



**Probity Services
Practitioner
Handbook**

Prepared By
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Foreword

The Australian public sector agencies and enterprises spend billions of dollars each year on goods, services and construction, including capital assets, funding arrangements, and works. At an individual agency level, and in government corporations, acquisition of goods and services is a core administrative and sometimes operational activity and may account for up to 80% of an agency's total expenditure. While the level of related expenditure varies across the Australian jurisdictions, in each, the order of expenditure is substantial.

Similarly, public and private corporations engage in business locally and globally, in which procurement and contracting are fundamental. Therefore, in both the public and private sectors, well-established and contemporary probity principles are core to sound corporate governance, organisational values, and legislative compliance.

To ensure the required outcomes are achieved along with optimum value for money, it is expected that procurement and contracting will be conducted corruption-free and with integrity. These are both public and private sector principles. Similar principles of value for money are embodied in public sector policies for grants, funding agreements, and sponsorships.

Prior to 2010 the skills and competencies of probity practitioners (probity auditors and advisers) were not supported by any structured training, professional education, standards, or reference text. While industry professional bodies have applied some training and professional development in probity and ethics, core competencies for probity practitioners to procurement were unsupported by any reference text to underpin their credibility, as expected by the public sector and business. Until there is a formal industry wide standard for probity service providers to the acquisition of goods and services processes, this handbook serves to establish proven credible probity practice. It is an ideal reference also for procurement professionals, legal advisers, and project managers. It also supports tertiary education in competency for Public Sector procurement and ethics.

This handbook aims at supporting the overall integrity of public and private sector processes and practices for the acquisition of goods and services. Likewise, it identifies the valuable practice of probity assurance, a key component of governance whether in the public or private sectors. It provides the essential information to better understand and assist in the management of the probity and accountability risks and requirements in procurement and other acquisition processes.

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1. Introduction

In 2008, the Australian Standard AS 8000 – Governance handbook on probity assurance¹ commented on the lack of standards or qualifications for probity auditors or advisers, or a representative industry body². Users of these services, particularly Government, had expressed concern for the lack of consistency within and across the public sector in the provision of services from probity auditors and advisers. As stated in the AS8000 handbook, there are no industry standards for practice or skills of practitioners, albeit that the referenced handbook provides fundamental principles. Those principles are no longer contemporary and while now superseded, the Handbook remains unrevised.

This Probity Services Practitioner Handbook, and its associated references, provides the information essential to the practice of professional probity services, and facilitates a contemporary understanding of issues of probity, ethics and integrity, particularly in procurement and similar processes. The translation into practical skills should be effected through training and assessment, or peer assessment. However, mutually dependent and essential to the applied skills of the Probity Services Practitioner is sound judgement and complex thinking abilities.

This Handbook provides only an overview of the range of procurement functions, but rather addresses the key probity principles in procurement. Training and professional development of procurement specialists is conducted by academic institutions, related industry associations, and by government. Audit disciplines associated with financial audits are only marginally useful to probity audit functions and do not apply to probity adviser services. Individuals with skills in structured and critical thinking, investigation and research, and complex procurement processes are well suited to the probity services roles provided that they have sound moral values and good judgment of fairness and reasonableness.

The Handbook highlights the pervasive influence of public sector policy and regulatory demands for ethics, integrity, and accountability, and also the global focus on anti-corruption in both the public and private sectors, in determining best practices for probity in procurement and similar processes. It assists in identification and management of probity risks, and emphasises the value of using ethical and accountable procurement processes and expertise, including procurement specialists, probity advisers and auditors, and legal advisers. It also introduces the principles of ethical decision-making in dealing with difficult issues during procurement and similar processes.

The intent underlying this Handbook is to develop some consistency in understanding of ethics and accountability, particularly in public sector procurement, but also for the private sector. It aims to promote greater awareness of the underlying probity principles so that probity service practitioners are in a better position to provide services that enhance procurement effectiveness, foster best business practices, develop a culture of high ethical standards, provide probity assurance, and generally support best value outcomes. See Figure 1.

“Ethical behaviour is one of the principle means by which accountability is maintained in the public sector.”¹

¹ AS 8000 - Governance, Handbook HB 325:2008, *Assuring probity in decision making*

² Box and Forde, *Probity and Managing Procurement: how to avoid corrupting the process*, Lexis Nexis Butterworths, Sydney, November 2007, and [3.1]



Figure 1. The probity assurance environment

2. Objectives

“Probity” is the collective of accountability, integrity, and ethical behaviour.

“Integrity” is unbroken completeness or totality with nothing wanting; the state of being unimpaired; soundness; uprightness, honesty, and sincerity.

“Ethical behaviour” encompasses the concepts of accountability, transparency, honesty, integrity, diligence, fairness, trust, and respect.

(various dictionaries)

Focus on Procurement³ and similar processes

The field of applied ethics is very broad, and particular regulatory and statutory requirements and standards have defined application to specialist areas. Since around mid-1990, the information age and demands for transparency have led to greater access to information on government procurement and grant arrangements, which in turn has brought about significant review of the related policies, legislation, standards, and procedures for reason of the public interest, transparency, and accountability. Consistent with ISO 37000:2021 Governance of Organisations, more broadly, corporations also have become more prescriptive in their codes of conduct not only due to the need for good governance, but also to ensure both compliance and avoidance of the potential for litigation over unfair dealing, and prosecution under vicarious liability provisions of international

³ See Glossary for a definition

legislation. This is a global shift in the paradigms of accountability, compliance, and risk management⁴.

It is now more broadly held by anti-corruption bodies that:

corruption is an encompassing term of something done improperly, e.g. accountability unfulfilled, or impropriety.

With the public focus on transparency, and the public interest in how public money is spent, together with a global focus on anti-corruption, this handbook focuses on the fundamental knowledge and skills required to provide probity services to the public and corporate sectors, with a particular focus on procurement, contracting, and similar processes such as grants, sponsorships, and funding arrangements.

