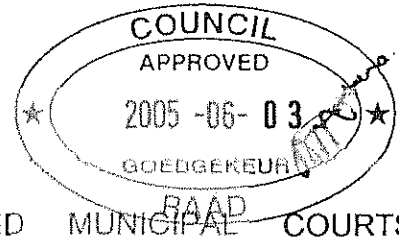


M.C.R. MAKOPO (358-7441)cm  
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12. LEGAL AND SECRETARIAL SERVICES AND MUNICIPAL COURTS  
DEPARTMENT (LEGAL SERVICES DIVISION)  
POLICY FRAMEWORK FOR CONSIDERATION OF UNSOLICITED BIDS  
RECEIVED BY CTMM  
(From the Portfolio Committee: Corporate and Legal Services: 4 May 2005)

"1. PURPOSE

To obtain approval of a policy framework to guide Council in considering unsolicited bids.

2. BACKGROUND

It is common cause that a number of presentations are occasionally made by the external service provider during Mayoral Committee meetings. These presentations are made with a view to securing contracts with the CTMM outside the normal procurement process as approved by Council and in line with statutory requirements.

It is however permissible for Council to consider these unsolicited bids made through a presentation to the Mayoral Committee subject to a policy framework approved by Council

3. INTRODUCTION

This policy promotes a high level framework which will be under-pinned by Corporate Governance Principles. The object of good corporate governance is attained when institutions demonstrate their public accountability and conduct their business within acceptable ethical standards.

The policy will further be subjected to continuing assessment and review.

It further provides for factors which will be taken into consideration when unsolicited bids proposals are processed for decision making, procedures which will be followed to ensure a competitive environment, ensure transparency and offer the community protection from potential monopolistic practices and opportunistic tendencies.

4. LEGISLATIVE FRAMEWORK

- (a) Local Government: Municipal Finance Management Act. In terms of the provisions of the above-mentioned Act, a municipality or municipal entity is not obliged to consider an unsolicited bid received outside its normal bidding process.

If a municipality or municipal entity devotes to consider an unsolicited bid received outside a normal bidding process, it may only do so in accordance with a prescribed framework.

The framework must strictly regulate and limit the power of municipalities and municipal entities:

- (a) to approve unsolicited bids received outside their normal bidding processes;
- (b) to exempt such unsolicited bids from their normal supply chain management processes; and
- (c) to grant preference to such unsolicited bids.

Section 117 of the above-mentioned Act provides as follows:

'17. No Councillor of any municipality may be a member of a municipal bid committee evaluating or approving tenders, quotations, contracts or other bids, nor attend any such meeting as an observer.'

It is thus clear that unsolicited bids/proposals will have to be considered by the bid committee established by the Municipal Manager to give effect to the provisions of the above-mentioned Act.

b. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 (ACT 108 OF 1996)

- 1. The status, objects, powers and functions of local governments such as the City of Tshwane are contained in chapter 7 of the Constitution.
- 2. The objects of local government are in particular set out in section 152 of the Constitution which reads as follows:

'1) The objects of local government are -

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment and;
- (e) to encourage the involvement of local government.
- (f) organisation in the matters of local government.

(2) A municipality must strive, with its financial and administrative capacity, to achieve the objects as set out in sub-section 1.'

3. The Constitution further determines that local government shall have the developmental duties as set out in section 153 that reads as follows:

'A municipality must -

- (4.4) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and ....'

## 5. POLICY SCOPE AND EXTENT OF APPLICATION

The policy application will cover a diversity of different projects and a range of contractual relationship model.

The nature of the said projects must be such that they exceptionally assist the Council in giving effect to its constitutional mandate as outlined in the legislative framework herein above.

This policy will not apply to the general procurement of services of CTMM where a project has already been identified and prescribed for in the City Development Strategy, Integrated Development Plan and in the budget.

