



c/o: Michael Clark, Researcher
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By email: scm.enquiries@capetown.gov.za

For attention: Ms Sandra Gomm
Supply Chain Management
City of Cape Town
Sandra.Gomm@capetown.gov.za

To whom it may concern,

RE: NDIFUNA UKWAZI COMMENT ON THE CITY OF CAPE TOWN'S REVISED SUPPLY CHAIN MANAGEMENT POLICY (2021)

1. Ndifuna Ukwazi is a non-profit activist organisation and law centre that combines research, community organising and litigation in campaigns to advance urban land justice in Cape Town. Our primary mission is to expand and protect access to affordable housing towards building a more just and equal city.
2. On 16 August 2021, the City of Cape Town ("the City") published its revised Supply Chain Management Policy ("the revised SCM policy" or "revised policy") and invited interested parties to comment on the revised policy. The publication of the revised policy is part of the City's annual review of the policy position on public procurement processes in terms of the Local Government: Municipal Finance Management Act 56 of 2003 ("MFMA"). Ndifuna Ukwazi has read and considered the revised SCM policy, and makes this submission to the City in accordance with the invitation to submit written comments.
3. Please see attached our submission on the revised SCM policy.

Yours faithfully,

Ndifuna Ukwazi

Per: Michael Clark, Researcher

[Sent electronically]

NDIFUNA UKWAZI COMMENT ON THE CITY OF CAPE TOWN'S REVISED SUPPLY CHAIN MANAGEMENT POLICY (2021)

INTRODUCTION

1. Ndifuna Ukwazi (“NU”) is a non-profit activist organisation and law centre that campaigns to advance urban land justice in Cape Town through research, community organising and litigation. Our primary mission is to expand, promote and protect access to affordable housing towards building a more just and equal city.
2. Over the last seven years Ndifuna Ukwazi has been involved in legal, research and organising work around evictions, relocations, rental housing, the allocation of state-subsidised houses, and the promotion of social, transitional and inclusionary housing. We have published several resource guides, research reports and pamphlets on these issues. Ndifuna Ukwazi has also been involved in a series of important court cases dealing with land occupations, evictions, the provision of alternative accommodation, and the state’s constitutional and legislative obligation to combat spatial apartheid and promote spatial, economic and racial justice and equality through expanding access to affordable housing. We have also advocated for the release of strategically located public land to the development of affordable housing.
3. It is from this perspective that Ndifuna Ukwazi has considered the City of Cape Town’s revised Supply Chain Management Policy (“the revised SCM policy” or “the revised policy”)¹ and makes the following submission.
4. Our submission is structured as follows:
 - 4.1 We outline specific concerns with the revised policy that we believe should be addressed. These include:
 - 4.1.1 Concerns about the clause related to deviations and lack of expedited procurement processes for emergency and transitional housing; and
 - 4.1.2 Concerns about the disposal management system for the disposal and letting of land and other immovable property, which fails to adequately give effect to how “economic and community value” should be assessed and considered in the process of disposal.

¹ City of Cape Town, *Draft Supply Chain Management Policy* (2020).

4.2 Thereafter we provide some concluding comments.

SPECIFIC CONCERNS FOR THE REVISED POLICY

Clause related to deviations and lack of expedited procurement processes for emergency and transitional housing

5. The City's revised policy provides for the possibility of deviating from existing procurement processes in a select number of circumstances. These circumstances are set out in clause 329 of the revised policy and are intended to be exceptional circumstances. Clause 239 reads:

“329 *The City Manager may dispense with the official procurement processes established by this Policy, and procure any required goods and services through any convenient process, which may include direct negotiation, but only in respect of:*

- 329.1 *any contract relating to an emergency contract relating to an emergency (as described in clauses 338 and 339 below) where it would not be in the interests of the City to invite bids,*
- 329.2 *any goods or services which are available from a single provider*
- 329.3 *the acquisition of animals for zoos, or*
- 329.4 *the acquisition of special works of art or historical objects where specifications are difficult to compile; or*
- 329.5 *any other exceptional circumstances where it is impractical or impossible to follow the official procurement process, including, but not limited to:*
 - 329.5.1 *any purchase on behalf of the City at a public auction sale;*
 - 329.5.2 *any contract in respect of which compliance therewith would not be in the public interest;*
 - 329.5.3 *ad-hoc repairs to plant and equipment where it is not possible to ascertain the nature or extent of the work required in order to call for bids;*
 - 329.5.4 *in the event of a major system failure; or*
 - 329.5.5 *in the event where the delivery of a municipal service would be significantly restricted.”*