Better and more accountable procurement outcomes are achieved through a better understanding of:

- the fundamental principles of accountability and transparency that underpin best practices;
- best practices to help ensure the integrity of processes and outcomes;
- practical resolution of ethical dilemmas that may arise; and
- probity assurance ‘built into’ governance within public sector entities and corporations⁵ and not ‘added on’.

In the procurement ‘industry’, the demand for quality and value-added probity services does not prescribe professional qualifications or standards. There is no defined statement of competency or quality for related probity services, nor defined requirements for an understanding of public or commercial procurement. The pervasive nature of procurement, mixed with the inherent financial and human behavioural issues, create the drivers for professional and skilled probity services with sound judgement and assessment of risks.

A good understanding of commercial procurement principles and practice is essential to the skills and competency of a probity service provider to procurement and similar processes.

Other areas of probity and ethics

Probity and ethics expertise is also required in areas other than procurement, including:

- Health and medical;
- Corrections services;
- Business models such as franchises;
- Real Estate;
- Sports;
- Art and performing Arts;
- Aged care;
- Applied Science and Technology;
- Aid programs;
- Intellectual property;
- Education;
- Financial services;
- Policing;
- Child care and child safety;
- Organisational governance;
- Legal;
- Media and advertising;
- Creeds and religion;
- Disability management;
- Humanitarian activities;
- Anti-discrimination;
- Personnel management;
- Emergency and disaster management;
- Accounting and Finance.

⁴ For example, the UK Bribery Act 2010, and the US Foreign Corrupt Practices Act 1977 go beyond bribery and corruption to include broad corporate codes of ethical conduct

⁵ AS8000 HB 325 Op. cit. [1.1]

While the generics of probity and ethics apply in the environment of each of these disciplines, each has particular characteristics, most of which are regulatory, and these characterise and differentiate the probity services or applied ethics requirements. In some technically specialised disciplines a technical understanding or qualification is essential.

In a few technical areas, the qualification requirements of a practitioner or auditor are regulated. Generally however, these disciplines do not prescribe the professional requirements for the probity services. It is more by default that the related professional qualifications are reflected in the probity service provider, either as a practitioner in the discipline or through familiarity with the operational processes, e.g. through operational auditing. The specialised skill to provide probity assurance to these respective areas usually requires a fundamental understanding of the operational area.

Overarching all of the above areas, and also in procurement are the principles of accountability, confidentiality, objectivity, fairness, and integrity. The private and public sector principles and regulations relating to commercial procurement are addressed in this handbook.

Internal Audit and Fraud

It is important to differentiate probity services from financial audits, internal audits, fraud audits, or those related transactional investigations. Those activities require professional accounting qualifications and skills, and are underpinned by regulatory governance⁶. Fraud risk assessment and audit is a specialised area⁷. While it is possible that a probity audit might expose or suspect fraudulent activity, it is more likely to be by exception. Fraud requires intentional deception to gain a benefit or to create harm; and is neither inadvertent nor an administrative error.

If fraud is suspected or evidenced during the conduct of probity services, the probity specialist must take immediate action to report it in accordance with the agreed reporting arrangements, and recommend it for specialist investigation. Fraud is a criminal offence.

Internal Audit broadly addresses financial accountability and compliance. The financial accountability aspects of internal audit have a regulatory framework, while the compliance is related to statutory and regulatory requirements as well as organisational policies and rules. It is not unusual that internal auditors in organisations also have responsibility for internal probity services associated with compliance. Anecdotally, this is a difficult area for many internal auditors since the probity and ethics compliance is less defined, and draws on an individual's ability for reflectivity and judgement. While some internal auditors may be quite capable probity service providers, internal auditors may not be afforded the 'powers' to exercise judgement or moderate risks. Hence, financial audit processes are not good models for probity risk management processes.

The contemporary roles of internal Compliance and Risk Management have emerged through the increased demands on organisational governance for accountability, transparency, and non-insurable risk. While internal and external audit functions are largely retrospective, the Compliance and Risk functions are somewhat prospective, and more-so in respect of risk identification and management rather than risk avoidance. That implies expectation of sound judgement. In the 'compliance' area there is a close functional relationship between financial, internal audit, and legal services.

⁶ Box and Forde, Op. cit. [7.12]

⁷ Some Accounting, Legal, and Audit firms have integrated specialist investigative units staffed by former Police officers and the like.

Figure 2 below generally depicts the respective functions, relationships, and inputs to organisational governance. External probity services are likely also to have some relationship with the Compliance and Risk function if one exists.



Figure 2. Probity assurance is complementary to corporate governance and adjunct to other governance inputs. These depicted inputs are not exclusive or exhaustive

Legal versus probity services

It is quite appropriate for legal practitioners to provide probity services, however it is important that those who do, whether they are in-house counsel or external lawyers, clearly differentiate their probity services from any legal services for reasons mainly of client privilege, as well as a broader duty to act under the rules of professional conduct of a lawyer⁸. A practicing lawyer who also provides probity services should ensure they have a clear scope of work for the probity services which ensures that the probity services and any legal services are clearly and physically delineated and differentiated.

In Figure 3, the ‘probity space’ ranges from the high moral ground to the provisions of ‘black-letter’ law; but laws may not be definitive on matters of ethical values.

Probity, morality, and the law

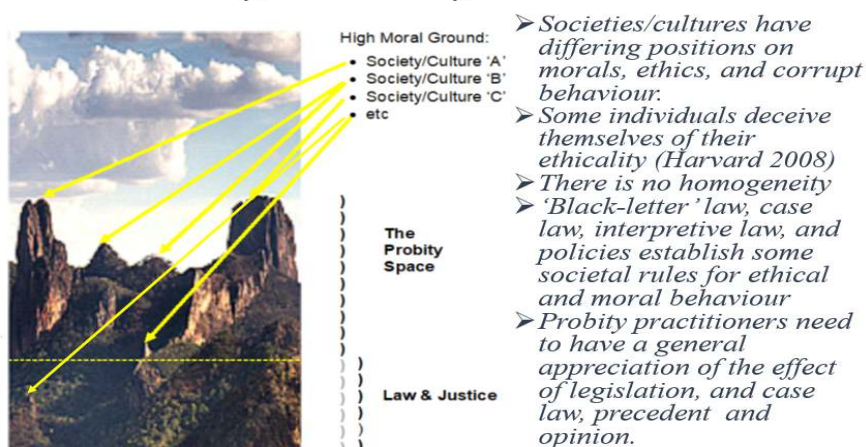


Figure 3. The ‘probity space’ is created by the need for judgement which cannot sit on the moral high ground, and may not be defined in law.