As the Council is in the process of finalising the policy in respect of the alienation of Council owned land (sale and lease), it is suggested that this policy not be made applicable to unsolicited bids for immovable property, as this aspect is dealt with in the said alienation policy.

## 6. OBJECTIVES OF THE POLICY

It is imperative that the private sector involvement through innovation in the acceleration of the provision of quality services and infrastructure development should be encouraged where it is evident that the CTMM will achieve better value for money.

It is thus advisable that contractual relationships with the private sector be developed under this policy with the following objectives in mind:

- To ensure that infrastructure and service delivery is provided in accordance with the best practice and where appropriate to relevant national and international standards;
- To promote and sustain economic development growth and employment opportunities for CTMM's geographical area of jurisdiction.
- To significantly improve quality service delivery to the community of Tshwane.
- To encourage innovation in the provision of infrastructure, and quality services to the community.

- To optimise/...

- To optimise the level of infrastructure and quality service delivery expenditure through the responsible use of resources of City of Tshwane Metropolitan Municipality.
- To promote and encourage local and international investment, creation of job opportunities, and skills development and transfer.

## 7. PRINCIPLES OF THE POLICY

Transparency, accountability, in reporting and disclosure of information, both operational and financial are internationally accepted to be vital to the practice of good corporate governance.

Corporate governance seeks to promote and achieve the following:

- Efficient, effective and sustainable structures and entities that contribute to the welfare of the society by creating wealth, employment and solutions to emerging challenges.
- Responsive and accountable institutions,
- Recognition and protection of stakeholder rights
- An inclusive approach based on the democratic ideals, legitimate representation and participation.

In giving effect to the above, the following principles will underpin City of Tshwane Metropolitan Municipality's approach with regard to the policy

- Performance measures should be established to ensure that the quality of the services delivered or infrastructure development meets the needs of the community and that the outcomes are transparent.
- The unsolicited bids/proposals should focus on the output specification (end result).
- The principles of transparency and accountability for process and outcomes must at all times be observed, with full recognition of the requirement to protect private sector intellectual property rights and confidentiality where necessary.
- The decision-making process should always be such that confidence by the community and all stakeholders is protected and maintained at all times.
- The unsolicited bid/proposal should be capable of delivering the best value for money.

## 8. EVALUATION OF UNSOLICITED BID/PROPOSALS

- 8.1 While all unsolicited bids/proposals will be treated or considered on a case by-case basis, the overall consideration of the subject-matter will be the exception rather than the rule and thus limited to unsolicited bids/proposals that demonstrate genuine innovation and/or use of proprietary technology.

The challenge remains getting the balance between encouraging the private sector to submit project ideas without losing transparency and efficiency gains of a well-conceived tender process.

The critical aspect of this policy is therefore the stimulation of innovation to create opportunities for the private sector and to receive proposals that seeks to ensure that the overall objectives of the Council are realised for the benefit of the community.

## 8.2 Format of bids

Unsolicited bids/proposals must contain the technical details of the project or service to be rendered and the financial implications.

The unsolicited bid or proposals should further reflect conformance with the objectives of City of Tshwane Metropolitan Municipality.

### a) Technical details of bid/proposal

The technical details of the unsolicited bid/proposal must contain comprehensive information necessary to enable City of Tshwane Metropolitan Municipality to assess need and desirability, sustainability, innovation and uniqueness.

The objectives, benefits and significance of the envisaged project or service must also be reflected in the unsolidated bid/proposal.

This should also clearly outline the following:

- Nature, scope and extent of the proposal
- Clear articulation of City of Tshwane Metropolitan Municipality responsibilities particularly with regard to monitoring of outcomes.
- Specified outputs and measurable performance standards and improvements expected from implementing the project
- Clear and enforceable risk allocation between contractual parties with consequential financial outcomes
- Contractual terms that include mechanisms for delivering ongoing value for money throughout the duration of the contract
- Payment mechanisms that apply only on the delivery of the specified services at the required standards.
- A brief description of technology or techniques to be used (if applicable) as a means to deliver the project.
- A list of all the parties and their partners, breakdown percentage shareholding and their roles within the bidder or proposer and relevant experience in the field of the unsolicited bid/proposal.

