

Service delivery agreements

Who reads them?

Who can own up to having read a standard service delivery agreement from start to finish and having understood it all? Very few people, I imagine. In the main, service delivery agreements are notoriously long, complex and wordy and are usually filled with legalese. They make little attempt to help the reader gain a meaningful understanding of the basic terms and conditions governing the contracting parties' relationship. In short, they are inaccessible to the ordinary reader.

Many agreements are hundreds of pages long and a more complex agreement, such as a concession contract, can, with all its attachments, reach up to 1 000 pages. The language is generally not accessible at all.

The contracts are not only not reader-friendly. Generally, they do not spell out, in simple terms, the financial arrangements between the parties. For example, some contracts have elaborate cross payments from one party to the other, which may even make it difficult to work out who ends up paying whom once all the payments balance out.

Also, if the contract is with a private company, one would almost invariably not be able to tell from the contract when, and to what extent, the company would expect to make a profit from providing the service during the term of the contract. Some may argue that this information is not suited to being translated into binding contractual terms. But there is no reason why it should not form part of the 'recordal' section of the contract. This is the 'introductory' part of a contract, which is usually specifically not legally binding and is instead intended to give the reader an understanding of the circumstances giving rise to the contract and what the parties want to achieve by entering into the contract.

In reality, the recordal sections at the beginning of many of the current outsourcing

key points

- **Service delivery agreements are notoriously long, complex and wordy documents and are usually filled with legalese.**
- **Inaccessible documents threaten the relevance of public participation in the outsourcing process and also pose a grave threat to effective monitoring of contracts.**
- **Each service delivery agreement should be accompanied by a short summary setting out the basic rights and obligations of each party and what they potentially stand to gain (or lose) through the contract.**

contracts in South Africa offer little real insight into the reasons and rationale behind the decision to outsource. They tend to be limited to a broad description of the general ideals and objectives of the outsourcing project, such as ensuring better service delivery, more efficient use of resources and the like, but do not go into any detail regarding the real commercial issues driving the contract.

Why should contracts be accessible?

There are two reasons why the inaccessibility of contracts is potentially a very serious problem. Firstly, it threatens the relevance of public participation in the outsourcing process. Secondly, it poses a grave threat to effective monitoring of the contract.

Public participation

The legislation regulating municipal outsourcing places a great deal of emphasis on public participation throughout the process, from the phase of assessing and reviewing possible service delivery mechanisms, to the phase of entering into service delivery agreements with a successful bidder. During this process the public is given the opportunity to comment on the proposed service delivery agreement. Again, after the contract has been signed the municipality is obliged to notify the public of its availability for inspection by any member of the public.

Of what benefit are these provisions if even a trained lawyer finds it hard work to unravel and understand the interrelationship between the parties and the essential rights and obligations created in the contract? In effect, the lack of accessibility makes a farce of public participation and transparency.

Monitoring contract implementation

The second serious problem created by the complexity of these contracts is that related to the municipality's monitoring function. It goes without saying that effective monitoring is probably the most important obligation a municipality faces when a municipal service is outsourced. If monitoring is not continuous and effective the municipality faces multiple threats, including loss of accountability, the threat of poor performance going unnoticed and unpunished and the threat of value for money being lost as a result of the municipality being

unable to assess the consequences of changing circumstances on the contract outputs.

Whoever does the monitoring for the municipality must necessarily have a close and in-depth understanding of the service delivery agreement. Naturally, if the service delivery agreement is difficult to understand, the ability of those responsible for monitoring to perform their obligations optimally may be threatened. Councillors will often have an important role to

play in the monitoring function and there is a real risk that councillors, who were not part of the lengthy negotiations leading up to contract finalisation, will be at a significant disadvantage when it comes to making input on contracts with which

they are totally unfamiliar. If, in addition to that, contract are hard to read and digest, then the risk of poor monitoring simply increases.

This is a real problem. A case study which, among other things, assessed how a particular municipality was monitoring one of its service delivery agreements, found that:

While city councillors are certainly part of the monitoring process, their own understanding of the detail of the contract remains limited, leading to acquiescence to those who hold technical expertise.

So what is the solution?

One cannot change the potentially complex relationship and balancing of risk that is necessarily inherent in any service delivery agreement. But what one can do is to record these rights and obligations in plain language. This will require a conscientious commitment by the municipality to demand that the person drafting the contract uses plain language as far as possible.

More importantly, it would be very helpful for each service delivery agreement to be accompanied by a one or two page summary setting out the basic rights and obligations of

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each party and what they potentially stand to gain (or lose) through the contract. Of course, the summary would not be binding and would have no bearing on the validity of the provisions in the contract. But it could play an important role in helping the public to make a more relevant input into the terms of a service delivery agreement. It would also help those performing monitoring obligations to understand the essential obligations of the parties and the nature of information that needs monitoring.

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This article is written in Victoria Johnson's personal capacity. Research was done as part of an ICCO-funded project on the outsourcing of municipal services.