



Property Council of Australia
ABN 13 008 474 422

Mezzanine Level, Australia Place
15 - 17 William Street
Perth WA 6000

T. +61 8 9426 1200
E. info@propertycouncil.com.au

propertycouncil.com.au
[@propertycouncil](https://twitter.com/propertycouncil)

The Hon. Terry Redman MLA
Minister for Lands
c/o Land Asset Management Unit
Department of Lands
Level 2, 140 William St
Perth 6000

Submitted via email: lamu@lands.wa.gov.au

1st October 2015

Dear Minister Redman,

Unsolicited Bids Guideline For the Sale or Lease of State Owned Land

The Property Council of Australia welcomes the opportunity to provide comment on the consultation draft for *Unsolicited Bids Guideline for the Sale or Lease of State-Owned Land (the Guideline)*.

The Property Council of Australia is the peak body representing property developers, investors and businesses that provide professional services to the property industry. By way of background, the property sector is a significant contributor to the State's economy, paying \$6.4 billion in taxes, directly accounting for 12 per cent of WA's economic activity and providing more than 200,000 direct jobs.

The introduction of a *Guideline* will unlock the investment opportunities available to our members and, as such, the industry welcomes the *Guideline* as a mechanism to leverage the private sector's expertise and experience for the benefit of the broader community. The Property Council generally supports the details of draft *Guideline* released for consultation, however there are a number of refinements and a particular concern around protection of intellectual property that are covered in the following comments:

General Comment

The Property Council of Australia strongly supports the introduction of an unsolicited bid guideline that balances the protection of private sector intellectual property with the procurement principles required by Government to deliver value for money.

Ultimately, the property industry supports a clear and transparent process that gives certainty of intellectual property protection to those promoting innovative projects.

Western Australia is the only state that does not have the governance structure in place to encourage greater private sector participation, through the development and promotion of unsolicited bid guidelines.



The introduction of the guidelines provides a significant return to the community for minimal cost. As noted by the Economic Regulatory Authority (2014), introducing a guideline for unsolicited bids to focus on specific policy areas such as asset sales or problem sectors, iconic developments or transport interchanges could contribute to the performance and productivity of the State's economy.

At a time when the State is experiencing such budget pain, it is essential that opportunities to support the growth and development of the State are not placed on the backburner and that the Government actively supports private sector-led investments to enable the property industry to create prosperity, jobs and strong communities.

Definition of an Unsolicited Bid

The Property Council supports the definition of an unsolicited bid as outlined in the *Guideline* to the purchase or lease of land (i.e. land or land and property) owned, held or managed by General Government Sector agencies and Public Non-Financial Corporations (State-owned land) for a specific development.

There are opportunities to broaden the definition of an unsolicited bid to maximize the community benefit from the unsolicited bid process:

- Accept and review proposals that include joint venture or public private partnerships with relevant Government Sector agencies and Public Non-Financial Corporations, such as Land Corp and the Metropolitan Redevelopment Authority.
- Adapt the *Guidelines* for use by the private sector to make an unsolicited bid for land (i.e. land or land and property) owned by a local government.
- Expand the use of the Guidelines beyond land to include infrastructure development.

These opportunities are beyond the remit of the *Land Administration Act 1997*; however, it would demonstrate a broader willingness on the part of government to collaborate with the private sector to unlock economic growth through development, deliver policy outcomes and address the State's debt challenges.

Objective of this Guideline

The Property Council supports the objective of this *guideline* to set out a transparent and consistent framework to guide the Minister for Lands in the exercise of the power under the *Land Administration Act 1997* to sell or lease State-owned land by private treaty in response to an unsolicited bid.

Transparency in sale or lease of government owned land through an unsolicited bid is fundamental to guarantee fair and equal opportunities for private sector participants to do business with Government.



The Property Council, therefore, supports the circumstances identified where it is beneficial to deal with one party to capture innovative ideas that provide tangible benefits to the community including:

- The proposal is unique or innovative; and
- The proposal results in an economic, social or environmental benefit to the State; and
- The proposal deliver value for money to the State; and
- The proposal is feasible; and
- The proposal aligns with Government policy.

Application of this Guideline

The Property Council agrees that the *Guideline* applies to unsolicited bids for State-owned land in WA:

- Where the estimated cost of the proposal (excluding the value of state-owned land) is \$5 million or more; or
- The Minister for Lands directs a proposal to be dealt with under the guideline; or
- The Land Asset Management Advisory Group directs a proposal to be dealt with under the guideline.

The Property Council recognizes the need to focus Government resources on the assessment of high value (\$5million +) proposals.

