at all three levels of government (national, provincial and local). To a large extent, however, reference will be made to contracts concluded at local government level, specifically contracts for the delivery of municipal services.

\*\* This article is based on certain sections of the author’s unpublished doctoral thesis *The Legal Regulation of Government Procurement in South Africa* (University of the Western Cape, 2005).

<sup>1</sup> A public call for tenders is also generally referred to as “competitive tendering”, “public advertisement”, “open tendering” or a “call for competition”. See Bright *Public Procurement Handbook* (1994) 22.

<sup>2</sup> The words “tender” and “bid” are often used interchangeably. See, eg, the Public Finance Management Act 1 of 1999, as amended by Act 29 of 1999 (PFMA) and the Supply Chain Management Regulations thereto (found in reg 16A of the National Treasury: Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities: Issued in terms of the Public Finance Management Act 1999, GG 27388 of 2005-03-15) which generally refer to the words “bid” and “bidding” whereas the Preferential Procurement Policy Framework Act 5 of 2000 (Procurement Act) and the Regulations thereto (Preferential Procurement Regulations GG 22549 of 2001-08-10) generally refer to the words “tender” and “tenderer”.

rule, also not considered and where feasible, returned unopened to the tenderer concerned.<sup>3</sup>

In a private tendering process, the selected contractor and the body that called for tenders are usually free to enter into negotiations regarding the terms of the contract to be concluded. Very few restrictions, if any, are placed on the scope for negotiations after the award of the contract. The parties are also generally free to vary the terms of the contract after its conclusion, and there are few, if any, provisos on what “must” be included in the contract. Do the same rules apply in a public tendering process? When a public body or organ of State calls for tenders and selects a preferred tenderer, are the parties at liberty to negotiate the terms of the contract to be concluded, are they free to amend the terms of the contract after its conclusion, and are there any provisos on what “must” be included in the contract?

The aim of this article is to show that in South Africa, the rules that apply to a public tendering process are very different from the rules that apply to a private tendering process. Section 217(1) of the Constitution<sup>4</sup> provides certain protections to contractors who participate in government procurement procedures (and these include public tender procedures).<sup>5</sup> It provides that when organs of State contract for goods or services, they must comply with five principles: fairness, equity, transparency, competitiveness and cost-effectiveness. To ensure compliance with the principles in section 217(1) of the Constitution therefore, and also with the framework of the specifications laid down in an organ of State’s tender call, a number of restrictions and obligations are in place to safeguard the continued integrity of the government procurement process. Limits are placed on the scope for negotiating the terms of a contract after the award of a tender. Limits are also placed on varying the terms of the contract after its conclusion. Provision is further made in legislation for the mandatory inclusion of certain terms or provisions in contracts.

In this article, attention will be given to the application of the principles in section 217(1) of the Constitution to contracts awarded by way of a tender process at all three levels of government, namely national, provincial and local.<sup>6</sup> As will be evident from the discussion *infra*, however, more attention will be given to contracts concluded at

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<sup>3</sup> Arrowsmith, Linarelli & Wallace *Regulating Public Procurement: National and International Perspectives* (2000) ch 8; Turpin *Government Procurement and Contracts* (1989) ch 5; Arrowsmith *Government Procurement and Judicial Review* (1988) 60-81.

<sup>4</sup> Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>5</sup> Other procurement procedures include petty cash purchases, written or verbal quotations, formal written price quotations and in some instances, two-stage bidding. For a detailed examination, see Bolton *The Legal Regulation of Government Procurement in South Africa* (unpublished LLD thesis, University of the Western Cape, 2005) ch 4.

<sup>6</sup> Attention will not be given to the application of s 217(1) to contracts awarded by way of other procurement procedures (see n 5 *supra*). In principle, however, similar rules as those that will be discussed in this article would apply to such procedures.

local government level and more specifically, contracts concluded for the delivery of municipal services.<sup>7</sup> The reason for this is that, unlike legislation at national and provincial government level, legislation at local government level provides clear and specific guidelines for the conclusion of contracts for the delivery of municipal services.

First, a brief overview will be given of the meaning of the different principles in section 217(1) of the Constitution. The focus will then shift to the negotiation and/or variation of the terms of contracts awarded by way of a tender process. In doing so, the administrative justice implications for the negotiation and/or variation of the terms of a contract awarded by way of a tender process will be examined. Specific attention will be given to the requirements that organs of State must disclose evaluation and adjudication criteria in a call for tenders, and they must abide by such criteria. Attention will then be given to the scope for negotiating the terms of a contract after the award of a tender. It will be seen that negotiations are generally allowed provided they do not result in the conclusion of a contract that is substantially different to the one initially advertised. It is also particularly in the context of municipal service delivery agreements that the scope for negotiating the terms of contracts is significantly curtailed by legislation. Next, attention will be given to the scope for varying the terms of concluded contracts, that is, contracts initially awarded by way of a tender process. Again, it will be evident that it is especially in the context of municipal service delivery agreements that the scope for variation is considerably curtailed by legislation. It will furthermore be evident that express provision is made in legislation for the mandatory inclusion of certain terms or provisions in municipal service delivery agreements.

## **2 Overview of the meaning of the principles in section 217(1)<sup>8</sup>**

As noted, section 217(1) of the Constitution provides that organs of State should contract for goods or services in accordance with five principles: fairness, equity, transparency, competitiveness and cost-effectiveness. In brief, “competitiveness” means that organs of State should make use of competition when procuring goods or services. They should “shop around” and attract the maximum number of contractors who will participate in such competition.<sup>9</sup> To ensure genuine

<sup>7</sup> For the definition of a municipal service, see s 35 of the Local Government Laws Amendment Act 51 of 2002 which amends s 1 of the Local Government: Municipal Systems Act 32 of 2000, as amended by Act 44 of 2003 (Municipal Systems Act). Examples of municipal services include refuse collection, street cleaning and vehicle maintenance.

<sup>8</sup> Space does not permit a detailed examination of the precise meaning of the different principles in s 217(1) of the Constitution. For a detailed examination, see Bolton *Government Procurement in South Africa* ch 3 par 4.

<sup>9</sup> Collins *English Dictionary: Complete and Unabridged* 6 ed (2003) 345; *Oxford English Dictionary* — available at [www.oed.com/](http://www.oed.com/) (confirmed access: 28 October 2005); Burton *Burton's Legal Thesaurus* 3 ed (1998) 97.

competition, all contractors should also have access to the same information in order to compete on an equal basis.<sup>10</sup> “Cost-effectiveness” is linked to “competitiveness” and can be said to refer to the effective and efficient use of government resources.<sup>11</sup> Thus, the aim should always be to obtain the best possible value for money, that is, taxpayers’ money.

“Fairness” can be said to refer to the method employed by organs of State when procuring goods or services and generally means free from discrimination, treating people equally, and unprejudiced.<sup>12</sup> In the context of the Constitution, fairness refers to substantive fairness and/or procedural fairness.<sup>13</sup> In the administrative law context, however, the word “fair” refers only to procedure and not substance.<sup>14</sup> Fairness, in the administrative law context, “is concerned only with the *manner* in which decisions are taken; it does not relate to whether the decision itself is fair or not”.<sup>15</sup> Since government procurement is of an administrative law nature, the reference to “fairness” in section 217(1) of the Constitution thus refers to procedural fairness. In light of the way in which procedural fairness under the Constitution has been interpreted by the courts,<sup>16</sup> procedural fairness broadly means that government contracts should be widely advertised and all contractors should be familiar with the rules of the competition. Contractors should also be treated fairly in relation to each other; all contractors should have equal access to competition; some contractors should not be afforded more time for the preparation and submission of quotes or tenders; and the same information should be made available to all contractors.

