

Director of Legal Services :
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BRIEFING

SECTION 123 LOCAL GOVERNMENT ACT 1972 – BEST CONSIDERATION

A INTRODUCTION

1. Significant case law has recently taken place on the interpretation of Section 123 of the Local Government Act 1972 and it is, therefore, appropriate to reconsider the current position. The District Auditor has also expressed an interest in this area and, as such, appropriate guidance is being given to all Officers to reinforce the importance of applying best practice to these types of issues.
2. The purpose of this Briefing is not, however, to cover all procedural aspects of applying Section 123 best consideration. These aspects are best dealt with in procedural manuals kept by the relevant client departments. The Legal Services Office is happy to review the same for clients, if required.
3. Section 123(1) indicates that, subject to the other provisions of this section, a local authority may dispose of land held by it in any way it wishes but there is no obligation on the Council to dispose of its land if it does not wish to do so [*R -v- Bolsover District Council ex parte Pepper [2000] EGCS107*], even after an advertising and procurement process has commenced.

4. Section 123(2) requires that except with the specific consent of the Secretary of State the Council **may not dispose of land for a consideration less than the best that can reasonably be obtained other than by way of a short tenancy**¹. There are a number of General Disposal Consents (see Section H below) covering routine matters which preclude the need to specifically approach the Secretary of State. Please consult the Public Law and Property Division of the Legal Services Office if you require further information in respect of the General Disposal Consent Orders.

B RECENT CASE LAW

5. In *R (on the application of Lidl) UK (GMBH) -v- Swale Borough Council and Aldi Stores Limited [2001] EWHC Admin 405*, the Court determined that:

"The Council is in the position of a Trustee in relation to the land which it holds on behalf of the community. Section 123 requires [the local authority] to obtain the best consideration reasonably available. That does not mean that the highest offer on the table is always the best, because a Council is entitled to conclude that "a bird in the hand is worth two in the bush", as this case demonstrates".

6. This case was brought as a result of a bid by Lidl on a site which Aldi had been assembling with the consent and approval of the Borough Council and which Lidl decided to try and delay whilst their own planning application (on another property in the same town) was receiving consideration from the Planning Committee. Lidl's bid was regarded as a spoiling tactic and not to be taken seriously.
7. In *R (on the application of Structadene Limited) -v- Hackney London Borough Council [2001] 12 EG 168*, Hackney LBC intended to sell property at auction and appeared to have two interested parties prior to auction. On the morning of the auction, Hackney LBC decided that it would sell to the tenants at a particular figure. Structadene made two bids (prior to the auction), the second bid was 125% of the other bid. Hackney LBC exchanged contracts with the Underbidder. An injunction restrained Hackney from completing the sale and the matter went to judicial review.
8. Contrast the *Structadene case* with a tender/bid disposal of a car park where bidder A submitted 2 bids "one fixed and one being in excess of all other bids with a ceiling of £165,000". Both A and the other bidder B were invited to resubmit fixed price bids as the bid from A required the disclosure of the bid from B in breach of the tender conditions. A repeated its 2 bids after being told that the referenced bid was void and B increased its bid (and won). From a best practice point of view, it is essential to state in the Tender Conditions that a bid by reference to other bids will be rejected and that only fixed priced bids will be considered.
9. With regard to the effective date of the disposal, although *Structadene* was effectively decided on the failure by Hackney LBC, in other respects Judge Elias set out his understanding of the law in order to attempt to clarify it; although it is arguable that his reasoning was wrong. Please consult, therefore, with the Public Law and Property Division if there is a challenge on an effective date.
10. Where however an unsolicited Bid is received from a party who has not previously been involved on the Tendering process (whether at preliminary or final stage) Paragraph 5 of the General Disposal Consents allow this new Bid to be disregarded if the tendered Bid has been formally accepted and ratified by Cabinet / the relevant Cabinet Member.
11. Where the ratification has not taken place, there is no authority to disregard the Bid. Likewise if the unsolicited Bid is so significantly higher than those received under the tendering process and the basis of the new Bid is compatible with the tender requirements, then this must call into question whether or not the Tender Bid is in fact Section 123 compliant and the Decision Maker advised accordingly.
12. In the circumstances set out in paragraph 11, the final tendering stage must be reopened and all those parties invited to submit their final bids should be invited to resubmit their bids in the light of "there being an unsolicited bid significantly / substantially in excess of the best bid previously made" The Invitation to Tender could be changed at this time if the evaluation of the first bids has revealed difficulties but the basis of the fresh bid should be made very clear and steps taken to ratify the reevaluated

bids once received as soon as practicable.

