

## UNSOLICITED BIDS IN THE CONTEXT OF

# Disposal of municipal immovable property

Section 14 of the Municipal Finance Management Act (Act 56 of 2003) (MFMA), read with the Municipal Supply Chain Management (SCM) Regulations issued in terms of the MFMA (GN868 of 30 May 2005), regulates the disposal of capital assets owned by municipalities.

Municipalities face an increasing number of unsolicited bids for the disposal of immovable municipal property. The interesting question arises: does the legal framework for such disposals permit the disposal of a council-owned asset to an unsolicited bidder in circumstances where such a disposal was not put out to public tender?

Section 14 of the MFMA does not expressly deal with unsolicited bids. Section 14(5) requires that any transfer of ownership of a capital asset must be fair, equitable, transparent, competitive and consistent with the supply chain management policy which the municipality must have and maintain in terms of section 111 of the MFMA. Section 112(1) stipulates that the SCM policy of a municipality must comply with the prescribed regulatory framework, the SCM regulations.

Section 37 of the SCM regulations deals with unsolicited bids and regulates the award of such bids without a competitive tender procedure having been followed.

In our view, however, regulation 37 does not apply to the disposal of capital assets, for a number of reasons. Firstly, the regulation is contained in Part 2 of Chapter 2 of the SCM regulations, which is headed “Acquisition management”.

Disposal management is dealt with under Part 3 of Chapter 2, headed “Logistics, Disposal, Risk and Performance Management”.

Secondly, the circumstances listed in respect of which a municipality may consider unsolicited bids are not applicable to the disposal of immovable property: including that immovable property does not constitute a “product or service”, that the product or service is not a unique innovative concept and that the bidder is not a sole provider.

Given that regulation 37, which regulates unsolicited bids, is not applicable to immovable property, is it nevertheless legally permissible for a municipality to consider unsolicited bids for the disposal of such property, given that both section 14 of the MFMA and regulation 40 (which regulates disposal management) are silent in this regard?

This question must be considered in light of the requirements of section 14 of the MFMA. Section 14(5) requires that any transfer of ownership of a capital asset must be fair, equitable, transparent and competitive. In most circumstances, the award of an unsolicited bid without following a tender procedure would not meet these requirements. A possible

exception may be circumstances in which an unsolicited bidder makes an offer for a piece of land adjacent to land already owned by that bidder which is not viable on its own and/or cannot be put to any use by anyone other than the bidder. A further possible exception may be where an unsolicited bid is made to acquire land for an express public purpose in circumstances where there is no other suitable land available for such a purpose.

An example of such an unsolicited bid would be one from a sea rescue organisation to acquire immovable property situated on the coast from a council to establish a rescue station. In such circumstances, a municipality should provide the public with an opportunity to comment and submit objections to the proposed disposal of land before the sale is concluded, in order to meet the requirements of section 14(5). However if the land is also viable for other purposes, there could be a risk of a third party challenging the disposal on the basis that it does not

meet the requirement of competitiveness.

A further legal requirement that must be borne in mind when considering unsolicited bids is that, in terms of section 14(2)(b) of the MFMA, a municipality may only transfer ownership of a capital asset after having considered the fair market value of the asset. Moreover, in terms of regulation 40(2)(b)(i), a municipality's SCM policy must stipulate that immovable property may be sold only at market-related prices, except when the public interest or the plight of the poor motivates a lower price. A competitive bid process is most often the best indicator of true market value, although it is, of course, also possible to obtain market valuations of land without embarking on a tender process.

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