The idea of “equal” treatment in the procurement process should, however, be understood in the light of South Africa’s history of unfair discriminatory policies and practices. Prior to the abolishment of apartheid in 1994, the majority of State contracts were awarded to large and usually white-owned businesses.<sup>17</sup> Today, in certain defined

<sup>10</sup> See *JFE Sapela Electronics (Pty) Ltd v Chairperson: Standing Tender Committee* 2004 3 All SA 715 (C) (held that “[a]llowing one tenderer to deviate from the [tender] specifications and to tender on the basis that all the work specified will not have to be done, while other tenderers tender on the basis that all the work specified will have to be done, results in a tender process which is procedurally unfair because it affects the competitive position of tenderers” (728c-d) — confirmed on appeal in *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2005 4 All SA 487 (SCA)).

<sup>11</sup> See *Collins English Dictionary* 380 524; ss 33(3)(c), 195(1)(b) and 215(1) of the Constitution.

<sup>12</sup> *Collins English Dictionary* 586; *Claassen Dictionary of Legal Words and Phrases* vol 2 E-M (1976) 228; *Burton Burton’s Legal Thesaurus* 228.

<sup>13</sup> See *S v Ntuli* 1996 1 SA 1207 (CC) for an interpretation of the meaning of a “fair trial” in s 35(3) of the Constitution.

<sup>14</sup> S 33(1) of the Constitution provides for administrative action which is “procedurally fair”.

<sup>15</sup> *Du Preez v Truth and Reconciliation Commission* 1997 3 SA 204 (SCA) 231G-H (emphasis added). See also *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 9 BCLR 891 (CC) pars 87-88.

<sup>16</sup> See, *inter alia*, *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) par 214; *Marais v Democratic Alliance* 2002 2 BCLR 171 (C) pars 64-85; *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board* 2001 12 BCLR 1239 (C) 1255A-B 1257A-1258D.

<sup>17</sup> *Gounden The Impact of the Affirmative Procurement Policy on Affirmable Business Enterprises in the South African Construction Industry* (unpublished PhD thesis, University of Natal, 2000) 3 11.

circumstances, an organ of State is allowed to treat private contracting parties differently. Specific provision is made in the Constitution for the “equitable” or preferential treatment of certain contractors in the award of government contracts.<sup>18</sup>

The principle of “transparency” means that government procurement procedures should be “open” or “public”.<sup>19</sup> Thus, organs of State should not contract behind closed doors. Procurement information should be generally available; there should be publication of general procurement rules and practices; contract opportunities should be advertised; contractors should know the criteria that will be applied in selecting a winning contractor; and contract awards should be advertised.<sup>20</sup>

In light of the broad discussion above of the different principles in section 217(1) of the Constitution, it is clear that an organ of State and the selected contractor are not, and cannot be, at liberty to negotiate the terms of the contract to be concluded after the award of a tender. The parties are also not at liberty to vary the terms of the contract after its conclusion. The principles in section 217(1) of the Constitution, in particular the principles of fairness, competitiveness and transparency, limit the scope for negotiations and variations. In broad terms, they require organs of State to disclose the criteria that will be applied in evaluating and selecting a winning contractor, and they require organs of State to abide by those criteria. Before proceeding to examine these two entitlements in greater detail, that is, the way in which they are given effect to in legislation and how they are enforced by the courts, attention will be given to the administrative justice implications for negotiating and/or varying the terms of a contract awarded by way of a tender process.

### **3 Administrative justice implications for negotiation and variation**

#### **3 1 General**

In South Africa, the administrative law of judicial review applies to government procurement, defining the scope of the government’s powers, the manner in which such powers should be exercised and the consequences that flow from an abuse of powers.<sup>21</sup> In short, organs of

<sup>18</sup> Ss 217(1), 217(2) and 217(3). See also Bolton *Government Procurement in South Africa* ch 6; Bolton “The Use of Government Procurement as an Instrument of Policy” 2004 121(3) *SALJ* 619.

<sup>19</sup> Burton *Burton’s Legal Thesaurus* 515.

<sup>20</sup> Evenett & Hoekman *Transparency in Government Procurement: What Can We Expect from International Trade Agreements?* in Arrowsmith & Trybus (eds) *Public Procurement: The Continuing Revolution* (2003) 272; Arrowsmith “Towards a Multilateral Agreement on Transparency in Government Procurement” 1998 47(4) *International and Comparative Law Quarterly* 793-816.

<sup>21</sup> On the law of judicial review in South Africa, see generally Burns & Beukes *Administrative Law under the 1996 Constitution* 3 ed (2006); De Ville *Judicial Review of Administrative Action in South Africa* (2003); Hoexter *The New Constitutional and Administrative Law* vol 2 (2002); Currie & Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001); Wiechers *Administrative Law* (1985); Baxter *Administrative Law* (1984).

State must act within the limits of their common law, constitutional law and statutory powers; organs of State may not fetter the discretion afforded to them, and persons affected by administrative decisions must be given an opportunity to be heard. These rules are generally regulated by the Promotion of Administrative Justice Act (Paja)<sup>22</sup> which, with the exception of sections 4 and 10, came into force on 29 November 2000 to give effect to section 33 of the Constitution.

In brief, Paja lays down rules and principles that apply to and bind all levels of government (national, provincial and local). Paja gives powers to the courts to scrutinise the lawfulness, reasonableness, procedural fairness and the right to written reasons for administrative action. It also provides for remedies that are available if these requirements are not complied with. It further provides for procedures and methods aimed at encouraging good decision making by organs of State, thereby aiming to reduce the need for judicial review. The prerequisite for recourse to judicial review under Paja, however, is “administrative action”;<sup>23</sup> only if the action or decision complained of amounts to “administrative action” can recourse be had to judicial review.

The courts have held that the conduct of the government procurement process, the evaluation of tenders and the award of a contract to a successful tenderer are all forms of administrative action.<sup>24</sup> An unsuccessful tenderer also has *locus standi* to challenge government procurement decisions by means of an application for judicial review.<sup>25</sup> An unsuccessful tenderer can challenge government procurement decisions on the grounds of lawfulness, reasonableness and procedural fairness. An unsuccessful tenderer can also challenge government procurement decisions on the basis of the reasons given for such decisions.

### 3 2 Procedural fairness and negotiation and variation

As noted,<sup>26</sup> the word “fair” in section 217(1) of the Constitution refers to procedural fairness as opposed to substantive fairness. Section 33(1) of the Constitution is, accordingly, of relevance because it provides that “[e]veryone has the right to administrative action that is procedurally

<sup>22</sup> 3 of 2000.

<sup>23</sup> “Administrative action” is defined in s 1 of Paja. Currie & Klaaren (*Administrative Justice Act Benchbook* par 2.4) note that “[a]dministrative action is: (1) a decision or a proposed decision; (2) of an administrative nature; (3) that is made in terms of an empowering provision; (4) that is not specifically excluded; (5) that is made by an organ of state or by a private person exercising public power; (6) that adversely affects rights and (7) that has a direct external legal effect”.

<sup>24</sup> *Umfolozi Transport (Edms) Bpk v Minister van Vervoer* 1997 2 All SA 548 (A) 552j-553a; *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 2 SA 109 (W) 117G-H; *Nextcom (Pty) Ltd v Funde NO* 2000 4 SA 491 (T) 504G-J; *Grinaker LTA Ltd v Tender Board (Mpumalanga)* 2002 3 All SA 336 (T) par 32; *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) par 5.