⁸ Box and Forde, Op. cit. (pp 156, 159-163).

“Ethical behaviour is not the same as legal behaviour. Acting ethically requires a positive moral approach that often means going beyond the prosecutorial standards dictated by law.”

Case Study –Late Response:

A government agency called for applications for funding for specified services under a State/ Federal program that was part of a government budget program. An application was received late. At least one other application was received on time. The Conditions stated that ‘Late applications may be considered’. The probity advice was to treat the late application as ‘Late’ and should only be successful if no other application was suitable and conforming. The Agency also was advised that if they got the process wrong, under redress it may be liable to Judicial Review. The Agency chose to get a legal opinion of their exposure to Judicial Review rather than to take the probity advice. The legal advice was that a complainant may seek Judicial Review; but the legal costs and liabilities made it improbable. Other forms of non-litigious redress were more likely to be prosecuted; and as these were more reputational or political, to refer the risk assessment decision to the Minister.

3. Public Sector Procurement

Public Sector procurement has substantial economic and community impacts. In addition to realising effective outcomes and value for money, it must always convey the right ‘optics’ to enhance community perceptions of ethics, accountability and probity.

The evolution of outsourcing and the devolution of strategic procurement functions have broadened the scope of agency procurement and changed the responsibilities of many professional staff and managers by requiring them to manage complex processes involving significant public money. It also has presented them with a broader set of ethical considerations, procurement risks, and probity risks.

Neither the public sector, nor its procurement processes, is homogenous within and across the levels of government, or the nature of the public sector entities, even where public sector procurement is prescriptive. National, state and local governments, their agencies, government corporations, statutory bodies, and government commercial entities, each have individual policies and statutes in which the acquisition of goods and services processes, and the related ethical requirements, are defined. While it is most important for probity service providers to understand the policy differences across the public sector, the fundamental principles of ethical behaviour are common due to the need to be responsive to the public interest⁹ and demand for accountability¹⁰.

3.1 Procurement and Grant Frameworks

Departments and Agencies, Statutory Bodies, government business enterprises (GBE), Government Owned Corporations (GOC), Corporate Commonwealth Entities (CCE) (AKA Commonwealth authorities and companies), local municipal/government authorities (LGA), government Special Purpose Entities, certain Quasi-Autonomous Non-Government Organisations (QANGOS), and other government owned or controlled enterprises, each are likely to have procurement policies and processes that differ from each other[3.2]; but for

⁹ For ‘public interest’, see Footnote at 3.9 for definition

¹⁰ Box and Forde, Op. cit. (Ch 2).

accountability for public funds when these entities the public interest demands that the fundamentals of probity and integrity are demonstrable and consistent¹¹ in the conduct of their operations, including their procurement. The applicability of government procurement policy and related legislation to public entities other than government agencies is enshrined in the policies and legislation or statutes related to these entities.

For example, in the Commonwealth public sector, departments and agencies must conform to the Commonwealth Procurement Rules (CPR), while CCEs also are required to comply with the CPR unless exempt¹². Other public sector jurisdictions have their respective Procurement Policies or Grant Guidelines, most of which are founded in law by financial accountability legislation and statutory provisions. Also in other jurisdictions, other government related entities may be directed by the stakeholding Minister, or otherwise in procurement policy in respect of applicability or exemption. Local government bodies (LGA) are subject to jurisdictional legislation from which these authorities draw their procurement and grants policies; in addition to LGA guidelines published nationally [3.10.10].

Organisations which operate with public funds such as QANGOs, and Not-for-Profit government subsidised service organisations (NGOs) are likely to have no liability for compliance with the government procurement policies unless otherwise specified in the organisation's constitution or contractual terms for funding. This is to minimise the effects of bureaucratic processes in their 'arm's length' commercial dealings and community services.

However under legislation, government cannot outsource or contract-out of its accountability for public money. Where procurement or grant arrangements for government services are sourced, government must pass on appropriate accountabilities to ensure the outsourced enterprises have acceptable accountable processes, policies, and governance; and also manage the performance of the outsourced services¹³.

Public Private Partnerships (PPPs) will have procurement policy applied in the process of establishing the PPP arrangement; but not in the operation of the arrangement, for reasons similar to QANGOs and NGOs.

With grants and public funding agreements, the accountability, transparency, and integrity requirements can be equally contentious and demanding as for procurement, sometimes more-so. Grants often are a means of obtaining services and solutions which the public sector resources cannot achieve cost-effectively; but can be perceived as a means of avoiding procurement accountabilities or transparency. Hence grant policies in jurisdictions are usually underpinned by legislation.

The Probity Service Provider will need to be familiar with the statutory and policy provisions which underpin the procurement and grant functions of public entities, otherwise the services provided may be inadequate, irrelevant or incorrect.

3.2 Procurement Policy

Due to the frequency of changes in governments, their terms, and machinery of government priorities, this handbook no longer contains any synopsis of each jurisdiction's

¹¹ Ibid, [2.32, 2.33, 3.7]

¹² CPR applies to 'Relevant Entities' subject to the *Public Governance, Performance and Accountability Act* 2013, unless exempt under Appendix A to the CPR Division 2. A 'Relevant Entity' is defined in the CPR

¹³ For example, Commonwealth Grant Rules and Guidelines (CGRG) require Agencies to assess funding recipients for CGG compliance. Similar provisions apply in other jurisdictions

procurement policy. A probity service provider needs to have a good understanding of their particular jurisdiction's contemporaneous procurement policies or rules, and also a good understanding of other related policies and statutes, codes, and standards which may apply in the related procurement environment. In each case, the applicable policy or codes have a statutory basis either directly through one or more pieces of legislation or regulation, or indirectly through subordinate legislation governing finance and administration management. As well, the Commonwealth and jurisdictions enter into Funding Agreements directly affecting procurement, and sometimes with other jurisdictions; where frequently cross-jurisdictional procurement policies apply.

