

**DISPOSAL STRATEGY**  
**2009**

**CONTENTS**

1.	INTRODUCTION	Page 1
2.	CONSIDERATION OF CORPORATE POLICY OBJECTIVES	Pages 1-2
3.	BEST CONSIDERATION ISSUES	Pages 3-5
4.	DEALING WITH SPECIAL PURCHASERS	Pages 5-7
5.	MARKETING CONSIDERATIONS	Pages 7-8
6.	MARKETING STRATEGIC SITES	Page 8
7.	MINOR LAND ENQUIRIES	Page 8-9
8.	DISPOSAL PROCESS	Pages 9
	APPENDIX	Page 10
	PREPARATION OF DISPOSAL	Pages 10-11
	Internal Circulation	Page 10
	Inspection	Page 10
	Special Purchaser	Page 10
	Asset Vehicle	Page 10-11
	Legal Matters	Page 11
	Physical Constraints	Page 11
	Define Development Potential	Page 11
	METHODS OF DISPOSAL	Pages 11-14
	Private Treaty	Page 12-13
	Informal Tender	Page 13-14
	Formal Tender	Page 14-15
	Dealing with Late Bids	Page 15-17
	Public Auction	Page 17-18
	PROPERTY OPTIONS	Pages 17-18
	MONITORING DISPOSALS	Page 18

## 1. INTRODUCTION

An owner of land is usually free to dispose of land as and when – in whatever manner – he or she chooses. But local authorities are subject to constraints when they come to sell land in their ownership. Some of these constraints are enshrined in law; others arise because of a general expectation that local authorities should be seen to act fairly when disposing of land as in other aspects of their work.

The Corporate Property Strategy 2005 recognised the impositions on Local Authorities when disposing of land and buildings, coupled with important service delivery considerations relevant to certain disposals. The approved policy identified a number of “key issues” for processing land sales. It further identified the preferred methods of disposal for the sale of different types of property where varying service objectives and marketing considerations are presented.

This Disposal Strategy is an integral part of the wider Medium Term Property Strategy which in turn is linked to the Medium Term Financial Strategy.

## 2. CONSIDERATION OF CORPORATE POLICY OBJECTIVES

Property disposals contribute towards the achievement of several important Service objectives, namely:

- **To lead the regeneration of our District**
- **Contribute to a safer society**
- **To deliver cost effective services that provide value for money**

These themes further flow through the Council's corporate planning process and strategies. Conducting a systematic programme of searching property review assessments to identify surplus properties for disposal is integral to the Asset Management Process.

Disposals guided by policy objectives, other than the simple generation of a monetary receipt, may be affected in two ways:

- **Disposal for preferred use may reduce receipt**

It is possible on rare occasions when disposal for a preferred use, or restricted use, does not produce the highest receipt available. An example would be the promotion of a scheme to create greater employment opportunities on a site where retail development could also be obtained and give a higher land value.

- **Disposal to a preferred purchaser (“special purchaser”) may conflict with equal opportunity and fairness principles**

Disposal to a particular party without the property first being offered on the open market exposes the Council to the challenge that equal opportunity for others to submit an alternative scheme and/or higher price has been denied.

The considerations and procedures to deal with these issues, within a legal and audit framework, are detailed in the following two sections of this report.

### **3. BEST CONSIDERATION ISSUES**

Section 123 of the Local Government Act 1972 requires Local Authorities not to sell land for a “consideration less than the best that can reasonably be obtained”. However, the Local Government Act 2000 provides Councils with a power to carry out any transaction provided they can prove social, economic or environmental well being. In 2003, the General Disposal consent was amended to allow Disposals to occur without Secretary of State Approval to assist to deliver the 2000 Act with the proviso that the disposal of the land where the difference between the unrestricted value of the interests to be disposed of and the consideration accepted (“the undervalue”) is £2 million or less.

The Council’s Disposal procedures fully reflect this fundamental legal duty.

Although it is accepted that “best consideration” need not be best price, it is understandable that price is perhaps the most obvious criteria by which to measure the negotiated terms of disposal. It is acknowledged that as a small District Authority, the occasions when a property disposal is promoted to achieve non-monetary objectives will be rare, the circumstances in which other forms of consideration can apply and how they can be quantified is not always clear cut and a cautionary approach is required.