<sup>25</sup> *National & Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government* 1999 1 SA 701 (O) 703H-704D/E.

<sup>26</sup> Par 2 *supra*.

fair”. Paja, in turn, gives content to the requirement of procedural fairness.<sup>27</sup> Most relevant for present purposes is that an organ of State must give “adequate notice of the nature and purpose of the proposed administrative action”.<sup>28</sup> In the procurement context, this requirement can be said to give rise to four entitlements for tenderers:

- sufficient access to tender competitions;
- timeous notification of the closing date for submission of tenders;
- information on evaluation and selection criteria; and
- the right to expect and require the organ of State calling for tenders to abide by the criteria laid down in its tender call.

It is particularly the last two entitlements that have a direct impact on the negotiation and/or variation of the terms of contracts awarded by way of a tender process. They have the effect that an organ of State and the preferred tenderer are not at liberty to negotiate the terms of the contract to be concluded. The parties are also not at liberty to vary the terms of the contract after its conclusion. An aggrieved party (unsuccessful tenderer) may, by means of an application for judicial review, challenge negotiations conducted after the award of a tender. It (an aggrieved party) may also challenge subsequent variations to the terms of a contract awarded by way of a tender process.

In the ensuing paragraph more detailed attention is given to the requirements that organs of State should disclose tender evaluation and adjudication criteria and that they should abide by such criteria.

#### **4 Pre-disclosure and abidance by evaluation and adjudication criteria**

##### **4 1 Pre-disclosure of criteria**

The pre-disclosure of tender evaluation and adjudication criteria clearly goes a long way in ensuring “fairness” and “transparency” in government procurement procedures.<sup>29</sup> It enables contractors to make informed decisions as to whether or not they are in a position to tender and enables all contractors to prepare and submit responsive tenders. It also ensures that organs of State do not apply criteria that are unknown

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<sup>27</sup> See s 3(2)(b) of Paja.

<sup>28</sup> S 3(2)(b)(i) of Paja.

<sup>29</sup> S 217(1) of the Constitution.

to contractors and facilitates the monitoring of the procurement process.<sup>30</sup>

At all three levels of government, provision is made for the pre-disclosure of tender evaluation and adjudication criteria. At national and provincial government level, the Supply Chain Management Regulations to the PFMA (PFMA SCM Regulations)<sup>31</sup> provide that organs of State must ensure that tender documentation include evaluation and adjudication criteria.<sup>32</sup> Tender documentation must also make reference to the criteria prescribed in terms of the Procurement Act<sup>33</sup> and the Broad Based Black Economic Empowerment Act (BBBEEA),<sup>34</sup> both of which make provision for the use of affirmative procurement in the award of government contracts.<sup>35</sup> The Procurement Act, for example, works on the basis of a point system.<sup>36</sup> Points are awarded to tenderers for the attainment of certain “specific” goals, and in terms of the Act, “any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender”.<sup>37</sup> This puts contractors in a predictable situation because they know, beforehand, that only tenders that contain an empowerment component will be afforded preference. Contractors are therefore at liberty to decide whether or not they still wish to participate.

The importance of the requirement that tenderers must have knowledge of the criteria to be applied in the selection process was emphasised in *RHI Joint Venture v Minister of Roads and Public Works*.<sup>38</sup> In this case, the tender board had a policy that work would be fairly distributed amongst contractors. In terms of the policy, preference would be given to contractors who had never been awarded a contract. The tender board then called for tenders but failed to inform prospective contractors of the policy. The court held that —

<sup>30</sup> See also Arrowsmith 1998 47(4) *International and Comparative Law Quarterly* 797 who notes that where there is pre-disclosure of selection criteria, “[t]here is less risk that [contractors’] participation will prove wasteful, either because decisions are in fact taken according to irrelevant and unexpected criteria (such as national favouritism or personal interest), or simply because the rules of the game are not clear. (For example, if qualification criteria are not clear in advance, firms without the desired qualifications may waste their time in bidding.) From the perspective of opening international markets, difficulties of obtaining information are disproportionately greater for foreign suppliers. They are also more likely to have doubts over whether a fair procedure will be applied where the system is non-transparent: in particular, suppliers may fear that non-transparent preferences will be given to national firms and products.”

<sup>31</sup> See n 2 *supra*.

<sup>32</sup> Reg 16A6.3(b).

<sup>33</sup> See n 2 *supra*.

<sup>34</sup> 53 of 2003.

<sup>35</sup> On affirmative or preferential procurement, see par 2 *supra*.

<sup>36</sup> See s 2.

<sup>37</sup> S 2(1)(e). S 2(1)(d) provides that specific goals “may” include “(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability; (ii) implementing the programmes of the Reconstruction and Development Programme as published in *Government Gazette* No. 16085 dated 23 November 1994”.

<sup>38</sup> 2003 5 BCLR 544 (Ck).

“the fact that tenders would be awarded on the basis of a policy that work would be fairly or equitably distributed amongst contractors should have been brought to the attention of prospective tenderers in the invitation to tender. Every tenderer was entitled to know, prior to tendering for the contract that preference would be given to tenderers who had not been awarded a contract previously. From a practical and financial point of view the necessity for this to have been disclosed is obvious. Those contractors who had previously been successful would then have been able to decide whether or not the expense of preparing and submitting a tender was warranted.”<sup>39</sup>

At local government level, the Supply Chain Management Regulations to the Local Government: Municipal Finance Management Act (MFMA SCM Regulations)<sup>40</sup> similarly provide for the disclosure of evaluation and adjudication criteria in a call for tenders, including any criteria required by other applicable legislation.<sup>41</sup> The Regulations, in turn, define “other applicable legislation” as:

“any other legislation applicable to municipal supply chain management, including —  
 (a) the [Procurement Act];  
 (b) the [BBBEEA]; and  
 (c) the Construction Industry Development Board Act, 2000 (Act No. 38 of 2000).”<sup>42</sup>

Tender specifications must indicate each specific goal for which points may be awarded in terms of the municipality or municipal entity’s supply chain management policy,<sup>43</sup> and “must be approved by the accounting officer prior to publication of the invitation for bids in terms of regulation 22”.<sup>44</sup> Tenders must also be evaluated “in accordance with (i) the specifications for a specific procurement; and (ii) the points system as must be set out in the supply chain management policy of the municipality or municipal entity in terms of regulation 27(2)(f) and as prescribed in terms of the [Procurement Act]”.<sup>45</sup>

In the municipal service delivery context,<sup>46</sup> it has also been pointed out that it is important for a municipality’s tender call to make reference to “the human rights dimension” of the service to be provided, and that this will play a pivotal role in evaluating tenders received.<sup>47</sup> Thus, tenderers or potential service providers must know that the aim of the municipality is

<sup>39</sup> Par 37. See, however, *South African Post Office Ltd v Chairperson, Western Cape Provincial Tender Board* 2001 2 SA 675 (C) par 16. Cleaver J held that the procurement process *in casu* was “accessible, visible and subject to examination and enquiry”; it was “open and transparent” and “fair, competitive and cost-effective”. Prior to tendering, all the tenderers were informed of the criteria that would be applied, that weightings would be allocated to the criteria and that such weightings would not be disclosed to them. None of the tenderers objected to this method of evaluation — all tenderers were therefore treated equally because “[n]one of them received any information which enabled it to gain any advantage over any of the others”.