In public procurement, except for local government, the Australian jurisdictions (including New Zealand) are members of the Australasian Procurement and Construction Council (APCC¹⁴) which has representation from the Ministers and departments responsible for procurement policy in the respective jurisdictions. Consequently, while the procurement policy structures and guidance varies across jurisdictions, and the key principles are enunciated differently, there is consistency with national and international agreements on government procurement, and strong commonality particularly in areas of:

- value for money,
- efficient and effective use of resources,
- probity and ethical behaviour,
- enhancing benefits to local business and industry,
- sustainability and the environment, and
- innovation.

3.2.1 Commonwealth:

Within the Australian Government, the CPR is the relevant policy¹⁵, which as stated earlier has a legislative basis under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). The CPR outlines the procurement rules and requirements mandated for the Australian government public sector procurement. The governance of Commonwealth procurement is managed by the Department of Finance which also publishes procurement practice guides.

The introduction of the *Government Procurement (Judicial Review) Act 2018* increases accountability requirements on Agencies for CPR compliance.

3.2.2 Queensland:

In the Queensland Procurement Policy¹⁶ (QPP) outlines the key principles to be applied in Queensland public sector procurement.

The policy has its foundation in the *Financial Accountability Act 2009* (Qld), and the *Financial Performance Management Standard 2009*. The QPP is supported by several subject-based Practice Guides and check-lists. The governance, implementation and effectiveness of the QPP is via a framework described in the QPP.

3.2.3 New South Wales:

The NSW Treasury issues the NSW Government Procurement Policy Framework¹⁷ under the *Public Works and Procurement Act 1912* in which the NSW Procurement Board is

¹⁴ <https://www.apcc.gov.au/>

¹⁵ Commonwealth Procurement Rules, Ibid.

¹⁶ For example, Queensland Government, *Queensland Procurement Policy 2023*. Updated from time to time.

¹⁷ For example, NSW Procurement Policy Framework 2024, and NSW Procurement Board Direction 2013-03 establish the rules and procedures. Check for latest policy and framework.

established to administer the policy. The NSW Procurement Board has the power to issue, and issues mandated Board Directions regarding government procurement processes and administration. This includes general and specialised procurement including construction and ICT.

Procurement activities also are subject to the *Public Finance and Audit Act 1983*, Treasurer's Direction under that Act, and NSW government agency policies and instructions.

3.2.4 Victoria:

Government procurement in Victoria is conducted under policies of the Victorian Government Procurement Board (VGPB) which is established under the *Financial Management Act 1994* (Vic). The procurement policy framework in 2013 established the procurement policy based on a complexity and risk model rather than a value threshold model.

The VGPB¹⁸ issues key policies on requirements for agency consideration in the planning and conduct of government procurement, which may be updated from time to time.

3.2.5 Tasmania:

The Tasmanian Government issues its procurement policy as a Treasurer's Instruction Purchasing and Property – Procurement Principles¹⁹.

The State Service Code of Conduct is referred to in the policy, and includes probity fundamentals of conflicts of interest, confidentiality and probity.

3.2.6 South Australia:

South Australian government after 2021 established the agency Procurement Services SA²⁰. The government's Procurement Policy Framework governed by the Agency, is regulated under a Treasurer's Instruction which directs the conduct of procurement under prescribed policies, principles, guides, and templates.

It also includes policies for funding to the not-for-profit sector (e.g. grants) and related principles including: robust planning, proportionality, probity, etc.

3.2.7 Western Australia:

The state's Department of Finance has embodied a Procurement Office/branch for the guidance and direction of government procurement and implementation in the state. Prior to 2001 there existed a State Supply Commission but subsequently managed the procurement framework within the government policy of the Department of Finance which has established Procurement Rules, directions, and a number of procurement related government policies²¹.

3.2.8 Northern Territory:

The NT Government's procurement is conducted under the *Procurement Act and Regulation*. Under these statutory provisions is issued the Procurement Framework and a

¹⁸ A complete list of VGPB policies is under <http://www.procurement.vic.gov.au/Buyers/Policies-Guides-and-Tools>

¹⁹ Treasurer's Instruction No 1101, Procurement Principles: Goods and Services.

²⁰ Treasurer's Instruction No 18, Procurement Services SA, <https://www.procurement.sa.gov.au/policies-and-schedules>.

²¹ At 2024 see <https://www.wa.gov.au/organisation/department-of-finance/procurement-rules-and-other-government-policies>.

Procurement Governance Policy from which establishes their Procurement Rules²². The rules are generally prescriptive.

3.2.9 Australian Capital Territory:

ACT Government procurement is conducted under the *Government Procurement Act 2001* and Regulations. The conduct of ACT government procurement²³ requires that the government entities pursue value for money as the best available procurement outcome; having regard for probity, risk, effective competition, life costs, and what also may be prescribed in Procurement Policy Circulars.

The Government Procurement Board is established under the Regulations; which reviews the conduct of government procurement and capital works, and provides procurement advice to the Government and government entities.

3.2.10 Local Government:

Some jurisdictions have aspects of governing local government legislation which set some rules for the conduct of procurement including certain thresholds. Most jurisdictions local governments have procurement policies and guides. These may be embodied in local government policy or in guidelines, according to the jurisdiction. There is ongoing consultation across the Australian Local Government Association²⁴ and in the jurisdictions in contemporary practice and development of the respective 'best practice' guides. The Australian Local Government Association also includes a level of consistency in best practice procurement to some degree in its agenda²⁵.