In such cases the following methodology needs to be adopted:

- Identify the relevant corporate policy objectives affecting the potential disposal and evaluate the depreciation in value it causes.
- Consider the implications of implementing a policy objective via a proposed property disposal and seek the approval of Cabinet to earmarking Capital Resources in order to specifically achieve the particular policy objectives rather than contributing generally to the capital receipts balances. The provisions of the ODPM Circular 06/2003, Local Government Act 1972: General Disposal Consent (England) 2003, specifically require that Members approve accepting an undervalue.
- Where the difference between open market value, and undervalue exceeds £2M, then Secretary of State Approval must be sought for the Disposal.
- Circular 06/2003 provides for a general disposal consent only where the following circumstances are met:
  - (a) the authority considers that the purpose for which the land is to be disposed is likely to contribute to the achievement of any one or more of the following objects in respect of the whole or any part of its area, or of all or any persons resident in its area:
    - (i) the promotion or improvement of economic well-being,
    - (ii) the promotion or improvement of social well-being,
    - (iii) the promotion or improvement of environmental well-being, and

- (b) the difference in the unrestricted value of the land to be disposed of, and the consideration for disposal, does not exceed £2,000,000.

In considering whether to rely on this General Disposal Consent and to sell land for less than the best consideration that could reasonably be obtained, the Council should consider the following aspects for each case:

- Ensure that the legal basis is in line with the General Disposal Consent. In particular, the Council will need to consider what evidence is available as to whether and how the economic/social/environmental well-being objectives would be met by the proposed disposal of the land.
- The need to ensure that the Council complies with normal and prudent commercial practices, including obtaining the view of a professionally qualified valuer as to the likely amount of the under value. In particular, the requirements of the Technical Appendix to the Circular must be met.
- The Council should have regard to its community strategy when considering the application of the well-being objectives.
- Ensure that the Council's policy/corporate objectives are met.
- Consider the Council's financial situation and the financial implications (including VAT) of disposing of the land at less than the best consideration that could reasonably be obtained. Use of the General Disposal Consent should not undermine or significantly increase risks associated with the funding of the Council's investment plans/Capital Programme.
- Consider the feasibility of each proposal, i.e. robustness of business case / ongoing viability, supported where appropriate by a fully documented Business Plan
- Consider alternative options for land / property in question, including uses and valuations
- Consider the interests of the Council tax payers and proportionality; i.e.
  - The extent of any economic/social/environmental advantages that will arise from the disposal, balanced against the financial loss to the Council.
  - Justification of the reasons for disposing of a particular piece of land at less than market value, whilst seeking the best consideration for other land.
- Fairness in dealing with third parties who may have an interest in acquiring the land, or in acquiring other land for which full market value is to be sought.
- Whether a sale at an under value would constitute state aid, and if so whether the "aid" is within any prescribed limits.

- Ensure that if the disposal is to be at less than best consideration, controls are in place to cover future disposal, so that the Council's financial interests are protected.

Finally, a major consideration with regard to dealing with Corporate Policy Objectives relates to the Council's financial position at any one time and its sometimes competing needs for both revenue income and capital receipts. Generally, the Council has recently been in the fortunate position of being able to achieve its capital receipts programme targets without seriously impacting on revenue income from property. In other words, most disposals have been of non-tenanted properties and this has fitted in well with the principal elements of the Corporate Property Strategy.

This position may change in future and the Medium Term Property Strategy seeks the maximisation of rental income and rental growth. Where the council may have a choice in whether a future stream of income is retained or a capital receipt is received, then maintaining that choice for as long as possible is important. Such a situation has arisen with the Canal Corridor Scheme, where terms have been agreed for either a capital receipt or a revenue stream with the Council having a choice when the scheme is completed. In other circumstances, it will be necessary to undertake a Property Review where the analysis of good and bad property performers is employed to advise the Council on which disposals are best brought forward in order to maintain the balance between conflicting requirements for income and capital receipts. Such a Review was most recently carried out in January 2008.

#### **4. DEALING WITH SPECIAL PURCHASERS**

The general approach to disposing of Council properties is to offer them for sale on the open market and invite offers by way of tender. This method is usually chosen to ensure that a transaction is fair and transparent and that best consideration will be achieved.

However, the possibility of negotiation with a single (special) purchaser is not precluded. Indeed there will be occasions when the benefits to the Council lie clearly in dealing with special purchasers. These benefits may relate to such matters as a policy of the Council, or the locality of an adjoining property already owned by the special purchaser. Where, for example, the Council is involved in a site assembly venture with other landowners, special purchaser arrangements are appropriate when the assembled site is sold to the scheme developer. The Special Purchaser is also relevant with the Housing Programme and the selection of preferred development partners such as Housing Associations.