<sup>40</sup> Local Government: Municipal Finance Management Act, 2003: Municipal Supply Chain Management Regulations GG 27636 of 2005-05-30.

<sup>41</sup> Reg 21(b).

<sup>42</sup> Reg 1.

<sup>43</sup> Reg 27(2)(f).

<sup>44</sup> Reg 27(2)(g).

<sup>45</sup> Reg 28(1)(a).

<sup>46</sup> Examined in greater detail in pars 5 2, 6 2 and 7 *infra*.

<sup>47</sup> Steytler “Socio-economic Rights and the Process of Privatising Basic Municipal Services” 2004 8(2) *LDD* 157 178.

to obtain “the best value for money for residents and other users of the service in the longer term”.<sup>48</sup> Tenderers must know that the tender will be awarded to the tenderer who can best meet the socio-economic rights obligations of the service in question.

#### 4.2 Abidance by criteria

Contractors who participate in a public call for tenders are, as noted above,<sup>49</sup> entitled to expect and require the body calling for tenders to abide by the criteria laid down in its tender call. The criteria specified by organs of State can be said to create a legitimate expectation<sup>50</sup> on the part of contractors that tenders will be evaluated and adjudicated in accordance with the criteria specified.<sup>51</sup>

The court in *Grinaker LTA Ltd v Tender Board (Mpumalanga)*<sup>52</sup> accentuated the importance of organs of State abiding by the criteria laid down in their tender invitations. In this case, the conditions for the award of a tender were clearly laid down by the tender board in its invitation to tender. The tender invitation provided that tenders would be adjudicated in terms of the Procurement Act, the Draft Procurement Regulations under section 5(2) of the Act would be incorporated into the conditions of tender, and the preference points as envisaged in the Draft Regulations would be awarded for active participation of historically disadvantaged individuals as equity owners of tenderers.<sup>53</sup> This being the case, the conditions can be said to have created a reasonable expectation on the part of tenderers that tenders would indeed be adjudicated subject to the conditions. Based on the facts before the court it was, however, clear that the tender board failed to abide by the conditions laid down in the tender invitation. The board was under the impression that it could calculate points on a basis other than that set out in the Draft Regulations which was one of the express conditions laid down in the tender invitation. The

<sup>48</sup> Department of Provincial and Local Government: White Paper on Municipal Service Partnerships GG 21126 of 2000-04-26, clause 4.6 (White Paper on Municipal Service Partnerships).

<sup>49</sup> Pars 2 and 3.2.

<sup>50</sup> In *Council of Civil Service Unions v Minister for the Civil Service* 1984 3 All ER 935 (HL) 944a Lord Fraser said that a “[l]egitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue”.

<sup>51</sup> See also Arrowsmith “Protecting the Interests of Bidders for Public Contracts; the Role of the Common Law” 1994 53(1) *Cambridge Law Journal* 104 123; Hogg & Monahan *Liability of the Crown* 3 ed (2000) 218.

<sup>52</sup> 2002 3 All SA 336 (T).

<sup>53</sup> The draft regulations were published for public comment and were promulgated on 9 August 2001, i.e. after the award of the tender. The promulgated regulations were therefore not applicable.

court set aside the tender board's decision and awarded the tender in accordance with the tender conditions.<sup>54</sup>

At local government level, the court in *Metro Projects CC v Klerksdorp Local Municipality*<sup>55</sup> also stressed the importance of organs of State abiding by the criteria provided in tender documents. In this case, a tender was awarded to a tenderer (the second respondent) who had been given an opportunity by a municipal official to supplement its tender after the closure of the tender process in order to ensure acceptance. The court held that this deception "stripped the tender process of an essential element of fairness: the equal evaluation of tenders. Where subterfuge and deceit subvert the essence of a tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning the tender or not".<sup>56</sup> The Procurement Act also defines an "acceptable tender" as one that "in all respects complies with the specifications and conditions of tender as set out in the tender document".<sup>57</sup> In this regard, the court admitted that "[t]here are degrees of compliance with any standard and it is notoriously difficult to assess whether less than perfect compliance falls on one side or the other of the validity divide". In the present case, however, the court found that "there is no difficulty. The offer put before [the decision making body] was not the one made in [the second respondent's] tender. It was not one elicited by the specifications and conditions of tender".<sup>58</sup> The award of the tender to the second respondent was accordingly set aside.<sup>59</sup>

### 4 3 Summary

In light of the discussion above, particularly the cases dealing with the pre-disclosure and abidance by tender evaluation and adjudication criteria, it is clear that an organ of State may only consider conforming or responsive tenders, that is, tenders that comply with the tender evaluation and adjudication criteria. What still needs to be determined, however, is whether the actual conclusion of a contract with the successful tenderer must also comply with the tender evaluation and adjudication criteria. What is the scope for negotiating and/or varying the terms of a contract

<sup>54</sup> Pars 51-54. See also *Coolcat Restaurante BK h/a Die Kafeteria UOVS v Vrystaatse Regering* 1999 2 SA 635 (O) 644I-J (held that applicant's tender rightfully rejected by tender board; it failed to comply with tender requirements); *JFE Sapela Electronics* n 10 *supra*; *Compass Waste Services (Pty) Ltd v Chairperson, NC Tender Board* 2005 JOL 15344 (NC) (applicant's tender involved an autoclaving process as a method of waste disposal; tender document, however, called for an incineration process; held that applicant's tender not in compliance with tender specifications; board acted properly in not awarding tender to applicant).

<sup>55</sup> 2004 1 SA 16 (SCA).

<sup>56</sup> Par 14.

<sup>57</sup> Par 15.

<sup>58</sup> Par 15.

<sup>59</sup> See also *Hunter Brothers v Brisbane City Council* 1984 1 Qd R 328 (SCB) (statute provided that council could only accept tender which was in tender box on the closing date; in *casu*, tender accepted not tender originally submitted; held that this amounted to acceptance of fresh tender that was privately invited; award of tender set aside).

awarded by way of a tender process? First, attention will be given to the scope for negotiating the terms of a contract after the award of a tender and thereafter, attention will be given to the scope for varying the terms of a contract after its conclusion.

## 5 Scope for negotiation after the award of a tender

### 5.1 General

Case law emphasises the importance of organs of State abiding by the criteria provided in tender documentation — organs of State may not consider or accept non-conforming tenders. Little clarity is, however, provided with the regard to the actual conclusion of contracts, specifically the *extent* to which an organ of State and the preferred tenderer may, after the award of the tender, negotiate the terms of the contract.<sup>60</sup> It is submitted that, as a general rule, an organ of State and the preferred tenderer are prohibited from negotiating the terms of the contract after the award of the tender. The requirement of procedural fairness and the principles of fairness, competitiveness and transparency in section 217(1) of the Constitution require organs of State to abide by the criteria specified in tender documentation.<sup>61</sup> Thus, the actual terms of the contract that is concluded must, as far as possible, conform to the criteria laid down in the tender documentation.<sup>62</sup>

The threat of corrupt procurement practices, in particular, necessitates contracting procedures that leave little scope for discretionary decision-making on the negotiating plane. At the same time, however, far-reaching restrictions on the discretionary powers of organs of State may inhibit the attainment of the best possible value for money, especially in the case of complex and high-value procurement contracts.<sup>63</sup> While restrictions on the exercise of discretionary powers may therefore help to eliminate opportunities for corruption, it may be difficult to obtain the best possible value for money without the entering into of negotiations.