6. The clause attempts to offer a measure of flexibility for the procurement process in various exceptional circumstances that may, for example, require expedited processes. This is in line with the legal and policy framework related to public procurement that does not provide for absolute or inflexible processes.

7. Public procurement processes are regulated by various pieces of legislation, including the Public Finance Management Act 1 of 1999, which applies to state entities at national and provincial level as well as state-owned enterprises, and the Municipal Finance Management Act 56 of 2003 (“MFMA”), which regulates procurement processes for municipalities. In terms of section 111 of the MFMA, each municipality must develop their own Supply Chain Management Policy, which should set out the policy for the procurement of goods and services by such municipality. This policy has

to comply with the overall procurement framework.² Section 112 of the MFMA also provides that the Supply Chain Management Policy of a municipality must provide for:

- “(a) *The range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions and other types of competitive bidding;*
- (b) *when a municipality or municipal entity may or must use a particular type of process; [and]*
- (c) *procedures and mechanisms for each type of process...*”

8. This indicates that the MFMA envisages a relatively flexible public procurement regime that makes room for a number of different procurement mechanisms to serve a multitude of situations, in particular emergency situations.
9. While Ndifuna Ukwazi welcomes the City’s recognition that expedited or flexible processes may be required during emergency circumstances, we are concerned that the revised SCM policy does not explicitly permit for the City to utilise expedited procurement processes when providing emergency or transitional housing. We believe that the failure to explicitly provide for more flexible procedures in relation to the procurement of goods and services for the provision of emergency and transitional housing is a significant oversight that should be urgently rectified by the City. Such an approach should provide for more flexible procurement mechanisms that provide for the purchase of land or expedited procurement processes for the development of housing in emergency situations (which should include instances of evictions or the imminent threat of an eviction).
10. An amendment of the SCM policy in line with the above recommendation is not without precedent. Section 33(2) of the City of Johannesburg former Supply Chain Management Policy that related to the purchase of land and immovable assets specifically, provided for deviations from ordinary procurement policies if it would be in the public interest or “in consideration of the plight of the poor”. In this regard, section 37 also specifically provided that the deviation policy may include deviations that seek to fulfil the housing policies of the City and the Johannesburg Social Housing Company (JOSHCO), a municipality-owned rental housing company.³
11. Municipalities across the country have regularly blamed their often slow and bureaucratic public procurement processes for the delay in being able to provide emergency housing or temporary alternative accommodation to unlawful occupiers who may be rendered homeless. These municipalities often argued that they are required to strictly follow the procurement processes set out in legislation, as well as their respective Supply Chain Management Policies, which may take considerable time, rendering them incapable of providing emergency housing or temporary

² Section 112 of the MFMA.

³ See M Clark & S Wilson, *Evictions and Alternative Accommodation in South Africa 2000-2016: An Analysis of Jurisprudence and Implications for Local Government*, 2 ed (2016), pp. 50-52, available at: https://www.academia.edu/32751932/Evictions_and_Alternative_Accommodation_in_South_Africa_2000_2016_An_Analysis_of_Jurisprudence_and_Implications_for_Local_Government_2nd_Edition_.

alternative accommodation speedily.⁴ A clause that expressly provides for a deviation from procurement policies when providing emergency or transitional housing would enable the City to utilise expedited procurement procedures to ensure that there is no unnecessary delay in the development of emergency or transitional housing.