Circumstances vary considerably as to whether the grant of special purchaser status may be justified. However, typical tests to be applied include the following:

- Identification of relevant policy objectives (if appropriate)
  - Assess degree to which objectives supported and identify any specific outputs/outcomes;
  - Identify linkages to other corporate policies/strategies;
  - Identify Partnership Working considerations.

- Assess any financial benefit to the Council
  - Determine premium price and/or marriage value;
- Assess whether there is any general market for property
  - Determine whether property is of interest or value to one party only by virtue of its particular location, access availability or other characteristic (often relevant to purchase applications from adjoining land owners).

To aid the understanding of the application of the tests, it is perhaps worth considering a few examples.

1. In the West End of Morecambe, approval has been given to identify suitable specific sites for developments by individual Housing Associations. Under this policy Housing Associations have consequently been given special purchaser status at market value to ensure grant aid from the Housing Corporation can be secured. The rationale behind this was that it was envisaged that Housing Associations would be the only builders of social housing for the foreseeable future and the Housing Corporation did not wish to have different Housing Associations all competing for funds. This approach can continue under the existing proposals.
2. From a Regeneration viewpoint particularly in the area of Business Development, there are perhaps four main areas to be considered:
  - a) Business expansion onto adjoining land;
  - b) Inward investment from targeted sectors of industry or commerce;
  - c) Business relocation, where the existing premises may be released for other objectives.
  - d) Redevelopment schemes involving preferred sectors of activity, such as tourism, and the like.

When a Special Purchaser application is received and where time allows, a report shall be submitted to Cabinet for consideration of justification for direct negotiations prior to their commencement. Once negotiations are underway, the Council's Property Service will be able to determine, and endeavour to seek, the best price and other non-monetary terms (as appropriate) for the property to be disposed of.

Where time is limited, or the transaction is relatively minor, a two part approval on the same report may be acceptable; i.e. consideration of award of Special Purchaser status in principle and then, if approval given, consideration of a provisionally agreed disposal terms.

Best consideration rules apply to "special purchaser" transactions in the same way as other disposals. It is usual practice for the Council's Property Service to undertake negotiations with confirmed Special Purchasers and report recommended terms. Where this cannot be achieved the parties could agree to appoint either the District Valuer or independent expert Surveyor to act as arbitrator to determine the matter and give the Council protection from future

challenge. Alternatively, where it is thought that a Special Purchaser is seeking to take unfair advantage of the situation, it may be prudent to market the property generally to stimulate a serious offer from the applicant.

Assuming the District Valuer is not already acting on behalf of the Council or would be purchaser (e.g. NHS Trust, Housing Association) in special purchaser negotiations, he may still have a role. To demonstrate that the agreed terms represent best consideration, and therefore protect the Council from challenge, it is good audit practice for the District Valuer to be asked to supply a "franking" report for transactions of a significant/strategic nature.

## **5. MARKETING CONSIDERATIONS**

The purpose of this section is to identify the marketing considerations which need to be taken into account before the Council makes its land available for disposal. This first distinction to be made is the difference between property that has significant development potential, and that which has not. Some of the property being dealt with will probably have little or no development potential because it is already fully developed, and planning consent is unlikely to be available for another use. A simple example might be a retail unit where there is no choice but to sell the unit as it stands.

Properties with development potential might range from an existing building where planning consent might be available to change to a more valuable use, to a vacant site which is ripe for development. It is essential to identify development potential before the sale process gets underway. Sometimes the potential is obvious; sometimes it needs seeking out. Within the Lancaster District, the number of sites available in council ownership where there is development potential is extremely limited. Should such a site be available for disposal, it may be easily marketed, or may require careful handling before marketing can be contemplated. When a site is ready for the market, there are two considerations that need attention. Firstly, what is the level of demand, and when should a particular property be sold to maximise capital receipts. Secondly, which sites and property should be actively promoted to benefit the perception of the City Council to the outside world, so that inward investment can be targeted. Both of these considerations are not dissimilar in the sense that they relate in the need to phase the release of land prudently to maximise potential.

The capital receipts programme is scheduled for a 5 year period meaning that some sites and premises will be dealt with in future financial years. This can mean that some properties may be vacant for a long period of time. In this case, consideration should be given to a number of important issues. Firstly, there is a need for an assessment of which vacant properties are most vulnerable to vandalism and damage, and potential erosion of the capital value. This will enable the formulation of a priority action list in the disposal programme. Clearly, vacant buildings would be at the top of the list in such circumstances.

