

# Dispute Resolution

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SOUTH AFRICA

The conundrum of unsolicited bids



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## The conundrum of unsolicited bids

**Municipalities regularly receive unsolicited bids, which are offers by third parties on their own initiative and without an invitation from a municipality to provide the municipality with goods or services. The general principle is that municipalities are not obliged to consider unsolicited bids as they fall outside the normal bidding process. In the circumstances, when a municipality does choose to consider an unsolicited bid it must do so within the prescribed legislative framework.**

The general principle of procurement is that when a municipality requires goods or services, it must implement a bidding process that is fair, equitable, transparent, competitive, and cost-effective. This type of procurement is the normal bidding process. When an award is issued that does not conform with the legal principles of a normal bidding process, it may be reviewed and possibly set aside.

The Municipal Financial Management Act 56 of 2003 (Act) recognises several instances that justify a deviation from the normal bidding process, such as in the case of an emergency or when it is impractical or impossible to follow the normal bidding process. But what happens when a municipality has not initiated the procurement process outlined above but receives a bid from a public member to offer it goods or services?

Unsolicited bids are regulated by section 113 of the Act and Regulation 37(2) promulgated thereunder. The starting point is that there is no obligation on a municipality to consider an unsolicited bid outside the normal bidding process and neither can a municipality be compelled to consider an unsolicited bid. If a municipality does decide to consider an unsolicited bid, then a statutory obligation is placed on the municipal manager to consider if:

- the product/service offered in terms of the bid is a demonstrably or proven unique innovative concept;
- the product or service will be exceptionally beneficial to or have exceptional cost advantage for the municipality or a municipal entity;
- the person who has made the bid is the sole provider of the service or product; and
- the reasons for not going through the normal bidding processes are found to be sound by the accounting officer.



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## The conundrum of unsolicited bids

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### Requirement to prove sole provider status

In the case of *Bushbuckridge Local Municipality v Mylocel (Pty) Ltd* (1537/2019) [2021] ZAMPMHC 23 (27 August 2021), the High Court discussed the legal principles above and was required to determine whether an agreement conclude between the Bushbuckridge Local Municipality (Municipality) and Mylocel (Pty) Ltd (Mylocel) for the supply, installation, and maintenance of digital screens at 20 of the Municipality's sites was unconstitutional as it did not comply with the statutory requirements of an unsolicited bid.

The High Court stated that nowhere in Mylocel's answering affidavit did it contend that there was no other provider at that time that could render the services that formed the subject matter of Mylocel's unsolicited bid. The High Court noted Mylocel's argument that the municipal manager accepted its unsolicited bid because it was convenient and did not emphasise Mylocel's argument that the services it provided to the Municipality were beneficial.

The High Court held that the requirements of an unsolicited bid as articulated in Regulation 37(2) were not met as Mylocel failed to prove that it was the sole provider of the services rendered to the Municipality and that the services were unique. The High Court accordingly ordered that service-level agreement concluded between the Municipality and Mylocel was invalid and set aside.

There are several advantages to unsolicited bids, namely that they encourage innovation by allowing third parties to propose unique solutions to municipalities that may not have been considered by the municipality. However, unsolicited bids must be considered within the ambit of the municipal legislative framework and should not be used as a disguise to avoid the normal bidding process especially when the goods or services that are being offered are not unique and the offeree is not a sole provider of the goods or services.

**Neha Dhana, Ledile Maloka and Tyler Lillienfeldt**

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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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