Clauses related to the City's disposal management systems

12. Clause 375 of the revised SCM policy governs the disposal and letting of movable and immovable municipal assets:

“375 Subject to the provisions of the Municipal Asset Transfer Regulations:

375.1 *moveable assets may be sold either by way of written price quotations, a competitive bidding process, auction or at market related prices, whichever is the most advantageous to the City;*

375.2 *immovable property may:*

375.2.1 *be sold only at market related prices except when the public interest or the plight of the poor demands otherwise;*

375.2.2 *let only at market related rates except when the public interest or the plight of the poor demands otherwise and provided that all charges, rates, tariffs, scales of fees or other charges relating to the letting of immovable property are annually reviewed...”*⁵

13. Ndifuna Ukwazi has, over the years, done considerable legal, research and advocacy work related to the disposal and letting of public land. Our work in this field stems from the City consistently blaming its spatially unequal form and acute affordable housing crisis on a lack of available well-located land that could be used for affordable housing.⁶ The City is not wrong when it says that suitable land is extremely scarce in central or well-located areas – it is expensive to buy and will only become more so in the future. But the City is missing the most obvious solution: It already

⁴ See, for example, *Hlophe and Others v Johannesburg Metropolitan Municipality and Others* 2013 (4) SA 121 (GSJ), where this argument was expressly raised. In this case, the City of Johannesburg argued that it was unable to provide temporary emergency accommodation to a number of evictees for the foreseeable future due to a lack of available buildings which could be utilised for such alternative accommodation. Among the various reasons raised by the City to justify this inability to acquire buildings for this purpose was that “the time period for the completion of supply chain management and procurement policies”. The South Gauteng High Court, however, did not entertain this argument. Although Satchwell J did not expressly rebut this argument, she did state that the municipal reports filed by the City failed to detail the steps taken by the City to provide alternative accommodation and were preoccupied with the “difficulties” confronting the City. The reports thus failed to find “solutions”. This statement seems to indicate that the court considered the City’s excuses, including burdensome public procurement processes, unfounded. The court recognised that the City had an obligation to provide alternative accommodation to evictees and was thus required to conduct the “necessary planning and preparations” to meet those obligations.

⁵ City of Cape Town, *Draft Supply Chain Management Policy* (2020), cl. 375 (emphasis added).

⁶ See, for example, P Grobbelaar, “Cape Town hurts housing”, *Property 24* (6 July 2011).

owns vast tracts of land in well-located areas, of which a large proportion is unused or under-utilised given its potential.⁷

14. It is our view that the City could alleviate the housing affordability crisis and reverse the City's apartheid legacy by unlocking and releasing well-located state land for the development of social or affordable housing.⁸ We assert that the City should embrace the 'social value' of public land, and adopt a more transparent and socially orientated approach to the portfolio of state assets. This is in line with the recommendations to alleviate poverty and inequality in the context of urban land rights issued by the High-Level Panel on the Assessment of Key Legislation and Acceleration of Fundamental Change and the Mandela Initiative.⁹
15. We therefore believe that disposing of strategically located City-owned land for the sole accumulation of an economic return, instead of using it for transformation and redress or leveraging it to advance spatial justice through the delivery of affordable housing is irrational and unreasonable. Moreover, the regulations and procedures governing the disposal of municipal land should be cognisant of the context of a profound housing and segregation crisis faced by the City and the opportunity that each well-located parcel of land offers the City to redress spatial inequality. The City's Management of Certain of the City of Cape Town's Immovable Property Policy ("the Immovable Property Policy") and the Supply Chain Management Policy should therefore provide a practical framework for the management of the City's property that offers guidance on how the City should give effect to the social value of public land when disposing or encumbering such land.
16. The MFMA sets out the requirements that municipalities are obliged to follow before disposing of immovable property that they own. In particular, section 14(1) and (2) of the MFMA provide that a municipality may not transfer ownership as a result of a sale or otherwise permanently dispose of immovable property unless two conditions have been met:¹⁰
 - 16.1 The municipal council has decided "on reasonable grounds" that the land "is not needed to provide the minimum level of basic municipal services"; and
 - 16.2 The municipal council has "considered the fair market value" and "the economic and community value to be received in exchange for" the piece of land.

⁷ According to the City's own polices it owns 87 000 pieces of land, and while not all of that land is not well-located or suited for the development of affordable housing, much of that land will be well-located and suited for housing development. See City of Cape Town, *Management of Certain of the City of Cape Town's Immovable Property Policy* (26 August 2010), Ref No C54/08/10, cl. 5.2. See also, generally, Ndifuna Ukwazi, *City Leases*, p. 1.