Secondly, having identified land or property that is likely to be unsold for a lengthy period of time, temporary treatment of those properties should be pursued in order to positively promote that perception of the City and its surrounds. This may involve such action as making sites and premises secure in the interest of public health and safety, and generally keeping property in a neat and tidy condition. Where long term disuse of land in particular is envisaged,

action should involve the exploration of funding sources to create temporary landscaping schemes.

As such matters relating to temporary treatment of land and buildings depart from the Disposal Strategy issues, this is dealt with by way of a separate section under the Medium Term Property Strategy.

In the current Local Authority environment, any disposal policy would not be complete without reference to financial considerations. Capital controls have essentially linked the Council's disposal programme to its capital programme. Whilst the phasing outlined above may generate one approach, the aspirations of the Authority in one particular year may force an alternative approach. The Medium Term Property Strategy is a flexible Strategy and where possible, will help to attain these objectives.

## **6. MARKETING OF STRATEGIC SITES**

Land disposals are undertaken by the Council's Property Service, although it may be prudent in certain circumstances to enlist the help of specialist agents if it is felt that this may result in a greater capital receipt to the Council due to their more detailed knowledge of the market for that property. The marketing strategy for each piece of land will reflect the outputs required from the disposal and each project will be taken on its merits.

## **7. MINOR LAND ENQUIRIES**

The Council regularly receives enquiries about the purchase of small areas of miscellaneous land. These enquiries can have an impact on service delivery as they can be quite time consuming yet result in minimal financial reward to the Council.

From time to time it is necessary to advise potential purchasers that if the disposal is not in line with Corporate Plan priorities, then it will not be possible to prioritise the work involved in the process. Where enquiries relate to miscellaneous sites of relatively low value (£5,000 or less) that may be of interest to more than one party but are not currently on the property review programme, in the interest of overall value as opposed to an individual's aspirations, it is appropriate for Property Services to be able to defer consideration of a case, albeit by placing the site at the lower end of the review list. Such enquiries should be deferred for up to 1 year, unless exceptional circumstances cause a dramatic increase in value. At the expiration of the 1 year period, the position shall be reviewed.

## **8. DISPOSAL PROCESS**

The appendix accompanying this document provides guidance for the treatment of transactions through the disposal process. It consolidates and updates best practice gained through the development of previous disposal policies and draws on experience in processing transactions over many years.

The preparation work required for a success disposal is outlined, together with an analysis of the available methods of disposal (particularly the tender mechanism). Topics relating to the grant property options and the monitoring of disposals are further discussed.



Where property disposals take place, each case should be considered and supported by the Asset Management Working Group. The property disposal programme for each year should also be considered by the Asset Management Working Group as part of its requirements to look at all investment decisions and to inform the Medium Term Financial Strategy. Any opportunity disposals that arise outside of this programme should be the subject of an officer recommendation to Cabinet in the first instance following full consideration by the Asset Management Working Group.

Where appropriate, Development Agreements should be used that ensure that the Council can retain control over major development schemes and yet ensure that maximum consideration is received as required under s123 of the Local Government Act 1972, as amended.

## **APPENDIX**

### **PREPARATION FOR DISPOSAL**

The key to a successful disposal of any sort is preparation. To assist in meeting the corporate targets set for capital receipts/regeneration projects/service delivery, a strict timetable should be set for the sale process, since the proceeds of sale will be required as quickly as possible. The stages of preparation for disposal need to be clearly defined and carefully followed, so that misconceptions and delay are kept to a minimum. These stages need to include the following:

#### **(i) Internal circulation**

Under normal circumstances, Property Services will be aware of all Departments' strategic needs for property in the future, via their Service Asset Management Plans. In circumstances where operational requirements are identified by Services and are included in the Capital Programme with funding available, then there may be a need to provide a safety net, by advising that Service of the availability of the property, subject to a strict timescale for, say, one month. However, such circumstances are very rare and it is envisaged that this will occur before the property is formally "declared surplus" to the Council's requirements and, once this latter trigger point has been passed, progress must be rapid.

**(ii) Inspection**

This is an obvious, but sometimes neglected stage. The purpose will be to spot any matter that is likely to hinder the disposal. This may be some physical defect in a building or, perhaps, evidence of encroachment by a neighbour. These matters will have to be dealt with before the property comes onto the market. The property to be sold should be as “clean” as possible. The inspection should bring to light any potential for development about which the Council is not already aware. For clarity, the inspection particulars and report to senior managers should be in a form which indicates that all necessary steps have been taken.