3.3 Value for money

Value for money is a core principle in government procurement; and also in the private sector but with different business drivers, and as reflective in the principles of public sector purchasing in 3.23.2] above, can incorporate local business and economic benefits principles. The concept of value for money is not reflected in price alone, but more so in the holistic consideration of all matters and risks relevant to the procurement and its processes. Along with financial consideration, value for money best practice [*Figure 1* the Probity Assurance Environment] requires defensible consideration of the following; and whether in the public or private sectors, they are mutually inclusive:

- applying accountability principles and rules,
- demonstrative fair competition, even if single supplier sourced,
- factors such as fitness for purpose, quality, service and support, technological adaptability, environmental impacts and sustainability, and safety;
- cost related factors including life costs and transaction costs associated with acquisition process, contracting, management, holding, operation, maintenance, and disposal;
- efficient and effective use of resources; and
- reasonable consideration of all related risks.

²² The framework is found at <https://nt.gov.au/industry/procurement/how-procurement-works/procurement-framework>

²³ A Procurement Circular issued under the Regulation states the applicable principles

²⁴ <https://alga.com.au/>

²⁵ For example, *Advancing sustainable procurement in local government*: <https://alga.com.au/16839-2/>

Value for money is the holistic result of accountable, transparent, and ethical procurement processes with all relevant costs and accountabilities being considered.

Public procurement frameworks across the Australian jurisdictions reflect similar principles and relationships. Private sector procurement will apply the same elements but with different commercial objectives, see [3.7]. These are global procurement principles. The Tasmanian Government applies value within a diagram similar to that below²⁶:

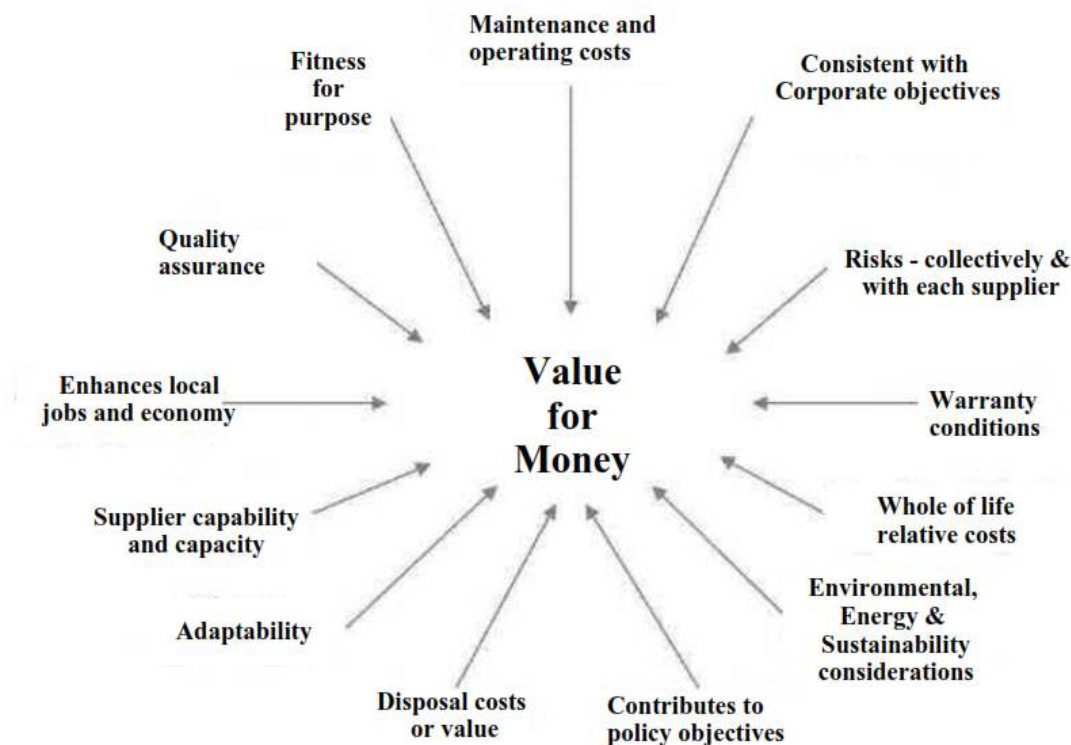


Figure 4. Value for Money indicative inputs

Case Study – Value for Money:

An agency needed to buy protective clothing for their staff on operational duties sometimes in cold and inclement weather. They conducted a tender process where the product fitness for purpose was thoroughly examined, and carried a 60% weighting. Price carried a 20% weighting. Warranty, life, and support were 20%. The Evaluation determined two products, each from reputable suppliers, which had final evaluation scores separated by only 1.5%. There was more than 7% to the next merit score. Of the two, the lower score had the highest 'fit for purpose' score, but was almost twice the price.

The higher merit score was cheaper, and was rated as fully fit for purpose. It offered best value for money in the evaluation.

The Agency management contended that the 'nicer' and more expensive Offer might be good for staff 'wellbeing', but was unable to provide the defensible 'rationale for how that would demonstrate better value for money. Staff 'wellbeing' was not a selection criteria.

²⁶ Winning Government Business/ How Government Buys/ Purchasing Principles/ Value for Money

3.4 Competition

All government jurisdictions support ‘competition’ within a key procurement principle, or support it as a component of value for money. The private sector depends on and encourages competition as fundamental to obtaining best value in their procurement.

The objects of encouraging competition are to:

- stimulate the supply market to provide wide opportunity for open and fair competition without discrimination,
- encourage the participation of Small and Medium Enterprises (SME)²⁷; and
- contribute fundamentally to obtaining value for money²⁸.

This can only be demonstrated by procurement planning which reflects a good understanding of the supply market, its nature, and characteristics.

The highly structured procurement processes of government, necessitated by public accountability may be perceived to have the effect of placing some constraints on the negotiability of tenders, particularly price negotiability. This is discussed further at [5.3.12]. One way to offset this is to design open and effective competition into procurement processes. Some individuals who are unfamiliar with the accountability and transparency rigor and structure of government procurement processes can be misled into believing that open negotiability as with the private sector is able to be conducted in public procurement, and this itself opens the potential for unethical behaviour. However, government procurement processes should not shy from negotiating best value for money, see [5.3.12].

Some jurisdictions have established procurement value thresholds which determine the justification for a procurement method to be applied, such as open tender or restricted²⁹. Others have indicative risk-based thresholds within procurement guidance.