There may, for example, be limited instances where some form of negotiation is necessary or desirable. A complete prohibition on negotiations may be too strict in that it does not allow the attainment

<sup>60</sup> A possible exception may be *JFE Sapela Electronics supra* (negotiations were conducted with a tenderer *prior* to the award of the tender that the tender would be awarded to such tenderer on a basis which deviated from the terms of the tender: the court held that this was procedurally unfair).

<sup>61</sup> See pars 2, 4 2 and 4 3 *supra*.

<sup>62</sup> See also Auricchio "The Problem of Discrimination and Anti-Competitive Behaviour in the Execution Phase of Public Contracts" 1998 5 *Public Procurement Law Review* 113-130; Arrowsmith "Amendments to Specifications under the European Public Procurement Directives" 1997 3 *Public Procurement Law Review* 128-137.

<sup>63</sup> Kelman *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (1990) 1 believes that the problem with the United States' government procurement system is that public officials are prevented from using common sense and good judgment to obtain the best deals. He believes that the system is in need of substantial deregulation to afford public officials more discretion which will, in turn, ensure greater value for money.

of the best responsive tender in favour of the organ of State. Negotiations on a limited basis may allow an organ of State to engage in post-award negotiations with the winning tenderer in order to obtain more favourable terms, for example, a lower price, more favourable delivery terms or added technical features to those offered in the tender. The likelihood of post-award negotiations would, however, have to be revealed to all tenderers in the tender documentation. Such limited post-award negotiations would then not be discriminatory since negotiations would be conducted only with the tenderer who submits the best tender. Tenderers would also be clearly advised in the tender documentation that the organ of State contemplates that it may be necessary to conduct post-award negotiations with the tenderer who submits the most favourable tender.<sup>64</sup> There would, in other words, be compliance with the principle of transparency.<sup>65</sup>

In the end, a fine balance should be struck between, on the one hand, the principles of fairness, equity, transparency and competitiveness in the procurement process and, on the other hand, the attainment of the best value for money, that is, cost-effectiveness. It is submitted that an unsuccessful tenderer should be able to raise a complaint on the basis of unfair treatment (in the sense of the procurement process not being fair, equitable, transparent or competitive) only if the preferred tenderer, after negotiations, is no longer the best tenderer *in accordance with* the criteria specified in the tender documentation,<sup>66</sup> or the resultant contract is *materially* or *significantly* different from the initial call for tenders.<sup>67</sup> Factors that may be relevant in determining the latter include the degree of alterations to the economic balance of the contract, the reasons for the changes and the scope and nature of the changes. Where, for example, the price, quantity, quality or timing for the delivery of goods or services negotiated on is very different from that specified in the call for tenders, an aggrieved party may be able to bring a successful challenge. Where an organ of State and the preferred tenderer negotiate a price increase but with no corresponding increase in obligations, this may also serve as proof of collusion: the parties may have agreed that the preferred tenderer would submit a low tender to win the contract, but on the

<sup>64</sup> Arrowsmith et al *Regulating Public Procurement* 490. See also Seddon *Government Contracts: Federal, State and Local* 3 ed (2004) par 7.25 under the heading “Post-tender Negotiations”.

<sup>65</sup> S 217(1) of the Constitution.

<sup>66</sup> See Case N-264/2002 *London Underground Public Private Partnership* Commission Decision of October 2 2002 [2002] O.J. 309/15 par 91 — available at [www.europa.eu.int](http://www.europa.eu.int); confirmed access 30 April 2006 (found that even though negotiations conducted with preferred tenderer, this would not have changed outcome of tender process).

<sup>67</sup> See *Streamline Travel Services v Sydney CC* 1981 WL 390831 (NSWSC) 46 LGRA 168 175-176 (held that “[t]he question is whether the variation involved a matter of form so that the substantial identity of the original tender remained intact, or the variation involved a radical departure from the substance of the original tender”). See also *Maxwell Contracting (Pty) Ltd v Gold Coast City Council* 1983 2 Qd R 533 (SCB) 538-539.

understanding that it (the preferred tenderer) will be allowed to increase its price once the contract is awarded.<sup>68</sup>

Thus, while an organ of State is not obliged to award a contract once tenders are received, it may not award or conclude a contract that is *materially* or *substantially* different from the one proposed in its call for tenders. Negotiations between the organ of State and the preferred tenderer for the conclusion of a contract must take place in good faith.<sup>69</sup> The terms of the contract to be concluded must fall within the parameters of the specifications laid down in the organ of State's tender call.<sup>70</sup> In those instances when an organ of State contemplates that it may be necessary, after the award of a tender, to conduct negotiations with the successful tenderer, this possibility should also be clearly stated in its tender call. Doing so will ensure compliance with the principle of transparency.

## 5 2 Negotiation and municipal service delivery agreements

Similar rules as those explained in paragraph 5 1 *supra* apply within the context of municipal service delivery agreements — the scope for negotiating the terms of municipal service delivery agreements is highly constrained. The Municipal Systems Act<sup>71</sup> provides that a municipality has a choice whether to deliver a municipal service through an internal mechanism (in-house) or an external provider (a private party).<sup>72</sup> A number of factors should be taken account of in deciding on the mechanism to be employed.<sup>73</sup> Most relevant for present purposes, however, is that if a municipality decides to make use of an external provider, and use is made of a competitive tendering process to select an external provider, negotiations surrounding the actual conclusion of the contract (for the delivery of the municipal service) may not materially affect the integrity of the tendering process. In terms of section 84(1),

“[a]fter a prospective service provider has been selected, the municipality must *on the basis of the bidding documents, and any addenda, amendments or variations thereto that were provided to all bidders*, negotiate the final terms and conditions of the service delivery agreement with the

<sup>68</sup> Arrowsmith *The Law of Public and Utilities Procurement* 2 ed (2005) pars 7.161 and 6.5-6.11.

<sup>69</sup> See *Coolcat Restaurante* case (n 54 *supra*) 645C-D/E and 645G/H-I (held that tender board was entitled to negotiate with sole remaining tenderer for lower price; after all other tenderers had been eliminated for non-compliance with tender requirements there was no danger of prejudice to other competing tenderers).

<sup>70</sup> See also Bright *Public Procurement Handbook* 25 who notes that “limited amendments to contractual terms can be made. If a tenderer requests the contracting authority to make a change and the contracting authority is willing to do so, the change can be made provided that it is not *fundamental* to the tender. If the contract is amended, however, the contracting authority must notify all the other tenderers of the change to avoid any discrimination in its treatment of them. If, on the other hand, the change would *fundamentally* alter the terms of the tender, the contracting authority will not be able to agree to it without being obliged to restart the entire tendering process.” (emphasis added)

<sup>71</sup> See n 7 *supra*.

<sup>72</sup> See generally ch 8 and, in particular, s 76.

<sup>73</sup> S 78.

preferred service provider and, if successful, enter into such an agreement with the selected service provider *on the terms and conditions specified in the bidding documents*, as modified or supplemented in the negotiations, *if such modifications do not materially affect the bid in a manner which compromises the integrity of the bidding process*”.<sup>74</sup>

The MFMA SCM Regulations<sup>75</sup> also provide that —

“(1) [a] supply chain management policy may allow the accounting officer to negotiate the final terms of a contract with bidders identified through a competitive bidding process as preferred bidders, provided that such negotiation —

- (a) does not allow any preferred bidder a second or unfair opportunity;
- (b) is not to the detriment of any other bidder; and
- (c) does not lead to a higher price than the bid as submitted.