The technical part of the unsolicited bid/proposal will be evaluated on the basis of their technical content, their conformance with the overall objectives and City Development Strategy of the CTMM as well as their anticipated impact on the socio-economic conditions within the geographical area of Tshwane.

### b) Financial/...

b) Financial implications of unsolicited bid/proposals

The proposal should clearly indicate project financial costs and the manner in which the prepared project or service is to be financed to enable City of Tshwane Metropolitan Municipality to evaluate the financial viability of the proposed project.

The following aspects should be clearly reflected in the proposal:

- Description of the prepared contractual structure of the project inclusive of commercial terms for the contract and proposed risk allocation.  
Conditions to be complied with prior to the financial proposal being implemented.
- Terms and conditions of debt finance with written proof of support from potential financiers.
- Payment mechanisms, if any, to meet obligations of the project/service
- An indication in writing from the financiers indicating for which period the financial commitment made shall remain valid.

c) The financial part of the unsolicited bid/proposal will be evaluated on the strength of the demonstrated financial viability of the project and/or value for money principle, public interest and the commercial terms and conditions of the contract with financiers.

8.3 Third party evaluation of unsolicited bids/proposals.

In order to ensure that the CTMM realises the objectives of this policy framework, it is imperative that in certain circumstances the unsolicited bids/proposals received are subjected to independent scrutiny and advice before a decision is adopted to enter into a contractual relationship with the bidder/proposer.

In giving effect to the above, the CTMM therefore reserves the right to submit any unsolicited bid/proposal to a third party for evaluation and expert advice thereof.

Appropriate undertakings of confidentiality will be sought from a third party before the unsolicited bid/proposal is submitted to the latter for expert advice.

The costs related to such expert advice from a third party will be borne by the unsolicited bidder or proposer. All other costs pertaining to the preparation of proposals and counter-proposals as well as all other costs that may have been incurred by original bidder or counter-proposer during all phases of bidding and negotiation processes will be borne by the original bidder/proposer and counter bidder/proposer, irrespective of whether their project is implemented or not.

8.4 Proposals/bids similar in nature submitted almost simultaneously.

In instances where more than one unsolicited proposal is received for the same, or a similar project, the following shall apply:

- If the projects are materially the same, the first come first serve approach will be applied by CTMM.

- If the projects have common elements, but are substantially different in other respects, the CTMM will consider all and decide which of the unsolicited bids/proposals is most desirable taking into consideration all the factors and objectives of this policy framework.

#### 8.5 Public Participation and other statutory procedural requirements.

All unsolicited proposal/bids to be considered by the CTMM will not be subjected to competition and counter-proposals from other parties in the private sector.

The Council will consider an unsolicited bid/proposal under the following circumstances:

- the product or services offered in terms of the bid is a demonstrating or proven unique innovative concept;
- the product or service will be exceptionally beneficial to or have exceptional court advantages for, the municipality entity;
- the person who made the bid is the sole provider of the product or service.
- the reason for not going through the normal process are found to be sound by both the accounting officer and mayor, or in the care of an entity, by both the accounting officer and board .

The onus with regard to proof and/or motivation pertaining to the above criteria rest solely with the bidder/proposer.

Subsequent to a decision of Council to consider an unsolicited bid/ proposal, the CTMM shall advertise a decision through print media inclusive of the following:

- Reasons why the bid should not be open to other competitors.
- an explanation of the potential benefits for the municipality or entity where it accepts the unsolicited bid; and
- an invitation to the public or other potential supplier to submit their comments within 30 days of the notice.

Comments received in response to the advert and any response from the unsolicited bidder must be submitted to the National Treasury for comments.