13. Advice should be sought, at the earliest possible stages, from Legal Services Office if issues arise under in particular, with regard to paragraphs 10 – 12.

C KEY PRINCIPLES

14. In *R (on the application of Lemon Land Limited) -v- Hackney London Borough Council [2001] EWHC Admin 336; [2001] 2EG165 (SC)* it was ruled that a lower bid which produced more employment should not have been accepted as the creation of jobs was not part of the consideration. That bid should have been rejected on the basis that it was the underbidder. It is also likely that, in assessing the bids, a competing bidder may in fact not be able to demonstrate that their scheme is viable or that a development can take place on the land without the acquisition of land held by another bidding party. The assessment of the bids may well result in the underbidders position being regarded, therefore, as a stronger and more deliverable bid than the higher bidders'.
15. Based on the *Lidl* decision (23 February 2001), it is essential for the Council:-

- (a) to consider all offers received;
- (b) Where the Council takes the initiative to sell a site, it must be openly marketed to establish a competitive value and the bids should then be assessed against the the Tender criteria. All tenders should be critically analysed by an appropriately qualified chartered surveyor against the tender criteria.

(c) However there are circumstances where open marketing of property would not be in the interests of Best Value. Where the transaction is a regearing of a lease or another transaction where there cannot be competitive tendering due to the existing legal interest of the other party to the negotiations, then solus negotiations are in order. However the Report seeking consent for such a transaction should explain the reasons behind the present transaction being handled on this basis.

(d) Where an adjoining Landowner invites an exclusive arrangement or this is being suggested, there must first be considered the cost benefit of a transaction involving both land holdings and the likely outcome of dealing with the City's land on its own. Where the adjoining land holding is significant and the joint approach is financially beneficial, then with the prior approval of the Assistant Director (Birmingham Property Services) solus negotiations may be undertaken. The Report to authorise the transaction must demonstrate the justification for this approach with the relevant values.

(e) In both (c) and (d) above it is important to document the reasons to proceed and that an internal appraisal (including the likely range of valuations for the property) demonstrating that best value is carried out. This must be repeated immediately prior to seeking Cabinet/Cabinet Member/ Delegated Authority to proceed

to exchange contracts /complete.

16. From legal, probity and propriety points of view, where the Invitation to Tender sets out the evaluation criteria, these cannot be changed when the bids are all in. An Invitation to Tender should be used in every case with the ITT used in the Masshouse case being the standard form to be adapted for each Project and a shortened version used for minor cases. .
17. It is essential, therefore, that great care is taken to formulate the relevant Tender criteria. These should, as a minimum, cover the financial standing of the bidder, the economic viability of the scheme and the likelihood of it being completed on time. There should also be a clear distinction between marketing information and the ITT which must be separate.

D VALUATION ISSUES

18. In assessing the value of the land / property to be disposed of against which bids are to be evaluated, the Council must disregard the effect on value of any restrictions that the Council seeks to impose because of its own policy as landowner. The only restrictions to be taken into account in valuation are those that burden the land / property prior to the acquisition by the Council and the requirements of the Local Planning Authority as expressed in the UDP, any Supplementary Planning Guidance issued affecting the site in question and any Masterplan in force. Valuers should, where considered appropriate or desirable to protect the City Council's interests, seek independent verification of values in difficult cases.

19. In this regard the terms of DOE circular 6/93 should be borne in mind. Unnecessary or unrealistic restrictions may be challenged and will, invariably, not satisfy the legal requirements on the Council to obtain the best consideration for the land / property.
20. In summary therefore a site should be sold for the best consideration reasonably obtainable, having regard to relevant probing of the bids received. In doing this the City must consider all relevant information and disregard any information not germane to the transaction in hand.

E ETHICAL AND OTHER CONSIDERATIONS

21. Whilst there may in many cases be strong sympathies with a developer who spends time assembling a site and then seeks to acquire Council land, it may be thought that there is an ethical obligation to proceed with that developer in contrast to a higher bid from a rival developer. The legal position, however, is clear : "the Council should realise that when it comes to selling their property (or rather the property that they essentially hold in trust for the ratepayers), ethical considerations are unlikely to have any lawful place in their consideration of rival bids" as per Judge Morrison in the *Lidl* case.

