Nothing Will Come of Nothing – Cancellation of a Tender

Introduction

Procurement decisions are amongst the most important executive functions of organs of state, who are often faced with finite and already overextended resources. This article summarises the case of City of Tshwane v Nambiti Technologies (Pty) Ltd1 which relates to Tshwane Municipality’s cancellation of a tender process prior to any award having been made for that tender.

Background facts

Nambiti Technologies (Pty) Ltd (hereinafter “Nambiti”) was contracted to the City of Tshwane Metropolitan Municipality (hereinafter “the City”) to provide SAP support services. A few months before this contract came to an end, the City published an invitation to submit tenders for substantially the same services (hereinafter “the Invitation to Tender”). Nambiti, as well as various other entities, submitted tenders in response.

The City appointed Mr Otumile as new Group Chief Information Officer. After reviewing the Invitation to Tender and the City’s technological needs, Mr Otumile concluded that “the Tender as published was seeking services inconsistent with the City’s needs and for a longer period than the policy of the City permitted”. Accordingly, the City decided to cancel the Invitation to Tender (“the Cancellation”) prior to any tender award having been made, and re-advertised it with changed specifications that addressed the City’s (then) current needs.

Nambiti sought reasons for the Cancellation in terms of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) and, although the City adopted the view that PAJA was not applicable as contractual matters were at play – it nonetheless decided to provide Nambiti with written reasons for the Cancellation.

Without making any allegation that the Cancellation was tainted by impropriety, Nambiti brought a successful application to the Pretoria High Court to have the Cancellation reviewed.
and set aside, and that the City be ordered to invite new tenders. The High Court found that the Cancellation was unfair, for want of justifiable reasons and the effect of its order was to “resuscitate the cancelled tender” and compel the City to “consider and award a tender that it had decided should not be proceeded with”.

The Supreme Court of Appeal Decision

Notwithstanding the fact that the Supreme Court of Appeal (“the SCA”) found the matter to have become moot (owing, primarily, to the passage of time), it elected to adjudicate thereupon as it raised a discrete issue of public importance that would have an effect on future matters.

For the cancellation of a tender prior to adjudication to constitute administrative action within the purview of PAJA, it must, among other things, involve a decision of an administrative nature which has a direct, external legal effect.

The SCA found that a decision not to procure certain services does not easily fit into the framework of administration, in terms of which government policies and functions which have already been determined through political process or executive action are implemented. Further, the SCA held that a “decision not to procure services does not have any direct, external legal effect” and that “no rights are infringed thereby”.

In these circumstances, there is no right to contract and, although Nambiti had a right to fair adjudication, that right only existed for as long as the Invitation to Tender remained extant. Once a tender is cancelled, any expectation that submitted tenders would be adjudicated upon falls away. Moreover, once the Invitation to Tender was cancelled, “none of the tenderers had any rights in relation to, or arising from, it”.

The City’s desire to procure the services which were the subject of the cancelled tender was “always provisional” in that the advertisement thereof “contained the caveat that ‘the lowest
of any tender will not necessarily be accepted” and, further, the standard conditions of tender provided that the City “may cancel the tender process and reject all tender offers at any time before the formation of a contract”. However, according to the SCA, it is possible that the aforesaid “express reservations merely made explicit what would in any event have been the position, namely, that it is always open to a public authority, as it would be to a private person, to decide that it no longer wishes to procure the goods or services that are the subject of the tender, either at all or on the terms of that particular tender”.

As Mr Otumile had, upon his appointment, reviewed the City’s SAP support needs, the SCA held that Regulation 10(4) of the Procurement Framework Regulations of 2011 was applicable, which provides that an organ of state may cancel a tender if (i) due to changed circumstances there is no longer a need for the services, works or goods requested; or when (ii) funds are no longer available to cover the total envisaged expenditure; or when (iii) no acceptable tenders are received.

Importance of the Case

Compromise is often a necessary evil. In accordance with the Doctrine of Separation of Powers, courts should not readily interfere with these executive decisions by compelling organs of state to enter into contracts to acquire goods or services which it has determined not to acquire and, if the courts do interfere, they should only do so in extreme circumstances.

Authors

Maurice Crespi
Partner at Schindlers Attorneys
Phone: +27 (0) 11 448 9600
crespi@schindlers.co.za
Kyle Tristan Telfer
Candidate Attorney at Schindlers Attorneys
Phone: +27 (0) 11 448 9706
telfer@schindlers.co.za

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