⁸ See Ndifuna Ukwazi, *City Leases*. See also M Clark, "Cape Town's course of injustice: Subsidising the rich to exclude the poor", *Daily Maverick* (28 January 2020).

⁹ See High Level Panel, *Report of the High Level Panel*; and M Clark and LR Circolia, "Informalisation, Urban Poverty and Spatial Inequality", Mandela Initiative Brief (2018).

¹⁰ See ss 14(1) and (2) of the MFMA.

17. These requirements are reaffirmed by section 11 of the City's Immovable Property Policy.¹¹ When read together these provisions mean that the City can *only* dispose of property if the property is not needed for a minimum level of basic services and after the municipal council has considered *both* the fair market value and the economic and community value received in exchange for the piece of land.
18. Respected local government legal experts, Nico Steyler and Jaap de Visser, argue that the requirement that the municipal council consider what is received in exchange for a capital asset requires a "holistic assessment", in terms of which the fair market value is "weighted against the economic and community value that may be gained" from the disposal.¹² They argue that this provision means that the City can dispose of land or immovable property at less than market value if it is receiving an appropriate economic or community value.¹³ Crucially, Steyler and De Visser write that municipalities should "provide for the disposal of assets other than for market price, in clear principles and processes in the municipality's SCM policy."¹⁴
19. We assert that the City's revised SCM policy incorrectly prioritises the highest monetary value offered by a bidder above the other returns mentioned in section 14(2) of the MFMA, which clearly lists market value as only one of the values that should be considered and optimised when disposing of public land. The market value of public land is listed alongside the economic and community returns. The provision does not rank or prioritise one set of returns over another. In this context, we argue that a purposive interpretation of the MFMA would consider each of these returns equally important. As a result, we assert that in order to fully comply with the prescripts of the MFMA, the City is required to also optimise the social and community value of the disposal of public land or immovable property.
20. For these reasons, Ndifuna Ukwazi believes that the disposal management mechanisms laid out in the revised SCM policy place undue emphasis on the market value of immovable assets, and fail to give expression to other values that are required to be considered in the disposal of immovable assets in asset management legislation. In particular, clause 375 fails to give adequate expression to the "economic and community value" that may be received in exchange for land or immovable property, as required by section 14(1) and (2) of the MFMA. We strongly urge the City to set out clear guidelines within the SCM policy that ensure that the City can meaningfully assess when and how to measure the community value received for public land, with a particular emphasis on the value of public land to contribute to the delivery of well-located affordable housing and redress of spatial apartheid.

¹¹ See s 11 of Management of Certain of the City of Cape Town's Immovable Property Policy.

¹² N Steyler & J de Visser, *Local Government Law of South Africa* (November 2019), p. 12-22(8).

¹³ Steyler & De Visser, *Local Government*, p. 12-22(8).

¹⁴ Steyler & De Visser, *Local Government*, p. 12-22(8).

CONCLUSION

21. Our submission on the City's revised SCM policy identifies two primary concerns with the policy, namely the lack of an explicit clause that allows of deviation from the existing procurement mechanisms or fails to provide for expedited procurement mechanisms in relation to the delivery of emergency and transitional housing; and concerns about the disposal management system for the disposal and letting of public land and other immovable property, which fails to adequately give effect to how "economic and community value" should be assessed and considered in the process of disposal.
22. We strongly urge the City to rectify these defects in the revised SCM policy by:
 - 22.1 Inserting a clause that expressly provides for a deviation from ordinary procurement policies when providing emergency or transitional housing, to enable the City to utilise expedited procurement procedures to ensure that there is no unnecessary delay in the development of emergency or transitional housing; and
 - 22.2 Amending clause 375 to ensure that it does not unduly prioritise the market value of public land and other immovable property during the process of disposal but rather set out clear guidelines within the SCM policy that ensure that the City can meaningfully assess when and how to measure the "economic and community value" received for public land as is required by section 14(2) of the MFMA, with a particular emphasis on the value of public land to contribute to the delivery of well-located affordable housing and redress of spatial apartheid.

ENDS