3.5 Efficiency and Effectiveness

In Australia, in each government entity, applying efficient and effective processes and use of resources is a responsibility of the Chief Executive Officer (or equivalent title, as a component of achieving value for public money, whether in procurement or more broadly. It requires:

- proportionality,
- a governance and risk management framework, and
- appropriate procurement planning and management.

²⁷ An SME is an Australian or New Zealand firm with fewer than 200 full time equivalent employees. Where the Australia US Free Trade Agreement (AUSFTA) applies, it is no more than 200 employees worldwide. The EU threshold for an SME is 250.

²⁸ For example see CPR Div 1, s5, Encouraging Competition.

²⁹ For example, CPR at s3 establishes thresholds for procurements, and Div 2, Additional Rules, establishes conditions for limited tender.

3.6 Probity and Ethics

An ethics framework which ensures probity and integrity in procurement planning management and execution³⁰ is fundamental to public accountability in the public sector; and in the private sector, for business credibility and expectation for fair dealing³¹.

Accountability and transparency apply to both the public and private sectors; but to different degrees. See the contrast at [3.7]. In the public sector, for example the CPR holds this as a discrete principle and also relates this principle to application of Efficient, Effective, and Ethical use of Resources. Across all Australian jurisdictions, and their respective procurement policies, agencies and applicable public sector entities are required to ensure that procurement processes are transparent, and supported by defensible rationalisation.

“Accountability” implies compliance with statutes, policies, directives and instructions, standards and codes, and authorised plans and procedures; and requires that a public entity is accountable for its decisions, and takes public responsibility for the outcomes.

“Transparency” is the evidence of accountability, and includes the actions and records which appropriately support scrutiny and auditability.

Public sector organisations must conduct their purchasing activities with the highest standards of probity and ethical behaviour which demonstrate probity assurance. Courts internationally have held that the public sector should be the morals exemplar³².

Other legislative or policy obligations may apply to the procurement activities of a particular type of public procurement; e.g. information technology³³; or to similar sensitive activities such as sponsorships³⁴ or grants.

Likewise across the jurisdictions, legislation, regulation, and policies will apply within particular procurement type, sponsorships, grants, etc; and these all form part of probity assurance and compliance. A Probity Service Practitioner must understand and consider these accountability and compliance requirements, and their implications, in providing the services. This is discussed further at [4.5].

³⁰ CPR Div 1, s6.

³¹ Australian courts deal with alleged improper behaviour of commercial enterprises under civil laws of Tort; and actions are taken against business enterprises by the Australian Competition and Consumer Commission under the Competition and Consumer laws.

³² For example, see *Tercon Contractors v Province of British Columbia* 2010

³³ Government Information Technology Conditions (GITC) version 4.1, see www.gitc.finance.gov.au. All jurisdictions have ICT policies which establish the conditions for procurement and contracting for ICT goods and services

³⁴ For example, the Australian Government Department of Finance “Accepting Sponsorship Guide” applies to Commonwealth Agencies.

Other offshore jurisdictions address probity in procurement

In the US, as a general principle, due process requires that a government procurement decision is made on a rational basis, not capricious or arbitrary, and free from bias, bribery or other improper conduct.¹ In July 2007, the US Office of Government Ethics issues guidance on Ethics and Procurement Integrity.¹

The European Union has issued procurement directives relating to public procurement applicable to all member states. These directives include requirements for effective competition by suppliers, the use of non-discriminatory technical specifications, and the use of objective criteria for selecting participants and awarding contracts.

Overseas jurisdictions, particularly Western democratic, have embraced strong and pervasive anti-corruption in procurement laws and policies which embody, more or less, the Australian characteristics of integrity, probity, ethics, accountability, and transparency. These characteristics are subject to dynamic social pressures which are drivers for incremental progressive change in both public and private procurement.³⁵

Under the Asian Development Bank/ OECD Anti-corruption Initiative, the twenty-seven countries of the Asia Pacific have committed to appropriate transparent procedures for public procurement that promote fair competition and deter corrupt activity.

The OECD, of which Australia is one of 30 member countries, in 2009 established the Principles for Integrity in Public Procurement. The Principles are supported by handbooks and an assessment methodology to assist compliance in member countries.

3.7 How is public sector procurement different?

Given that the public sector purchases many of the same items as the private sector, what are the distinguishing features of public sector procurement?³⁶

An important difference is that public sector procurement is based on activities in the public interest, not on primary measures of profit or shareholder return. The public sector seeks to provide programs and services for the benefit of the community. Another key factor is that procurement activities must help maintain and promote public trust.

This public interest philosophy explains many of the differences between the operating environments of the public and private sectors and the resulting processes, rules, regulations and accountabilities.

As well as the obligation to refrain from conduct that uses public office for private benefit or partisan advantage, public officers carry a duty to conscientiously pursue the public

³⁵ Transparency International monitors and publishes annually the Corruption Index ranking countries globally in their exposure to corruption; Box & Forde, Op. cit. Ch 5

³⁶ Box and Forde, Op. cit. [3.1 – 3.9]

interest. Figure 5 below contrasts the procurement drivers and rationale in the public sector versus the private sector:

<i>Procurement Rationale:</i>	<i>Sector:</i>	
	<i>Public</i>	<i>Private</i>
➤ make the right decisions	√	√
➤ based on the right reasons	Public	\$
➤ executed at the 'right' time	Public	\$
➤ for the benefit of the stakeholders	Public	\$++
➤ in the public interest	√	X
➤ rights to information & redress	√	x

Underlying is the extent of accountability, transparency, & commercial interests

Figure 5. Contrasting the rationale for procurement decisions

While these should be self-evident, the challenge is how to achieve these goals in practice within competing priorities and the preservation of probity and integrity. For example, the private sector is now more conscious of the impacts of matters of social and community interests on their commercial and shareholder interests, and will address these in procurement risk identification and management more-so than in the public policy approach of the public sector,

However the Private Sector when contracted to perform or deliver public sector administrative or operational functions are likely to bring different integrity values, particularly in use of public money and resources, conflicts of interest, and public accountability and transparency³⁷.

