

Step 1: Sale by a government body?

If (immovable) property is sold by a government body, several steps have to be taken (and had to be taken in the past) pursuant to the Dutch Supreme Court decision of 26 November 2021.

These steps have to be taken in case of a sale by a municipality, province, the national government and certain other public legal entities. It is likely that these steps also have to be taken for other transactions (including perhaps long term lease). Furthermore, these steps might not be limited to the sale of real estate.

Step 2: Scarcity?

Is there scarcity? The Dutch Supreme Court finds that this is the case if there are multiple prospective buyers, or if it can reasonably be expected that there are multiple prospective buyers. It should be investigated whether this is the case.

No scarcity

If there is no scarcity, the sale can take place as usual. In the (internal) decision-making, it is advisable to state reasons why it cannot reasonably be expected that there will be multiple buyers.

Step 3: Criteria

In case of scarcity, criteria for the selection of a buyer must be formulated. When formulating these criteria, the government body may take into account its public policies. The criteria must be objective, verifiable and reasonable. The latter should be seen in the light of the policy to be served.

Step 4: Multiple prospective buyers within the criteria

After the criteria for sale have been formulated, it has to be established whether there still are (or whether it can be reasonably expected that there still are) multiple prospective buyers given these criteria.

Step 5a: There is one prospective buyer

If there is only one prospective buyer (and it cannot be reasonably expected that there will be multiple serious prospective buyers), the intention to sell has to be made public in due time prior to the sale.

Furthermore, it should be motivated why it is established or it can reasonably be assumed that only one serious prospective buyer is eligible.

It is probably sufficient to publish the intention to sell on, for example, the website of the relevant government. In addition, there must be a reasonable period between publishing the intention to sell and the actual sale. This term may vary depending on the good sold, but as a general guideline a period of 30 days can be used.

Negotiations between the government body and the prospective buyer are allowed during this period, but it is wise to make a caveat during these negotiations that other prospective buyers may present themselves.

Step 5b: there are multiple prospective buyers

If there are multiple prospective buyers (or when it can reasonably be expected that there will be multiple prospective buyers), it has to be made public:

1. that the (immovable) property is available;
2. what the selection procedure looks like;
3. what the timetable looks like;
4. which criteria will be applied when selecting a buyer.

Furthermore, "an adequate degree of publicity" should be taken into account by the government body. This appears to be a procurement law-like criterion, whereby depending on the type of (immovable) property national or even international publicity should be given to the intention to sell.

Subsequently, also other prospective buyers should be given the opportunity to compete for the (immovable) property.

In this case, the terms of sale should be published and it is not recommended to engage in negotiations with only one prospective buyer. Furthermore, it is recommended to include in the terms of sale an expiry period for lodging objections against the envisaged sale of 20 days after the selection of a buyer.