**(iii) Special Purchaser** (refer also to Special Purchaser Section in main body of Policy document)

At an early date, it should be established whether the balance of advantage is likely to lie in dealing with a special purchaser. In some cases, the decision is marginal. However, there will be situations where the adjoining owner wishes to acquire the Council’s land, or where he may own an overriding interest over it, such as a right of way, for instance. Dealing with this party direct may produce a marriage value which would enhance the capital receipts above that which would be paid in the general market. In such circumstances, it may be prudent to deal with the special purchaser against a strict time limit with contingency plans, having been made to go to the market if negotiations cannot be progressed. If the special purchaser does not already have an interest in the property, it can sometimes be advantageous to let him bid in open competitions, particularly if this is by sealed tender.

**(iv) Asset Vehicle**

Where the Authority chooses to use its assets to procure modern methods of delivering regeneration projects, it may be appropriate to put land within an asset value which will have a 10-15 year timescale on return and investment but will secure sustainable regeneration projects.

**(v) Legal Matters**

The Legal Service should be instructed as early as possible to report fully on the Council’s title and any rights or obligations which might affect it. Typical examples could include restrictive covenants, rights of way and reversion clauses. It is often too late if any problems become apparent once marketing and negotiations are underway, as these tend to prejudice the Council’s position. In addition, where it is intended to include covenants or conditions, it is essential to obtain legal advice at an early stage to ensure that these can be fulfilled in practice, prior to negotiations.

**(vi) Physical Constraints**

Certain physical constraints (e.g. electricity pylons) will be obvious from inspection; others (e.g. underground cables, adverse ground conditions) may not be. It will be necessary, therefore, to check the Council’s own records, and also to check with statutory undertakers. Opinions differ about the validity of carrying out site condition surveys, as these are expensive

and often may not relate directly to a particular developer's own intentions. The merit of undertaking such a survey will need to be considered in relation to each site, and the extent of the restrictions which the Authority intends to place on the development activity.

**(vii) Define Development Potential**

At this stage, a view will have been formed on any development potential which might exist, and any matters affecting potential value will have been brought to light. It will be necessary to decide if some, or all, of any identified constraints should be removed before marketing takes place. For those properties with development potential, it is essential, in order to maximise the realisation from disposal, to give potential purchasers the most detailed possible guidance. In straightforward cases, the equivalent of an "outline planning consent" for the most valuable use available should be secured. Where definite scheme criteria are to be met, or a range of development options is possible, a "development brief" could be agreed which gives some scope for the "flair" of individual developers. Where the Council wishes to consider ensuring a desired use of property to achieve its policy objectives, it will be necessary to introduce appropriate clauses or covenants.

It is Council policy to include a clawback provision on disposals.

**METHODS OF DISPOSAL**

In view of the potential scale and sensitivity of land transactions, a high standard of probity is necessary to avoid any possible allegation of corruption. The chosen method of disposal must therefore be fair and consistent, entirely transparent and primarily in accordance with Standing Orders.

Where the property is marketed, as opposed to negotiations with a special purchaser, there are four principal methods of disposal available:

- (i) Private Treaty
- (ii) Informal Tender (sealed bids)
- (iii) Formal Tender (contractual bids)
- (iv) Auction

Clearly, each method of disposal engenders varying degrees of ensuring fairness and transparency with the sale by formal tender probably being the most likely to avoid any criticism of the authority's dealings. However, it is not always appropriate or convenient to adopt the formal tender route, nor does it always guarantee best consideration when potential purchasers are put off by the sometimes complex and lengthy procedures. The Property Service should recommend to the Council which other method of disposal is appropriate provided that best consideration can be achieved.

**Council's Constitution**

It is important that the appropriate sections of the Council's Constitution are strictly adhered to, in particular the Contracts Procedure Rules and Financial Regulations.

It will also be noted that the decision on the method of any disposal will be taken in accordance with the principles and guidelines set out in this policy document.

The characteristics and constraints of each method of disposal are as follows:

(i) Private Treaty

This is probably the most widely used method of disposal in the property market, as it is the simplest to adopt, and the asking price can be at a pre-determined figure. Further advantages are that it allows a flexible approach, time pressures are seldom imposed and it is widely understood and accepted by the general public. However, it is also acknowledged that the main disadvantage is that proceedings cannot always overcome allegations of unfairness, and it is therefore a method to be used sparingly and with caution in the local government field. Difficulties have arisen where individuals have anticipated that, where they are first to apply, they will receive an option to acquire, and this has caused some concern, both to Council Members and, more importantly, to the market in general. To overcome such potential problems, unless a special purchaser situation applies, all properties to be sold under this method should be advertised for sale, in any event, so that all interested parties have an opportunity to enter into the discussions.