Procurement can frequently be a high-risk area with many attributes that predispose towards unethical behaviour, knowingly or otherwise. It involves processes leading to the expenditure of significant funds, the exercise of judgement, the need to use discretion, and to ensure confidentiality in a marketplace driven by competing commercial interests. The processes also expose public sector officers to potentially corrupt or unethical external influences³⁸.

3.8 Roles in the procurement process

Procurement ranges from relatively simple with minimum risk to quite complex and high risk³⁹. The functions and structure of the buying organisation, the scope and value of the requirement, the technical, procurement and probity risk profile, the expertise available, applicable standards codes and regulations, and the policies and procedures of the organisation, all have an impact.

That is why it is generally not feasible to mandate how every purchase should be organised; albeit that frequent purchases of low value high volume requirements are ideally

³⁷ The ICAC NSW report *Corruption and Integrity in the NSW Public Sector*, December 2018, cites the issues at p10

³⁸ Box and Forde, Op. cit. [5.10-5.15]

³⁹ Many Australian jurisdictions provide templates and models to assist public procurement to assess and plan procurement risk broadly by value and technical complexity.

suited to multi-user supply panel arrangements as practiced by the public sector and corporations. Whatever the procurement model however, all supply arrangements must fit within an acceptable ethical and accountable framework. As a result, the individual roles and the allocation of tasks and responsibilities can vary quite substantially across agencies and organisations according to the type, nature, and characteristics of the procurement or similar function, e.g. 'lease or buy', sponsorships, grants, or funding schemes.

Of significance however is that procurement touches many people within and across an organisation, and in ways they sometimes do not realise, whether they be a manager, user, professional, financial officer, technical adviser, or procurement specialist. This has importance in how those people may seek to influence a procurement at its various stages. Note *Figure 3* earlier in that there is no homogeneous position on ethics and probity.

This involvement becomes clearer when one examines the broad functions to be performed in procurement as shown graphically in *Figure 15*.

The *Table 1* [Page 18] outlines of roles and responsibilities of persons in procurement shows where input to the procurement process from management, users, technical/professional, and financial would generally occur.

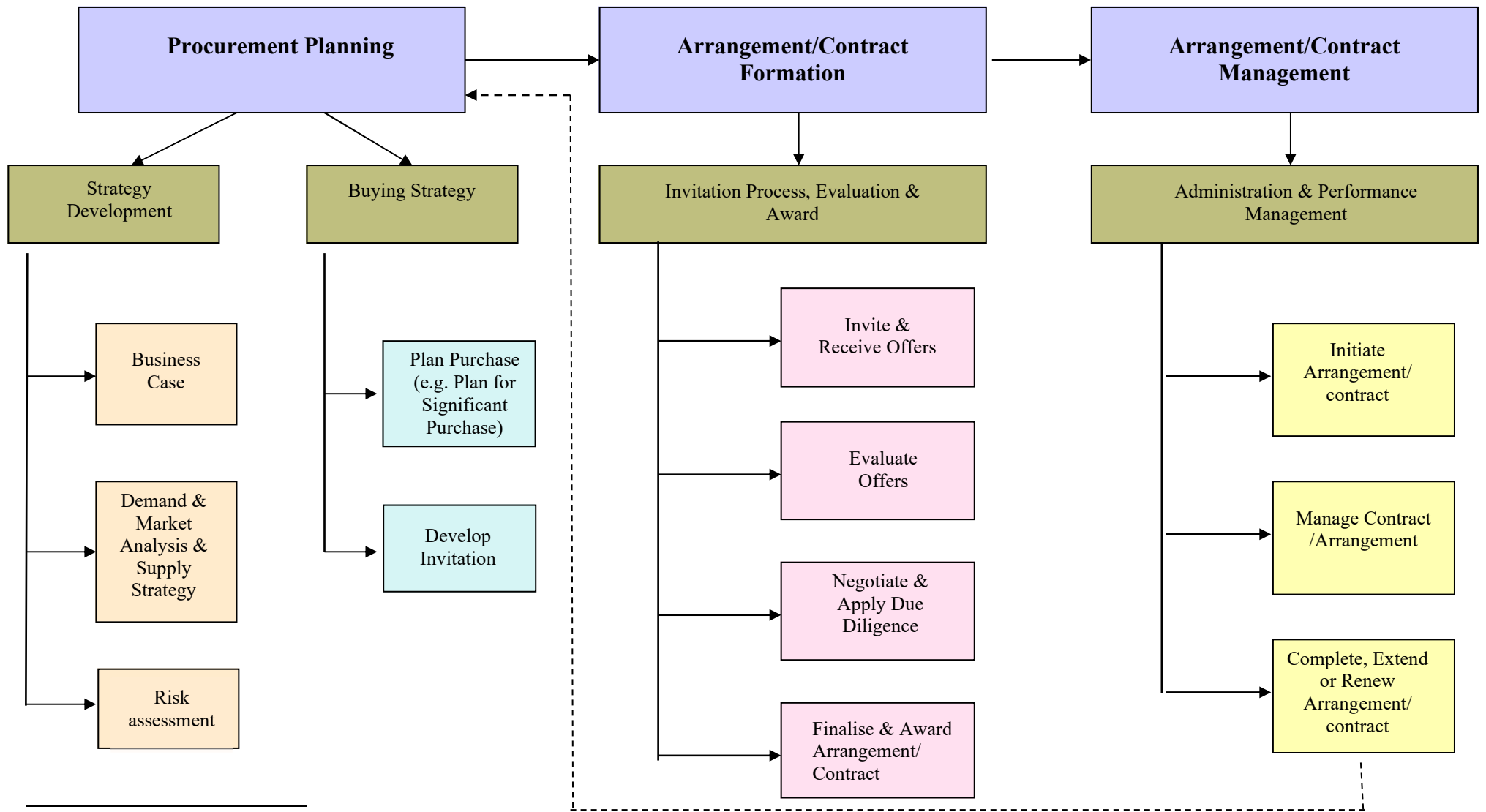
How effectively an organisation realises its procurement outcomes, the probity of the processes should incorporate the basic factors of:

- *Involving people with skills appropriate for the complexity, cost, and outcome of the procurement, and who can bring their skills, experience and knowledge to the evaluation, selection, and contract management;*
- *Implementing processes that demonstrate and deliver probity and transparency;*
- *Applying procedures that are efficient, auditable, and reliable;*
- *Using established and reliable system;*
- *Ensuring suppliers and the market are dealt with equitably and consistently;*
- *Ensuring accountability and transparency of decisions and actions; and*
- *Acting with integrity which demonstratively flows upwards and downwards.*

Despite this, people within the cause and effect of procurement in an organisation may seek to either rationally or irrationally influence procurement, often for complex reasons of human behaviour⁴⁰.