(2) Minutes of such negotiations must be kept for record purposes.”<sup>76</sup>

Much emphasis is therefore placed on compliance with the principles of fairness, competitiveness, cost-effectiveness and transparency insofar as negotiating the terms of municipal service delivery agreements is concerned. The Municipal Systems Act<sup>77</sup> also makes it possible for a municipality to enter into negotiations with the next-ranked prospective service provider “[i]f the municipality and the selected service provider fail to reach agreement within a reasonable time allowed by the municipality for negotiations”. The municipality is, however, still required to conclude a contract that falls within the parameters of the tender specifications advertised.

## 6 Scope for variation after the conclusion of a contract

### 6 1 General

It has been noted<sup>78</sup> that after the award of a tender to a preferred tenderer, there is very little room for negotiations as far as the actual conclusion of the contract is concerned. The concluded contract must, as far as possible, be in compliance with the specifications that were laid down in the call for tenders. The preferred tenderer must, after negotiations, remain the best tenderer *in accordance with* the criteria specified, and the contract must not be *significantly* different from the specified criteria. The question then arises whether the same is true after the conclusion of the contract. In short, must amendments to and renegotiations of the concluded contract also be in compliance with the specifications that were laid down in the call for tenders?

First of all, it should be noted that in practice, variations to existing contracts will be difficult to challenge. Those who participated in the tender process may not be aware of changes made to the contract during

<sup>74</sup> Emphasis added.

<sup>75</sup> See n 40 *supra*.

<sup>76</sup> Reg 24.

<sup>77</sup> S 84(2).

<sup>78</sup> Par 5 1 *supra*.

its operation and even if they are, it may be very difficult to prove loss in order to claim damages.<sup>79</sup> This does not, however, deter from the fact that in light of the principles of fairness, competitiveness and transparency in section 217(1) of the Constitution, and the requirement of procedural fairness, an organ of State and the preferred tenderer are not, and cannot be, at liberty to vary the terms of a contract awarded by way of a tender process. As is the case in the context of negotiations after the award decision, however, case law provides little clarity with regard to the *extent* to which an organ of State and the preferred tenderer may, after the conclusion of the contract, vary or change the terms of the contract.

It is submitted that in light of the requirement of procedural fairness and the principles of fairness, competitiveness and transparency in section 217(1) of the Constitution, consensual variations should be allowed provided they are minor.<sup>80</sup> Variations should also not be so radical as to constitute an unfair obligation on the part of the contractor.<sup>81</sup> Thus, variations should not give rise to a contract that is *substantially* or *materially* different from the contract initially advertised. The “new” contract must not, in other words, be *significantly* different from the contract contemplated by the competitive tendering process. If this is the case, the whole rationale behind a competitive tendering process would be undermined. There would be non-compliance with, in particular, the principles of fairness, transparency and competitiveness in section 217(1) of the Constitution. The interests of consumers, rate-payers, voters and those who participated in the tendering process (unsuccessful tenderers) may also be prejudiced.

In the European Union, it has been suggested that based on existing jurisprudence and the policy of the European Union Procurement Directives, certain general principles should apply to the variation of contracts awarded by way of a tender process.<sup>82</sup> Most of these, it is submitted, may also find application in the South African context.

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<sup>79</sup> Arrowsmith *Public and Utilities Procurement* par 6.5. If, of course, major changes are effected to a contract almost immediately after its conclusion, there is a greater likelihood that those who participated in the process may come to know of them and bring a successful challenge.

<sup>80</sup> See cl 18.1 of the National Treasury: Government Procurement General Conditions of Contract (GCC) — available at <http://www.treasury.gov.za/showpfma.htm> – use the search engine, click on “Chief Directorate: Norms and Standards” and then on “Annexure A” (confirmed access: 28 October 2005) which provides that “[n]o variation in or modification of the terms of the contract shall be made except by written amendment signed by the parties concerned”. See also par 63 of the State Tender Board: General Conditions and Procedures (St 36) which provides that “[n]o agreement to amend or vary a contract or order or the conditions, stipulations or provisions thereof shall be valid and of any force and effect unless such agreement to amend or vary is entered into in writing and signed by the contracting parties. Any waiver of the requirement that the agreement to amend or vary shall be in writing, shall also be in writing”.

<sup>81</sup> The contractor should, eg, be compensated for any increased costs incurred due to the minor changes made by the organ of State.

<sup>82</sup> Arrowsmith *Public and Utilities Procurement* par 6.6.

- The reasons for varying a contract are important. Exceptional and unforeseeable events that do not reasonably fall within the risks undertaken by the parties may, for example, require certain changes to be made to a contract. Arrowsmith,<sup>83</sup> however, correctly notes that changes are more likely to be justified in the case of innovative, long-term or complex contracts because with such contracts, planning is usually more difficult and the costs of a new tender procedure are likely to be higher.
- If changes give rise to new work that were not set out in advance and/or taken into account in selecting a winning tenderer during the award process, such changes could be successfully challenged. In Case C-340/02 *Commission of the European Communities v French Republic*,<sup>84</sup> for example, the European Court of Justice ruled that France violated the European Community Services Directive by not advertising a second lot of work because such work was not part of the original contract that was awarded to the successful tenderer.
- The more substantial the changes are in relation to the nature and scope of the original obligations of the parties, the more likely it is that the changes could be successfully challenged.<sup>85</sup> Thus, if for example the current contract is for the purchase of ten machines and the parties agree to vary the contract to such an extent that provision is made for a further purchase of 50 machines, this variation could be successfully challenged.
- If an organ of State discloses in its tender call that it may be necessary to effect certain changes to the contract during its operation, such changes should be allowed because all tenderers will have known beforehand that changes may be made to the contract during its operation.<sup>86</sup> There would, in other words, be compliance with the principle of transparency.
- Changes should be allowed if they are made in accordance with the reasonable expectations of a particular industry, for example contracts of insurance.<sup>87</sup>

## 6 2 Variation and municipal service delivery agreements

In South Africa, the Medium Term Expenditure Framework prepared for 1998/1999 indicated a backlog for municipal service delivery.<sup>88</sup> The findings indicated that if backlogs are addressed through public sector

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<sup>83</sup> *Public and Utilities Procurement* par 6.7.

<sup>84</sup> ECJ judgment of October 14, 2004.

<sup>85</sup> Arrowsmith *Public and Utilities Procurement* par 6.10.

<sup>86</sup> Arrowsmith *Public and Utilities Procurement* par 6.9.

<sup>87</sup> Arrowsmith *Public and Utilities Procurement* par 6.11.

<sup>88</sup> White Paper on Municipal Service Partnerships n 48 *supra*, s 1 headed “The Rationale for a Municipal Service Partnership Policy”, subheading “Backlog”.

resources alone, that is, “in-house”, many communities will receive adequate services only in the year 2065. The present trend, therefore, is to give municipalities a broad discretion on the methods and mechanisms for service delivery. The use of public-private partnership (PPP) agreements has been identified as one way in which municipalities can address service backlog.<sup>89</sup> At local government level, and in the context of municipal service delivery, PPP agreements are also generally referred to as municipal service partnership (MSP) agreements and read together, the Municipal Systems Act and the Local Government: Municipal Finance Management Act (MFMA)<sup>90</sup> provide the legal framework for these agreements.