In applying this method, it should be remembered that this approach is satisfactory in the case of properties whose sale value is reasonably easy to predict, and therefore settlement of an asking price is straightforward, e.g. dwellinghouses. It is difficult to engender competition on price because an indication of what will be acceptable is generally given at the outset. It should be considered bad practice to try and play offerers against each other to build up their offers of the asking price, and could damage the Local Authority's reputation in the market (although an acceptable price).

Development sales should not be conducted by this method, since it leaves little scope for the flair and interpretation which may lead to the unexpectedly favourable offer. It is worth noting that the procedure can be time-consuming since time limits are difficult to fix, and there may be many individual negotiations before a satisfactory transaction takes place. It is the method with the least openness and, therefore, the most susceptible to abuse.

To ensure the greatest possible transparency in this type of transaction, proposals have been put forward with regards to recommended procedures. Primarily, there is a need to ensure segregation of duties i.e. one person should not be able to undertake all the fundamental stages in the sale process. This might involve one person preparing a valuation and another carrying out the negotiations although it is considered technically unsatisfactory to do this. More practical measures are already in place, and will continue to be so, where an independent person (usually a manager) reviews the valuation of another. In any event, the "asking and settling" figures should be approved by the Head of Property Services at the outset, and should be reviewed in line with progress.

In view of recent market conditions, it is considered prudent that the Council should set a time limit against potentially tardy prospective purchasers, and that they are made aware of the Council's firm view on this prime point at

the outset of negotiations. It is also worth noting that the Council must satisfy itself as to the financial ability of the prospective purchaser to complete, before negotiations become too advanced.

(ii) Informal Tender (sealed bids)

Procedures which need to be adopted are similar to those as set out below for the Formal Tender. However, tenderers may put forward conditional offers which will only become binding once that conditions have been resolved. It will, therefore, be open to the Council to pursue discussions with more than one tenderer in order to achieve the most advantageous transaction. Since considerable time and effort may be spent on such discussions, it is essential that *bona fide* shortlisted tenderers should be established at the outset, and guarantees that finance for a particular scheme is available.

As it is possible to hold discussions, there is more opportunity to arrive at a deal which suits both parties. Some conditions may not be capable of fulfilment for a considerable time, but there is an opportunity to build in provisions for the Council to take advantage or, say, a better than expected planning consent or better receipts above an agreed threshold.

For more complex development schemes, it is commonplace for interested parties to be interviewed and outline development schemes presented, before the tender procedure starts. This is in line with the three key criteria that have been long established in progressing major schemes, i.e. quality of the scheme, deliverability and the financial bid. It may be appropriate for a selected list of purchasers/developers to be asked to take part in the tender procedure itself. This approach saves wasted effort from potential purchasers, and cuts down the possibility of abortive negotiations being pursued on receipt of tenders. An important role with the Informal Tender procedures, which needs to be adopted by the Council, is that the Council should not seek to increase the basic tenders put forward, nor accept increased offers from unsuccessful tenderers. However, it will be permissible for the Council to seek increased rewards from the fulfilment of conditions which would create more value than the original offer envisaged.

In comparison with the Formal Tender, the Informal Tender lacks the advantage of speed, since post-tender negotiations can be protracted. It also lacks the certainty of the Formal Tender procedure, since negotiations may not be successful. There is a much greater burden on the professionals' skills of the Council's advisers, as the requirement to negotiate raises some of the disadvantages of a sale by private treaty. For this method to be a success, the rules for Informal Tenders must be laid down very clearly and followed to the letter by the Council and external advisers. The main advantage of the Informal Tender process is that the most advantageous terms for the Council can be formulated even in very complex cases. Notwithstanding the advantages and disadvantages, the Informal Tender route is presently the most commonly used method of disposal by this authority.

Generally, the rules to ensure transparency, fairness and consistency outlined above in the sale by private treaty method should be applied to informal tendering where practical.

(iii) Formal Tender (contractual bids)

The Formal Tender (otherwise known as Contractual Tender) procedure requires a great deal of preparation, as the tender document forms the contract for sale. A full appraisal of the transaction needs to be carried out in order to have a baseline against which to assess the tenders when they are returned, and may, indeed, provide a guide price during the course of marketing. For sound legal reasons, the Council will need to indicate in the tender documents that it is not bound to accept the highest or any tender. In addition, tenderers must be required to provide evidence, on return of the tender, that finance is available to proceed. In order to ensure fairness and the best chance of an acceptable offer, the tender will be widely publicised, and all interested parties given the chance to participate.