F PUBLIC OPEN SPACES

22. Any sale of land to which the General Public has access is public Open Space (whether formally as defined in the planning legislation or not) and must be advertised first. Under the current scheme of Delegations, the authority to do this rests with the Director of Housing and the Director of Economic Development only. Please consult the Public Law and Property Division

for clarification if there may be doubts.

23. The same advertising requirement applies where Open Land to which the public has access is being formally appropriated.

G REPORT WRITING AND CONFIDENTIALITY

24. It is vital that in reporting to Cabinet or a Cabinet Member in a situation where there is a strong possibility of legal or audit action, that there is spelt out in the report the latest position with regard to the law, the duty to be **Wednesbury** reasonable and those aspects of the bid which can and cannot be taken into account before taking a decision.
25. The report must also be clearly written and should stand up to scrutiny if "called-in" by the Overview & Scrutiny Members. Equally, the report should set out the proper valuations and any relevant legal justification and statutory provisions for the recommended action.
26. If any legal advice is to be set out in the report or any lawyer is to be quoted, the relevant lawyer must check the draft report before it is finalised. **Clients should obtain legal advice, therefore, well in advance of finalising any report. Failure to do so may also prompt the Council's Monitoring Officer (Chief Legal Officer), or the Chief Finance Officer (Strategic Director of Resources) taking action to halt any decision-making process if an unlawful, illegal or procedurally deficient action is being proposed in a report.**
27. If an external consultant's report or valuation is used to assist the Assistant Director (Birmingham Property Services) in deciding whether a particular transaction can

be signed off as being S.123 compliant, the report should accurately set out the consultant's relevant assumptions or conclusions on the matter. These will be important considerations, if the final decision is ever challenged by the District Auditor or a third party.

28. Where considered appropriate and as a matter of good practice, a copy of the external consultant's report must be available for the relevant decision-maker(s) to consult/read (if required) before any decision is taken on the matter. Any internal difference of opinion with regard to an external consultant's advice or recommendation, must also be clearly and satisfactorily explained in the relevant covering report.
29. Confidentiality is important between parties and must be maintained at all times. All Reports with tender evaluations and other bid information of which the Contact Officer is aware is commercially sensitive and should carry a warning as to the confidential nature of the information in the Report. Officers and members are reminded of the requirements for confidentiality contained in their respective Codes of Conduct. Any officer found to have breached a bidder's (or potential bidder's) confidentiality may be disciplined under the Council's Disciplinary Procedure and, depending upon the severity of the breach, could be dismissed by the Council. Any Member breaching the Code of Conduct may be referred to the Monitoring Officer for consideration as to whether or not this matter should be referred to the Standards Board.

H GENERAL DISPOSAL CONSENTS

30. In the event that a disposal at less than best consideration is considered appropriate for policy,

regeneration or other reasons it is open to the Council to make an application to the Secretary of State for specific consent should the General Consents not cover the position. However before there can be any consideration of such an approach, the Accounting Procedures Manual containing the Standing Orders should be consulted and a case presented to the Assistant Director (Birmingham Property Services) demonstrating compliance with the Accounting Procedures Manual to obtain his prior authority to seek a Secretary of State's Consent.

31. In **Structadene** it is clear that if Hackney LBC had indicated to Structadene that it was applying to the Secretary of State for consent to dispose at less than best consideration, the case may not have come before the court.
32. The General Disposal Consents permit in certain circumstances a sale at undervalue where leasehold land is passing to Health Service bodies and medical professionals, charities, organisations providing leisure facilities and for certain functions supported by or required by statute.
33. Also in certain circumstances freehold disposals can be made under the General Disposal Consents where the use is consistent with the Unitary Development Plan or other statutory plan and is for leisure use, place of worship, certain housing and business uses with additional restrictions.
34. There are also specific Consents under Housing legislation relating e.g. to small disposals under £50,000 outside London, preserved Right to Buy, the transfer of freeholds under Shared Ownership Schemes, the grant of shop leases and short leases

for community purposes or special needs.

35. In any circumstances where it is thought that General Disposal Consents or other Consents may apply, please contact Legal Services Office as the Consents are liable to change and there are specific conditions attaching to some of the Consents.

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Note 1 (on page 1)

For the purposes of Section 123 a disposal by way of short tenancy is for the grant of a lease not exceeding 7 years or an assignment of an existing term with no more than 7 years still to run.

For further advice on the contents of this Briefing Note please contact :

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