Most relevant for present purposes is that similar rules as those explained in paragraph 6.1 *supra* apply within the context of PPP/MSP agreements — the scope for changing or varying the terms of such agreements is highly constrained. The White Paper on Municipal Service Partnerships, for example, proposed (in 2000) that

“[a]mendments to MSP contracts should be limited to those circumstances in which the Amendment would likely have been required no matter which bidder had won the contract. In addition, the council and/or the contractor should establish a transparent and accountable amendment process to ensure that stakeholders can be informed of the reasons for, and the scope of, the proposed amendment. Stakeholders can then make representations to the council with respect to those matters before the council decides to amend or renegotiate the MSP contract.”<sup>91</sup>

The MFMA PPP Regulations<sup>92</sup> currently make provision for amendments and variations to PPP agreements. The relevant treasury’s prior written approval needs to be obtained in the case of material amendments to PPP agreements; material variations to the outputs in PPP agreements; or waivers contemplated or provided for in PPP agreements.<sup>93</sup> Material amendments will also be approved provided that the relevant treasury is satisfied that the amended PPP agreement will continue to provide value for money, affordability and substantial technical, operational and financial risk transfer to the private party.<sup>94</sup> Amendments to PPP agreements are further subject to community consultation.<sup>95</sup>

<sup>89</sup> The definition of a PPP is contained in reg 1 of the PPP Regulations to the MFMA (Local Government: Municipal Finance Management Act 2003, Municipal Public-Private Partnership Regulations GG 27431 of 2005-04-01). See also generally the “PPP Quarterly” produced by the National Treasury’s PPP Unit — can be accessed at [www.treasury.gov.za](http://www.treasury.gov.za); Akintoye, Beck & Hardcastle (eds) *Public Private Partnerships: Managing Risks and Opportunities* (2003).

<sup>90</sup> 56 of 2003. See in particular ch 11 part 2 s 120.

<sup>91</sup> Cl 4.11.

<sup>92</sup> See n 89 *supra*.

<sup>93</sup> Reg 16.8.1.

<sup>94</sup> Reg 16.8.2. Reg 16.8.3 also provides that “[t]he accounting officer or accounting authority must substantially follow the procedure prescribed by regulations 16.4 and 16.6 for obtaining such treasury approval”.

<sup>95</sup> S 116(3)(b) of the MFMA. Similar rules apply to the amendment and/or variation of PPP agreements concluded at national and provincial government level. See the PPP Regulations to the PFMA, in particular, reg 16.8 (found in reg 16 of the PFMA Regulations — see n 2 *supra*). No provision is, however, made for community consultation.

The Municipal Systems Act also generally provides for community consultation in case of amendments being made to concluded service delivery agreements. Section 81(4) provides that where a service delivery agreement was concluded by way of a competitive tendering process, the agreement can only be amended

“after the local community has been given (a) reasonable notice of the intention to amend the agreement and the reasons for the proposed amendment; and (b) sufficient opportunity to make representations to the municipality”.<sup>96</sup>

The scope for varying the terms of concluded municipal service delivery agreements (and this includes PPP/MSP agreements) is thus highly constrained. It is particularly the principles of transparency and cost-effectiveness that play a significant role in the variation or amendment of agreements. In practice, however, it appears that the provisions requiring public participation, that is, transparency, for the amendment of municipal service delivery agreements are by and large ineffective.<sup>97</sup> Municipal service delivery agreements are generally extremely long and complex and prevent the community from participating in a meaningful way. It has accordingly been suggested,<sup>98</sup> and rightly so, that to ensure meaningful public participation, service delivery agreements should contain at least a summary in plain and simple English which sets out the obligations of the parties to the agreement and what they potentially stand to gain (or lose) through the contract.

## **7 Mandatory provisions for municipal service delivery agreements**

To safeguard the continued integrity of the government procurement process, legislation makes provision for the mandatory inclusion of certain terms or provisions in contracts. It is especially at local government level and in the context of municipal service delivery agreements that this is provided for. Municipalities, as noted above,<sup>99</sup> have the power to contract out the delivery of municipal services. This, however, is subject to specified conditions.<sup>100</sup> A municipality, for

<sup>96</sup> See also s 116(3) of the MFMA (n 90 *supra*) which provides that “[a] contract or agreement procured through the supply chain management policy of the municipality or municipal entity may be amended by the parties, but only after (b) the local community (i) has been given reasonable notice of the intention to amend the contract or agreement; and (ii) has been invited to submit representations to the municipality or municipal entity”.

<sup>97</sup> See generally Johnson *The Local Government: Municipal Systems Act and the Out-sourcing of Basic Services in South Africa* Seminar on Water Delivery in South Africa and the Netherlands: Public or Private? 7-8 March 2005, Wiarda Research Institute, Utrecht University.

<sup>98</sup> See Johnson *The Local Government* 36 and “Service Delivery Agreements: Who Reads Them?” 2005 7(2) *Local Government Bulletin* 7.

<sup>99</sup> Par 5 2.

<sup>100</sup> See generally ch 8 of the Municipal Systems Act.

example, must still ensure that a service is provided to the local community in accordance with the Municipal Systems Act.<sup>101</sup> The municipality may not disassociate itself from its responsibilities of providing the service to the community. The contract concluded with the service provider must reflect the municipality's continuous responsibility for the proper delivery of the service. Section 81(1) of the Municipal Systems Act provides a framework for the structuring of the agreement: it "must" make provision for, *inter alia*, the following:

- the municipality must, in terms of the agreement, continue to "regulate the provision of the service" in accordance with its performance management system.<sup>102</sup> In other words, it must "set appropriate key performance indicators"<sup>103</sup> as well as "measurable performance targets";<sup>104</sup>
- the municipality must continue to "monitor and assess the implementation of the agreement, including the performance of the service provider" within the framework of its performance management system;<sup>105</sup>
- the municipality must, in terms of the agreement, continue to "perform its functions and exercise its powers" in accordance with its integrated development plan and its performance management system;<sup>106</sup>
- the municipality must "control the setting and adjustment of tariffs by the service provider" within a tariff policy determined by the municipal council;
- the municipality must continue to exercise its service authority to ensure the uninterrupted delivery of the service in the best interests of the community.

The Municipal Systems Act further makes it possible for the parties to include in the agreement certain discretionary provisions.<sup>107</sup> More importantly, however, provision "must" be made for the following:

- the "continuity of the service if the service provider is placed under judicial management, becomes insolvent, is liquidated or is for any reason unable to continue performing its functions in terms of the service delivery agreement";<sup>108</sup> and

<sup>101</sup> S 81(1).

<sup>102</sup> S 41.

<sup>103</sup> S 41(1)(a).

<sup>104</sup> S 41(1)(b).

<sup>105</sup> See also s 41(1)(c).

<sup>106</sup> See ch 5 and 6 of the Act.

<sup>107</sup> S 81(2), in particular subss (a), (b) and (c).

<sup>108</sup> S 81(2)(d). See also the White Paper on Municipal Service Partnerships (cl 3.2.2) which recommends that municipal councils and MSP service providers consider providing contractual safeguards in the event of the insolvency of an MSP service provider. MSP contracts, it is recommended, could make express provision for so-called "step-in" rights. Thus, the municipal council and the service provider's financiers agree in advance on a method of replacing the service provider in the event of insolvency. The Companies Act 61 of 1973 appears to favour the liquidation of, rather than the reorganisation of, insolvent enterprises. This means that there is a real risk for councils and residents if an MSP service provider encounters difficulties and the related municipal services are suspended.