The advantages of the Formal Tender procedure are that it can be concluded quickly where it is unconditional, it avoids tentative time-wasting enquiries, the Council does not need to accept any tender if the offer is not satisfactory, the tender procedure should guarantee complete fairness and, as bids are not public, tenderers should put forward their best offer, rather than, as at auction, a figure marginally more than the second bid. However, this method does have its disadvantages: some potential purchasers may be put off by the procedure whereby they commit themselves contractually upon making the financial offer. All matters must be completely clear before the procedure starts. There is little room for discussion about the scheme itself although to some extent this could take place with prospective purchasers during the marketing preparation provided care is taken not to compromise the transparency of the transaction.

This method of disposal is, therefore, inappropriate for straightforward transactions where conditions of substance remain to be overcome before the bid can be finalised. In development situations, it could, for example, be effective in the sale of cleared sites for residential development where planning consent is available and the density of development is not in question. It may also be appropriate where several development schemes might be possible where negotiations with various parties will not be required to achieve the best scheme. On the other hand, it is now becoming more common in residential land sales for Formal Tenders to take place conditional upon detailed planning consent where outline consent has been previously obtained.

The rules for formal tenders for sale cover, inter alia:-

- advertising that tenderers are to be sought;
- procedure for pre-tender shortlisting of applicants, where appropriate;
- evidence of financial standing required from tenderers, either on receipt of tenders or at the pre-tender selection stage;
- the principal contents of the tender package, including a clear indication of the date before which the tender must be returned;
- inclusion of a pre-addressed envelope clearly indicating details of a tender and the date on which it is to be opened;

- how receipt of tenders should be recorded and arrangements for safe keeping prior to the opening date;
- the constitution of the Council's team which should be present at opening of tenders and if an independent witness is necessary;
- arrangements for listing and witnessing tenders on opening;
- the form of the officer's report to Committee recommending which tender(s) should be accepted or pursued further in discussion;
- rules for informing successful tenderers;
- instructions not to solicit or accept increased basic offers after receipt of tenders;
- Members should not engage in negotiations under any circumstances;
- the external advisers should not be bound by similar rules.

#### Tenders – Dealing with Late Bids

Whilst best efforts are made to ensure that policies and procedures are watertight and completely fair and transparent, there are occasional circumstances that, if not handled with great care, can lead to challenges against the Council of maladministration. In the context of sale of land and property by tender, the issue of dealing with late bids is one such area of concern.

The potential dilemma is that whilst it may be appropriate to maintain a policy of disregarding any late bids in a tender exercise, the Council may find itself missing the opportunity to secure best consideration where a late bid substantially exceeds bids received on time. Indeed, case law referred to in the Legal Framework confirmed that Councils could be found to fall short of achieving best consideration if rival bids are not fully investigated.

Presumably in the light of this case law, the Local Government Act 1972 General Disposal Consents were widened in 1998 to effectively give authorities the discretion to disregard late bids in a formal tender exercise. Unfortunately no guidance was given as to whether using this discretion would defeat a challenge of the actions of the Council if taken to Court.

As far as this Council is concerned, where it is decided that the tender route for the sale of land and property is the right approach, there are very good reasons for laying down strict rules of compliance with the procedures, particularly time-scales. This is to ensure that all interested parties are treated equally and that the Council operates in an efficient and cost effective manner by reducing uncertainty and delay. Above all, the principle that parties should not benefit from the tactic of an intentional late bid is paramount. Nevertheless, there may be, at times, genuine late bids and where the proposed disposal involves a substantial capital receipt the Council must be able to make decisions that avoid foregoing significant increases in sums achievable.

It is proposed, therefore, that the policy of the Council in respect of late bids should be as follows:

- Where a land and property disposal is to be effected by way of tender, whether informal or formal, any bids received after the specified closing date will not be accepted.
- This will at all times be made quite clear in the tender documentation.
- In the case of a tender exercise where the highest bid opened in accordance with the rules and procedures is less than £50,000, the Head of Property Services will proceed to report for approval all bids received on time and exchange contracts with the approved bidder accordingly.
- In the case of a tender exercise where the highest bid opened in accordance with the rules and procedures is £50,000 or more, the Head of Property Services will proceed to report for approval all bids received on time. If, however, at any time before approval or exchange of contracts a higher bid is received, the Head of Property Services will bring such a bid, or bids, to the attention of Council.
- Where late bids are brought to attention of the Council, the recommendation of officers would invariably be that a re-tender exercise should be undertaken, unless the late bid is less than £5,000 above the highest valid bid, in which case best consideration as a whole would be compromised by a re-tender exercise.

