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Legal Q&A

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Must a city accept the highest bid when selling real property by notice and sealed bid?

It depends. Section 272.001(a) of the Local Government Code governs the sale of real property by notice and sealed bid. Under that section, a city must publish notice in a newspaper of general circulation in the county in which the land is located, or if there is no such newspaper, in an adjoining county. The notice must describe the land and the procedure by which sealed bids to purchase the land may be submitted.

Cities are required to follow the procedures set forth in Section 272.001(a), described above. However, Section 272.001(d) provides that “[t]his section does not require the governing body of a political subdivision to accept any bid or offer to complete a sale or exchange.” Thus, nothing in Chapter 272 obligates a city to accept the highest bid. As long as the city determines that a bid provides the best benefit for the taxpayers of the city *and the bid conforms to the bid procedures and specifications set forth in the published notice*, the governing body may be able to accept a bid that is lower than the highest bid received. *See, e.g., West Orange-Cove Consol. Independent School Dist. v. Smith*, 928 S.W.2d 773 (Tex. App.—Beaumont 1996).

Because a city may not necessarily be required to accept the highest bid, some would argue that the decision of which bid to accept is no longer a legal issue, but rather a policy judgment that should be carefully weighed by the governing body. Because attorneys disagree on the above analysis, each city should consult with local legal counsel on the issue.

Must a city accept the highest bid when selling real property by public auction?

Yes. Section 253.008 of the Local Government Code provides an alternative to selling land by the notice and sealed bid procedure of Section 272.001.

Section 253.008(a) states that:

The governing body of a municipality may sell real property owned by the municipality by public auction or by sealed bid under Section 272.001.

An “auction” is defined as a “sale of property to the highest bidder.” BLACK’S LAW DICTIONARY (8th ed. 2004). Thus, if a city chooses this method to sell land it owns, the property must go to the highest bidder.

Is a lease of a city’s real property subject to notice and bidding?

Probably not. A recent court decision indicates that a temporary lease is not subject to notice and bidding requirements. Section 272.001(a) of the Local Government Code provides that the notice and bidding process applies only to the “sale or exchange” of land owned by a political subdivision. There is no language indicating a direct applicability to the lease of city land.

In *Walker v. City of Georgetown*, the Austin Court of Appeals held that a city's temporary lease of parkland (ten years, with an option for ten-year renewal) is not subject to the notice and bidding requirements in Chapter 272. *Walker v. City of Georgetown*, 86 S.W.3d 249, 259 (Tex.App.—Austin 2002).

In deciding that the city was not subject to notice and bidding requirements, the court reviewed the language of Chapter 272. Because the statute only referenced the “sale or exchange” of land as necessitating the requisite formalities, and not the lease of land, the court held that the drafters of the statute did not intend for a city to be subject to these requirements when leasing parkland: “[T]he plain language of the statute indicates that the Legislature intended for the notice and bidding requirements to apply to the ‘sale or exchange’ of land, not the lease of land.” *Id.* at 259.

While the *Walker* decision restricts the applicability of Chapter 272, the case is arguably applicable only to temporary lease arrangements similar to the potential twenty-year lease involved in the case.

Under what circumstances would a city's lease of real property not be considered temporary (and therefore subject to the notice and bidding procedures in Chapter 272)?

Several factors must be considered in determining whether or not a lease is essentially the same as a sale or exchange of land subject to Chapter 272. A recent attorney general opinion suggests that the following all have a bearing upon the status of the lease agreement: (1) the duration of the lease; (2) the city's right to control the land during the lease term; and (3) the city's right to make improvements upon termination of the agreement. Tex. Att'y Gen. Op. No. GA-0321 (2005), at 9. An older opinion suggests that the lessee's option to purchase the leased property upon expiration of the lease may also be indicative of a sale. Tex. Att'y Gen. LO-96-053, at 3.

The attorney general has suggested that a lease of city land in excess of fifty years may equate the lease to a sale or exchange, putting it within the ambit of Chapter 272. Other courts have indicated that a lease agreement exceeding forty years may be considered “extremely lengthy,” which indicates that forty years may be the outer limits of being characterized as a lease for purposes of Section 272.001 of the Local Government Code. *See Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552, 559 (Tex.App.—Texarkana 2003).

There is no clear indication of the threshold number of years in which a lease goes from being “temporary,” and thus not subject to notice and bidding requirements, to “long-term,” which might make the lease the equivalent of a “sale or exchange,” and thus subject to the notice and bidding requirements. Opinions from the attorney general, as well as a limited amount of case law, indicate that leases with a duration in excess of forty to fifty years could rise to the level of a “sale or exchange.”

Each city should consult with local legal counsel to review the facts and law associated with a lease of real property.