The pipeline of land and property assets earmarked for disposal demonstrates the diversity within the government's portfolio with respect to lot size, value and location. Smaller, less desirable land and property assets would benefit from an unsolicited bid guideline by virtue of the fact there would be limited interest from the broader market.

The Property Council would suggest that the application of this Guideline provide detail as to the treatment of unsolicited bids for proposals worth less than \$5 million.

Principles Underpinning this Guideline

The Property Council supports the principles that underpin the process for considering unsolicited bids as they are based on global best-practice principles for unsolicited bids including:

- Promoting innovative and unique ideas with the private sector where appropriate;
- Ensuring value for money for the State is achieved;
- Ensuring maximum value for money for the State is achieved;
- Ensuring the benefits of the project for the community are measurable and can be maximized;
- Ensuring the proponent's intellectual property is respected; and
- Incorporating competitive processes wherever possible in the assessment framework to ensure value for money for the State.



Clarification is required for the final principle as to how competitive processes will be incorporated under the *Guidelines*.

Assessment Criteria

The Property Council supports the assessment criteria that must be met by the proponent to justify a proposal being dealt with as an unsolicited bid and makes the following comments with respect to the criteria:

- (i) *The proposal is unique or innovative to result in an outcome that could not otherwise be obtained through a competitive process, including ownership of intellectual property or strategic assets.*

“Unique or innovative” are defining characteristics of the unsolicited bid process and, therefore, greater clarity is required of the definition and expectations to address this criteria.

The Property Council suggests that LAMU provides examples and/or case studies to demonstrate what is considered unique or innovative with respect to land and property development to assist the proponent in determining if the proposal has merit. Examples and/ or case studies of unsolicited bids that failed to address the “Unique and innovative” threshold would also assist.

- (ii) *The proposal will result in a benefit to the State.*

The Property Council suggests that LAMU provides a preferred model to measure economic, social or environmental benefit including hurdle rates.

- (iii) *The proposal demonstrates value for money.*

The Property Council suggests that LAMU provides a preferred model to calculate net economic benefit including hurdle rates.

The Property Council would like to understand at what stage of the assessment process is a value to be placed on the government-owned land and how the value is determined.

Pre-Submission Meeting Requirement

The Property Council strongly supports a pre-submission requirement prior to lodging an unsolicited bid as it save time and costs for the proponent.

This meeting is fundamental to the unsolicited bid submission and must be used to identify whether the proposal meets the unique/ innovative assessment criteria. It is vital that the pre-submission meeting identifies the weaknesses of the proposals prior to the proponent expelling too much cost.

The Property Council recommends that the pre-submission meeting be held with people of appropriate seniority to determine if the unsolicited bid meets the unique/ innovative criteria.



The Property Council would like additional clarification as to how much information the proponent must prepare to inform this meeting. That is, would the proponent simply have to identify the site and informally address how their bid would meet the assessment criteria?

Submission of Proposal

The Property Council supports the submission process outlined in the consultation draft *Guideline* where the minimum information requirements include:

- Pre-submission meeting;
- Estimated cost of the proposal;
- Detailed description of the unique or innovative characteristics;
- Measurable social, economic or environmental benefits;
- How the proposal delivers value for money;
- Proponent's experience and capacity to deliver the project;
- How the proposal aligns with relevant Government Policy;
- Indication of Support from relevant departments;
- Content identified that should not be in the public arena;
- Areas of the proposal that are considered IP; and
- Declare any conflicts of interest.

The Property Council would also query how the Guidelines would manage two or more unsolicited bids for the same land asset:

- Would this trigger a competitive process?
- Would negotiations with each party continue, where the bid that best meets the assessment criteria enters exclusive negotiation?
- Would unsolicited bids be accepted for land that was already the subject of a submission proposal?

The Property Council suggests that the Guidelines incorporate an interim agreement/ Memorandum of Understanding to steer negotiations until a binding arrangement is made at a later stage to manage two or more unsolicited bids for the same land asset.

The proponent must have the right to withdraw from the process at any time and retain all intellectual property related to the proposal.

Assessment of Proposal

The Property Council supports the staging of the assessment process including:

- Preliminary assessment by Dept. of Lands;
- Assessment by an inter-agency working group convened by the Dept. of Lands;



The Property Council recommends that the proponent should have the opportunity to amend the proposal based on feedback from the interagency working group prior to submission to the Land Asset Management Advisory group. This would minimize the sunk costs associated with the project should the working group determine that the proposal falls short or is unviable.

- Submission of an assessment report to the Land Asset Management Advisory group;
- Recommendation made to the Minister for Lands to either:
 - Request additional information;
 - Enter into exclusive negotiation;
 - Go through an open competitive process; or
 - Not proceed with the bid.

In the event that the recommendation not to proceed is made, the proponent should have the opportunity to amend and re-submit the proposal to the inter-agency working group for assessment.