#### 8.6 No legal obligation on CTMM.

No obligation, legal or otherwise will rest on CTMM to accept any unsolicited bid/proposal or counter bid/proposal and the CTMM shall not be liable for any claim of whatsoever nature which might result from the above processes or the implementation of this policy framework.

- 8.7 Submission of unsolicited bid/proposal. Three copies of the unsolicited bid/proposal must be delivered by hand, or posted to office of the Municipal Manager.

9. EMPOWERMENT AND SKILLS TRANSFER

Empowerment is essential to improve the financial well-being of the majority of South Africans and to ensure that the previously disadvantaged are afforded/enabled an opportunity to actively participate in the economic mainstream of the country.

It is therefore imperative through approval of the unsolicited bids subject to the condition that a joint venture be entered into with a black economic empowerment partner. The joint venture must comply with the order of good practice on broad based economic empowerment.

This type of partnership will deliver mutual returns while transferring vital skills to BEE partners in the public sector as well as with business seeking to increase procurement through empowerment organisations.

10. COMMENTS OF THE CHIEF FINANCIAL OFFICER:

The draft Regulations in terms of Section 112(1) of the Municipal Finance Management Act, no. 56 of 2003: Framework for Supply Chain Management states, amongst others, the following:

6.2 Unsolicited bids

If a potential supplier presents a product or a service that may be beneficial / cost advantageous for the accounting officer to procure as a resource to fulfil an already determined need and such a product / service was not identified as the optimal resource during the strategic planning and budgeting processes, such product / service should be obtained through a competitive bidding system.

It should be noted that a Corporate Supply Chain Management Policy is currently being prepared that will address the issue of unsolicited bids. The finalisation of the said policy is subject to the promulgation of the abovementioned draft regulations.

It is therefore suggested the interim policy in terms of unsolicited bids be accepted and implemented until the finalisation and approval of the Corporate Supply Chain Management Policy.

11. COMMENTS OF THE STRATEGIC EXECUTIVE OFFICER: CORPORATE SERVICES

'We fully support the recommendations of the report.'

12. RESPONSE/...



## 12. RESPONSE TO COMMENTS BY THE CHIEF FINANCIAL OFFICER

It is very clear from the Local Government: Municipal Finance Management Act that the procurement of goods and services and the consideration of unsolicited bids is regulated by different and separate provisions of the said Act. Both Section 111 (Supply Chain Management Policy) and Section 113 (Unsolicited bids) requires a regulatory framework.

On a proper construction of Section 112 of the said Act which provides for the aspects to be covered in the Supply Chain Management Policy, it is very clear that the consideration of the unsolicited bids has not been included.

However, the draft Regulations published for the public comment in terms of the provisions of the said Act only provides that the Supply Chain Management Policy must state that the Municipality or Municipal entity is in terms of Section 113 of the Act not obliged to consider unsolicited bids received outside a normal bidding process.

The proposed regulations further provide certain conditions for consideration of unsolicited bids.

The reality of the situation is that currently Council does not have a policy framework as required by Section 113 of the abovementioned Act with regard to consideration of unsolicited bids.

In terms of the notice of the draft regulations by the Minister of Finance, the effective date for supply chain management that was originally gazetted to come into effect on 1 December 2004 will now be effective from 1 July 2005.

The notice referred to above, further provides that noting stops a municipality from applying any aspect of the draft regulations to the extent that they are applicable.  
(My emphasis)

In light of the above, it is strongly recommended that this proposed policy framework be submitted to Council for consideration with a view to providing interim guidelines until circumstances dictates a review of the policy framework."

### RESOLVED:

1. That cognisance be taken of the contents of this report.
2. That the policy framework for handling unsolicited Bids/proposals as outlined in the report, excluding unsolicited bids for the alienation (sale and lease) of Council owned property be approved and be applicable from date of approval by Council.
3. That the Municipal Manager through the Bid Committee be assigned with the responsibility of handling and finalising unsolicited bids/proposals and report to Council.
4. The policy framework applies to unsolicited bids proposals received by Municipal Entities.