It is recognised that dealing with late bids would be less of an issue where the period between receipt of tenders and exchange of contracts is minimised. The Council's Property Services will, therefore, use all practical means to reduce the time taken to complete transactions after receipt of bids, notwithstanding delays that can be encountered when dealing with a cautious purchaser.

It is interesting to note that in the case *R v Pembrokeshire C.C. ex parte Coker* (1999), the rejection of an offer by the Council owing to it being late and lacking certainty of monetary worth (offer dependent on success of further negotiations), it was held on this point that the Council has acted reasonably. The conclusion was that it was common sense for the Council to accept the bird in hand offered by one party in contrast to an alternative offer that was "a bird in a faraway bush".

(iv) Public Auction

To achieve success with this method of disposal, external auctioneers will inevitably be used. It will be advisable for the auctioneer to be briefed at an early stage, and fully involved in preparing conditions of sale and fixing the reserved price. The reserve should be approved by the Council and conveyed to the auctioneer immediately before the auction. Sale by auction requires preparation of all contractual details beforehand in order that a binding contract may be affected immediately a bid is accepted.

The advantages of an auction are complete openness and swift completion of the transaction if an acceptable bid is generated. However, there are disadvantages with this method. Firstly, the principle of sale by auction falls in and out of favour with the market, and there are times when auction should not be considered as the interest from the market will be low.



Secondly, success of an auction will depend on the atmosphere generated in the sale room which, in its own right, may depend on the quality of other lots on offer, over which the Council may have no control, and a great deal will rest with the skill of the auctioneer. Thirdly, as a binding contract must be entered into immediately a bid is accepted, funds to meet the sale price must be available within 28 days, and this may exclude most purchasers who need to raise finance. Fourthly, there is little time for potential purchasers to consider the transaction, and no opportunity to discuss alternative ways to structure the deal. Finally, the winning bid need only be marginally more than the second highest bid, and need not represent the maximum the purchaser would have been willing to pay.

In view of the current financial constraints illustrated above, auctions are only considered appropriate for property where they do not hold any major strategic influence.

## **9. OPTIONS**

A further matter, which needs to be considered under this heading, is the question of options. In relation to land and property, these are rights, usually created by contract, enabling a party to acquire property at a future date if certain pre-conditions are satisfied. Normally, in this Council's experience, options are used to assist industrialists with long term business planning and expansion or to give developers an opportunity and comfort to work up expensive development proposals on complex schemes. The latter can sometimes be linked to a "Lock Out" agreement whereby the Council would agree to withdraw a piece of property from the disposal market for a fixed period of time, usually of short term duration.

In the past, the City Council has rarely used this process, but that does not mean to say that it does not have a place in the disposal process, especially where market conditions were to seriously deteriorate, and they were need to bring confidence to future investment. In any event, there is invariably a potential value to an option, and in the right commercial circumstances, the Council should negotiate a suitable consideration before granting an option on land or property.

## **MONITORING DISPOSALS**

Disposals of land and property obviously play a key role in both the Council's realisation of policy objectives, and in maintaining an acceptable capital programme through the generation of capital receipts. The Property Review process has helped to bring forward substantial capital receipts in recent years, but, as time goes by, it is proving more difficult to identify opportunities, as assets reduce. Nevertheless, important links have been established with the Head of Financial Services via the Asset Management Working Group, to successfully monitor the situation and, with the limitations of capital controls, the free flow of up-to-date information is always important.

To assist in the monitoring role, the Head of Property Services reports on a regular basis on progress with disposals through the Asset Management Working Group and through the PRT process.

As resources become tighter, it has become clear that this monitoring process needs to stretch through to completion, as the availability of capital receipts greatly affects the flexibility of the Council's actions. In addition, where disposals

at restricted values are agreed, it will be important for the Council to monitor the position on the ground to ensure that its intended objectives are achieved, and, where developments change, to seek clawback. Similarly, post-disposal monitoring also extends to checks to ensure that purchasers comply with any conditions of sale or covenants (usually within stipulated time periods) specifically imposed in order to achieve Council Policy objectives. As part of wider property management best practice, post-monitoring procedures are followed to ensure that the Council does not miss any opportunities created in the past or near future.