In the event that a bid is accepted subject to additional information, that is additional costly reports are needed, and then the Government decides not to proceed, then there should be a mechanism to reimburse the costs shouldered by the proponent.

In the event that the recommendation is to go to an open competitive process, this indicates that the proponent failed to meet the unique or innovative assessment criteria. If this is the case, it would not be unreasonable to allow the proponent one further opportunity to refine- or clarify- this aspect of their proposal.

The Property Council suggests that indicative timeframes for each assessment stage would be useful for the proponent. An interim agreement may identify a timeframe for the assessment process that can be extended or abandoned by mutual agreement.

Exclusive Negotiation Process

If the proposal is success, the Department of Lands will negotiate the sale or lease of the state owned land by private treaty in accordance with the Government policy.

The relevant Government policies that will inform this negotiation need to be clearly identified at this point of the *Guideline*.

Open Competitive Process

The Property Council notes the Minister's ability to recognize the proposals merit, but decide that an open competitive process is preferred:

- Invite expressions of interest in respect of the State owned land;
- Invite public tenders for the purchase or lease of the State-owned land;
- Sell or lease State owned-land by public auction;



- Sell or lease State owned-land by public tender.

Should the decision be made to go to an open competitive process, the Property Council recommends that the number of competitive bids received should be limited. Limiting the number of competitive bids will result in higher quality bids. Requesting detailed submissions from an unidentified number of proponents potentially dilutes the quality of the submissions. The Property Council suggests a procurement process similar to that implemented by the Metropolitan Redevelopment Authority or LandCorp sales processes.

The Property Council is concerned that this process fails to acknowledge the innovative bid made by the original proponent. A number of other jurisdictions in Australia (such as Victoria) acknowledge the original proponent in the open competitive process through one of the following mechanisms:

- **Access To The Best And Final Offer**- two-stage bid process is used, in which the highest-ranked bidders from the first stage are invited to submit final proposals in a second stage. The original proponent is included in the second stage.
- **Bid Bonus**- the original proponent receives a scoring advantage- typically defined as an additional percentage added to its evaluation score or related to the sunk cost of preparing the proposal- in an open bidding process.
- **Swiss Challenge**- if an open competitive process is launched as a result of an unsolicited bid, the original proponent has the option to match the winning bid and enter into an exclusive agreement.

The Property Council recommends that the *Guidelines* recognize the original proponent should the decision be made to take the proposal to open competition via one of the above mechanisms.

Secondly, the Property Council requires further details as to how the proposal will be framed in the open competitive process. The proposal must be framed so that the unique or innovative component of the proposal (intellectual property) is not compromised, but ensures that the unique or innovative component can be included in any response by the original proponent to demonstrate competitive advantage.

As an example, would the tender brief simply identify the land opportunity, or would it identify the desired development outcome on the land?

The Guidelines need to demonstrate:

- How the original proponent's innovative idea, in that it is a combination of non-unique elements combined in a novel way, be protected.
- How the original proponent's work to address the assessment criteria (e.g. feasibility studies, calculating economic benefits, alignment with State plans) be used to inform the tender brief.



- If the bids received from an open competition will be required to address the economic, social and environmental assessment criteria, or if the tender purely focus on the financial aspects of the bid.

Intellectual Property

The major concern for the property industry is the protection of intellectual property of the proposed unique and/or innovative idea, use of technology or construction method that belongs to the proponent. The industry supports the *Guideline* if it gives certainty of the intellectual property protection to those promoting innovative ideas.

The challenge with an unsolicited bid process for both the private and public sectors is that, if government procedures are not in place to protect intellectual property, then the private sector will be reluctant to submit unsolicited proposals.

The Property Council strongly recommends that the Guidelines need to clarify how intellectual property (or commercially sensitive information) will be protected during the bidding process and in the event of an open competitiveness processes.

How intellectual property (or commercially sensitive) information will be treated if a Freedom of Information request is made? Particularly, in the open competitive process

Closing Comment

The Property Council of Australia welcomes the opportunity to provide comment on the consultation draft for *Unsolicited Bids Guideline for the Sale or Lease of State-Owned Land (the Guideline)*.

The Property Council of Australia strongly supports the introduction of an unsolicited bid guideline that seeks to balance the protection of private sector intellectual property with the procurement principles required by Government to deliver value for money.

The introduction of the *Guideline* will unlock investment opportunities and establish a mechanism to leverage the private sector's expertise and experience for the benefit of the broader community.

If you would like any additional information on this submission, please contact Rebecca Douthwaite on 9426 1203 or rdouthwaite@propertycouncil.com.au

Regards,



Joe Lenzo

Executive Director