

Protecting IP in campaign tendering

By [Nola Bond](#)

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In a free market environment, the tender process is important to ensure fairness and transparency but a practice has developed whereby those tendering are often required to relinquish their ideas, proposals and intellectual property, even if their tender is unsuccessful, and with no compensation...

This in itself flies in the face of the basic tenets of intellectual property rights, namely to reward those who give of their labour and time to create something new and original.

'Intellectual Property' is a term often loosely used in documents and agreements. Its scope however goes much further than purely trademarks, copyright, patents or designs being the traditional forms of intellectual property protected by statute and extends to business plans, know-how and technology - all of the things which provide a competitive edge in a free market economy.



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Practical example

Recently the Department of Environmental Affairs published for the appointment of service provider to develop and implement a comprehensive national and international marketing strategy around the International CITES Conference to be hosted in South Africa in 2016, for the protection of endangered fauna and flora.

The scope of the bid is enormous including:

- The development and implementation of a communication strategy which must be monitored amongst stakeholders and the public, both locally and abroad.
- The development, procurement, distribution, publication and broadcasting of promotional material conveying key messages and information.
- The creation, maintenance, and monitoring of a website for the CITES conference
- Development and implementation of a comprehensive social media campaign
- Conceptualising and managing an exhibition
- Developing a legacy programme to engage communities in the sustainability of conservation
- Procuring sponsorship.
- Managing the programme

A detailed costing and business plan is ultimately called for by any party who qualifies to tender.

However, the crunch issue is that the intellectual property will belong to the DEA. Thus whilst the successful party in the tender process will no doubt benefit handsomely, everyone else who tendered will not only receive no compensation, but have the prospect of their ideas and proposals being incorporated into the final campaign, which is delivered by the successful party.

This is not an isolated example. A tender put out in 2014 by a multi-national pharmaceutical giant which clearly states that ideas and adaptations presented in the bid proposals may be used by the company, even if the agency is not successful in the tender process.

Contrary to the Code

This practice of claiming intellectual property and the right to use ideas and concepts developed by unsuccessful agencies is clearly an unhealthy situation. In fact, it is completely contrary the Code of Conduct of Members of the Association for Communication and Advertising. The Code was developed in collaboration with the dti, the Government Communication and Information Services (GCIS) and National Treasury, to ensure the advertising and communication sector encourages healthy competition, promotes creativity and training and rewards industry players who participate in the procurement and provision of marketing, advertising and PR services. In this Code, provision is made for limiting the number of short-listed agencies to five per bid, protecting the intellectual property of the agency and paying a pitch fee of at least R50,000 to each unsuccessful agency.

Negative impact

From the cases mentioned above, it is clear that the Association's Code is not being adhered to, which is regrettable, as many industry players will simply refuse to become involved in bidding for tenders and what this translates to is that the best suited agencies are not doing the work.

Ultimately this can only negatively impact on the advertising and communication sector as a whole.

There is no easy solution to resolving this dilemma. As an intellectual property lawyer, my advice is always to client secure their intellectual property. This must be seen in a commercial context and if you seek to own something which does not belong to you, fair compensation to the owner is the only way of ensuring a transparent and healthy approach exists in the bidding process for advertising and communications sector. Industry players thus need to support each other, challenge violations of the Code, educate role players and encourage membership in order to provide for fairness and due

compensation.

ABOUT THE AUTHOR

Head of the Trade Mark Department at DM Kisch Inc.

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