



Market-led Proposals.

Market led proposals and the use of beneficial enterprises for the disposal of land.

When a member of the public puts forward a unique proposal to a local government which would involve the disposal of land (by lease or sale) owned by that local government, the process in which that local government must follow should be carefully considered. With the right guidelines and procedures in place, the local government can successfully deliver innovative solutions proposed by the private sector without offending any legislation or any probity principles.

What are market-led proposals?

Typically, when a local government has an idea for a specific project and wants to procure a contractor for that project, it will undergo a competitive process by inviting expressions of interest and tenders, unless there are certain exceptions that apply. It is not uncommon however for local governments to receive proposals for ideas from the private sector. These proposals can cover a variety of projects which may or may not include the disposal of local government land.

The importance of implementing processes for market-led proposals

Depending on the size of the local government, its resources and the types of projects occurring in the local government area, some local governments can receive an abundance of market-led proposals, which is why it can be useful to have public and internal facing guideline documents which specify how market-led proposals are to be dealt with. These guidelines will typically include 'gates' or 'stages' which will detail how the local government will consider the proposal. The benefits of having internal and external guidelines include:

- reducing the administrative burden of receiving proposals from the private sector that the local government will not consider due the proposal not aligning with that local government's strategic and planning objectives by clearly conveying those strategic and planning objectives;
- reducing the administrative burden of combing through large proposals at the initial stages by prescribing proposal requirements and size limits;
- clearly distinguishing the process for consideration of market-led proposals involving the disposal of land and the process for consideration of those that do not involve the disposal of land (importance described later on in this article);
- clearly defining the process for consideration and the responsibilities of each party through each of the gates or stages to ensure that any consideration of market-led proposals is defensible from a probity perspective; and
- properly informing the private sector of the consideration process and the potential outcomes of each gate or stage of the process.

Market-led proposals involving the disposal of land

Market-led proposals involving the disposal of local government land need to be dealt with differently to those market-led proposals that do not involve the disposal of land as there are specific legislative requirements with respect to how local governments may dispose of land. Disposals of valuable non-current assets (land) are dealt with under sections 227, 228 and 236 of the Local Government Regulation 2012 (**Regulation**).

Pursuant to section 227 of the Regulation, a local government may only enter into a valuable non-current asset contract (a contract for the lease or sale of land) if it first invites written tenders for the contract under section 228 or offers the non-current asset for sale by auction, unless one of the exceptions applies. The exceptions are set out in section 236 of the Regulation. Key exceptions include where the land:

- was previously offered for sale by tender or auction and was not sold and is then sold for more than the highest tender or auction bid received;
- is disposed of to a government agency or community organisation;
- is subject to a lease renewal to the existing tenant of the land;
- is disposed of for consideration other than money, for example, other land given in exchange for the disposal, it is in the public interest to dispose of the land without a tender or auction and the disposal is in accordance with the sound contracting principles;
- is to be used as an airport or for related purposes, it is in the public interest to dispose of the land without a tender or auction and the disposal is in accordance with the sound contracting principles;
- is being disposed of via a grant of lease and the lease had previously been offered by tender or auction but has not been entered into; or
- is the subject of a Ministerial exemption.

If a local government receives a market-led proposal involving the disposal of land, the Regulations limit the ways in which it is able to dispose of the land. If the proposal is something that the local government would like to pursue, it will need to invite tenders or conduct an auction to dispose of the land unless one of the exceptions apply. When receiving a proposal of this kind, the local government should take steps to inform the entity of this and determine whether one of the exceptions applies as early as possible.

If no exceptions apply and the local government needs to invite tenders, the local government should take steps to ensure that it does not undermine the competitive process with ongoing communications with the entity that submitted the proposal. Internal and external guidelines, comprehensive probity protocols and engaging a probity adviser to oversee the process is essential for preserving the integrity of the process.

The benefits of a beneficial enterprise

Pursuant to section 40 of the Local Government Act 2009 (Qld) (**Act**), a local government may conduct a beneficial enterprise by participating with an association, which includes, amongst other things, a corporation limited by shares but not listed on a stock exchange. When looking to establish a beneficial enterprise, the local government should consider the costs and resources associated with setting up the beneficial enterprise, the principles of competitive neutrality in the Act and the intended purpose and scope of the beneficial enterprise. As a general overview, beneficial enterprises are often established by local governments for significant high value projects that will span years and where the local government has a specific strategy to undertake projects of a similar nature, such as property development. They are also often established for the conduct of ongoing business development activities.

Beneficial enterprises can be extremely useful when a local government receives a market-led proposal that it wants to pursue which involves the disposal of land. As noted above, one of the exceptions to the requirement to undertake a written tender or auction for the disposal of land under section 236 of the Regulation is the disposal to a government agency. A government agency is defined in Schedule 8 of the Regulation as:

- the State, a government entity, a corporatised business entity or another local government; or
- another Australian government or entity of another Australian government; or
- a local government of another State.

A government agency therefore includes a beneficial enterprise.

Default or Strategic contracting approach

After development of a local government policy and procedure/guideline for market-led proposals, the policy and procedure/guideline should be incorporated into the local governments' policy framework or Contract Manual (if the local government has adopted a strategic contracting approach under the Regulation).

Overview of steps when receiving a market-led proposal

When receiving a market-led proposal, broadly a local government should:

- determine whether the proposal involves the disposal (by lease or sale) of local government land;
- determine whether there is competition for the proposal, that is, whether the proposal also be delivered by other contractors or suppliers such that it would be in the local government's best interest to conduct a written tender process;
- if there is competition, consider conducting a written tender process for the proposal; and
- if there is little competition or if the proposal is particularly unique, consider whether one of the exceptions to tendering or auction applies for the disposal of land, including whether a beneficial enterprise exists or one should be formed for the specific project or series of projects.

Note that the above steps should be reflected in internal and external guidelines and procedures, and in process conditions that are provided to the proponent to ensure transparency of the process.

Conclusion

Dealing with market led proposals can be a complex process, and legislation and probity principles need to be carefully considered. It is also essential to have strict guidelines in place to assist the local government to navigate a market-led proposal and to ensure that the process is transparent to the market. If you have any questions in relation to the process for dealing with market-led proposals, or would like to discuss establishing tailored internal and external processes for market-led proposals, please do not hesitate to contact us.

We also invite you to attend our upcoming Government Seminar Series on 28 August 2024 where we will be delving into the complexities and nuances of market-led proposals and beneficial enterprises.



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