- on the expiration or termination of the agreement, the municipality must, where applicable, take over the municipal service and all assets.<sup>109</sup>

Moreover, the community is entitled to view the draft agreement and is entitled to comment thereon, and after the conclusion of the agreement, it must be disseminated to the community through the media.<sup>110</sup> As noted above,<sup>111</sup> any amendments made to the agreement are also subject to community consultation. The aim of the Municipal Systems Act, therefore, is to provide adequate protection to members of the public where a municipal service is contracted out.<sup>112</sup>

The MFMA also makes provision for contracts and contract management. Section 116(1) specifically states that a contract or agreement procured through the supply chain management system of a municipal entity must:

- “(a) be in writing;
- (b) stipulate the terms and conditions of the contract or agreement, which must include provisions providing for —
  - (i) the termination of the contract or agreement in the case of non- or under-performance;
  - (ii) dispute resolution mechanisms to settle disputes between the parties;
  - (iii) a periodic review of the contract or agreement once every three years in the case of a contract or agreement for longer than three years; and
  - (iv) any other matters that may be prescribed.”

All “reasonable steps” must be taken to ensure that the contract is properly enforced.<sup>113</sup> Performance under the contract must be monitored on a monthly basis<sup>114</sup> and the accounting officer must ensure that the municipality has the necessary administrative capacity to oversee the day-to-day management of the contract.<sup>115</sup> The accounting officer must also on a regular basis report to the council of the municipality or the board of directors of the entity on the management of the contract and the performance of the contractor.<sup>116</sup>

The MFMA PPP Regulations also lay down basic requirements with which PPP agreements must comply.<sup>117</sup> A PPP agreement between a municipality and a private party must, *inter alia*,

<sup>109</sup> S 81(2)(e).

<sup>110</sup> S 80(2).

<sup>111</sup> Par 6 2.

<sup>112</sup> See, however, the criticism noted in par 6 2 *supra* on the lack of meaningful public participation in practice with regard to service delivery agreements.

<sup>113</sup> S 116(2)(a).

<sup>114</sup> S 116(2)(b).

<sup>115</sup> S 116(2)(c)(ii).

<sup>116</sup> S 116(2)(d).

<sup>117</sup> Reg 5. More or less similar requirements are in place for PPP agreements concluded at national and provincial government level. See the PFMA PPP Regulations, in particular, reg 16.7 which deals with the management of PPP agreements (The PFMA PPP Regulations can be found in reg 16 of the PFMA Regulations — see n 2 *supra*).

- “(c) describe in specific terms the nature of the private party’s role in the [PPP];
- (d) confer effective powers on the municipality —
  - (i) to monitor implementation of, and to assess the private party’s performance under, the agreement;
  - (ii) to manage and enforce the agreement.
- (e) impose financial management duties on the private party, including transparent processes relating to internal financial control, budgeting, accountability and reporting;
- (f) provide for termination of the agreement if the private party —
  - (i) fails to comply with terms or conditions of the agreement; or
  - (ii) deliberately provides incorrect or misleading information to the municipality.”<sup>118</sup>

A PPP agreement must further comply with section 116(1) of the MFMA which, as noted above, makes provision for *inter alia* the monitoring and inspection of contractual performance. The monitoring and inspection of contractual performance clearly go a long way in ensuring the attainment of value for money throughout the procurement process: it ensures that problems or difficulties are detected and solved at an early stage which leads to cost-savings. In practice, however, it appears that the sheer length and complexity of service delivery agreements may inhibit the effective monitoring and inspection of contracts. A study also found in 2003 that persons given the task of monitoring and inspecting contractual performance were not familiar with their roles and responsibilities. They accordingly played an inactive role in differing with those who had technical expertise.<sup>119</sup>

## 8 Conclusion

It is clear that in South Africa, the rules that apply to a public tendering process are different from the rules that apply to a private tendering process. As a general rule, when an organ of State calls for tenders and selects a preferred tenderer, the parties are prohibited from negotiating the terms of the contract to be concluded. Negotiations are only allowed if the preferred tenderer will remain the most favoured tenderer in accordance with the tender criteria, and the contract will not be significantly different from the contract initially advertised. More or less similar rules also apply to the variation of a contract after its conclusion — changes made may not result in a contract that is materially different from the contract initially advertised. There are, furthermore, a number of provisos on what “must” be included in contracts, especially in the context of municipal service delivery

<sup>118</sup> Reg 5(1)(c)-5(1)(f). The private party to the PPP may also not, for the full period of the contract, have contractual relations with a current official of the municipality or a person who was an official of the municipality a year prior to the PPP offer being made (reg 5(1)(g)). The private party may also not, for a period of three years, have contractual relations with an employee of the municipality who is/was directly involved in the negotiation of the PPP agreement (reg 5(1)(h)).

<sup>119</sup> Smith & Fakir *The Struggle to Deliver Water Services to the Indigent: A Case Study on the Public-Public Partnership in Harrismith with Rand Water* Centre for Policy Studies Johannesburg, Research Report 103, September (2003) 14-15 — available at <http://www.cps.org.za/rep.htm> (confirmed access: 28 October 2005).

agreements. These restrictions are, of course, justified. Government procurement contracts differ from ordinary private procurement contracts in a number of respects: they differ with regard to the policies they aim to achieve (the policy and philosophy behind government contracting being that the State must provide for its citizens); the importance, from a public interest point of view, of their subject matter; their need for flexibility and control; and simply the huge amounts of public money involved. It is of utmost importance to ensure the integrity of the government procurement process from the time that tenders are called, until the conclusion of a contract and the completion of contractual performances. This is precisely what the principles in section 217(1) of the Constitution aim to ensure.

### OPSOMMING

In 'n private tenderproses is daar geen beperkinge op die inhoud van kontrakte wat gesluit word nie. Die suksesvolle tenderaar en die party wat tenders aanvra is vry om oor die spesifieke bepalings van die kontrak te onderhandel en hulle is vry om later die bepalings van die kontrak te wysig. Daar is ook geen reëls wat neerlê dat sekere bepalings in die kontrak "moet" verskyn nie. Hierdie artikel toon aan dat die reëls wat vir 'n private tenderproses geld baie verskil van die reëls wat geld vir 'n publieke tenderproses in Suid-Afrika. Artikel 217(1) van die Grondwet beskerm kontrakteurs wat aan 'n publieke tenderproses deelneem. Artikel 217(1) bepaal dat wanneer staatsorgane vir goedere of dienste kontrakteer, hulle moet voldoen aan vyf beginsels: regverdigheid, billikheid, deursigtigheid, mededingendheid en kostedoeltreffendheid. Om te verseker dat staatsorgane aan artikel 217(1) en ook aan die tendervoorwaardes gehoor gee, is daar 'n hele aantal beperkinge en verpligtinge om die volgehoue integriteit van die tenderproses te verseker. Daar is beperkinge op die omvang van onderhandelinge ten opsigte van die bepalings van kontrakte en die wysiging van kontrakbepalings na die sluiting van 'n kontrak. Wetgewing bepaal ook dat sekere bepalings in kontrakte "moet" verskyn.

In hierdie artikel word die aanwending van die beginsels in artikel 217(1) van die Grondwet bespreek insover dit op die drie vlakke van regering, naamlik nasionaal, provinsiaal en plaaslik, betrekking het. Die klem sal val op kontrakte wat op plaaslike regeringsvlak gesluit word, en meer spesifiek, kontrakte vir die lewering van munisipale dienste. Die rede vir die onderskeid is dat wetgewing op plaaslike regeringsvlak baie spesifieke reëls vir die sluiting van kontrakte vir die lewering van munisipale dienste neerlê.