⁴⁰ Box and Forde, Op. cit. (Ch 5)

Figure 6. Procurement Process Flowchart⁴¹



⁴¹ Updated 2018 from Queensland Government Probity Workbook, 2007

Table 1. ‘Indicative’ involvement of personnel in procurement⁴²

Procurement Function	Responsibility:				
	Management	User	Technical	Financial	Procurement
Policy development & dissemination	R				
Resourcing; allocating responsibilities	R				
Planning framework: priorities, plan	R	A	A	A	
Procurement objectives	R	A			
Training; availability skills & expertise	R				
Needs determination	C	R		A	
Procurement planning—timing	J	J	J		J
Integrity, probity, accountability, transparency	C	J	J	A	R
Specification		C	R		
Market research		A	A		R
Key information	J	J	J	J	J
Formulate evaluation plan	C	C	A	A	R
Risk management planning	C	A	J	A	J
Develop critical success factors, KPIs	C	A	J	J	J
Financial inputs				R	
Documentation of financial process		A		R	
Payables procedures		A		R	A
Procurement plan—buying strategy	C		A	A	R
Contract strategy	C		A	A	R
Invitation & contract documentation			A	A	R
Negotiation		A	A	A	R
Monitoring performance		J	A	A	J
Reporting		A		A	R
Effectiveness review	R	A	A	A	A

R = responsible **J** = joint responsibility **A**= assists, provides inputs **C** = confirms

⁴² Ibid.

3.9 The ethical foundations

‘Best Practice’ procurement should have integrity built-in from start to finish, and transparent evidence ethical behaviour. Ethics are the moral principles or values that guide individuals in all aspects of their work. See *Figure 3*. Ethical behaviour includes avoiding conflicts of interest, preserving confidentiality and security of information, and acting with honesty, impartiality, and objectivity.

In the public sector, both public servants and those who represent the government in the procurement and government services delivery processes are expected to act in the public interest. In any Australian jurisdiction, it is the elected representatives of the Government of the Day, not the bureaucracy or the government opposition parties, or the media that establish what the government believes is ‘*in the Public Interest*’⁴³.

Public sector ethics are the principles to be applied in the exercise of powers or functions of public office. They are concerned not only with distinguishing right from wrong and good from bad, but also involve a commitment to always act in the public interest.

While ethics is a set of social values and beliefs which may vary across cultures and societies, a Code of Conduct should be more specific in showing the practical application of ethical principles to a given environment, e.g. an organisation. It usually contains rules and guidelines that place the conduct principles into the operating context of the organisation. It should govern the ethical behaviour of the organisation’s employees, as well as those persons engaged by the organisation to deliver its functions, e.g. contractors, consultants, and even volunteers. While several conduct principles will be common to public and private sector organisations, the scope and emphasis may differ with the respective roles and responsibilities.

For example, the code of conduct for a financial services organisation will have different emphasis on conflicts of interest to say a mining company, since the financial services staff may be exposed to family financial transactions.

A Code of Conduct may be quite prescriptive in stating the values or rules that employees and contractors should embrace (for example, client relationships during procurement or in a regulatory environment). It may set limits and prohibitions on certain actions (e.g. acceptance of gifts and benefits) or provide guidelines and examples of best practice responses to typical situations likely to occur in practice.

Simply following the letter of the law may still fall short of meeting the objective test of community expectations of ethical behaviour. Sound ethical standards are based on shared values, character, integrity, and conscience.

⁴³ Public interest is the interest of society as a whole, or the “common good”. Public servants or those representing the government would not take an action in the public interest unless authorised to do so. The Government of the day determines the ‘Public Interest’. Legislation such as the *Public Interest Disclosure Act* or *Protected Disclosures Act* provide a ‘responsibility framework’ for government officers to act when they believe the public interest is not being observed.

Research has shown that ethical behaviour can be situational, i.e. some individuals will modify their ethical behaviour according to rules of the situation.

3.10 Ethical Values across jurisdictions:

All Australian jurisdictions and the Commonwealth have established an anti-corruption agency. Collectively these bodies, i.e the NACC, ICAC NSW, ICAC SA, ICAC NT, IBAC Victoria, CCC Qld, CCC WA, Integrity Commission Tasmania, Integrity Commission, ACT, and their respective offices of their Ombudsman met regularly as the Australian Public Service Anti-corruption collective. Their focus is on a consistent approach to Australian public sector integrity and anti-corruption policy and management.

3.10.1 Commonwealth:

The strong values of ethics in Australian Public Service are enunciated in the Australian Government Public Service publication “Values and Code of Conduct in practice”; and specifically related to procurement Department of Finance provides guidance material for the good practice of ethical and accountable procurement⁴⁴. The ANAO⁴⁵ does not provide probity services, but conducts Audits of questionable significant procurement processes; but the Australian Government Solicitor can provide probity services to Commonwealth entities subject to the PGPA Act, the Commonwealth Procurement Rules (CPR), the Commonwealth Grants Rules and Guidelines (CGRG), and the *Public Service Act*⁴⁶.

Since 2018, the *Government Procurement (Judicial Review) Act* provides legal redress for complainants against decisions during and from procurement under the CPR⁴⁷. The Commonwealth Ombudsman has a role to investigate and attempt to resolve complaints about the conduct of administrative processes, including government procurement, within the Commonwealth jurisdiction.

Whistleblower provisions are found with the *Public Interest Disclosure Act*. Reporting suspect or alleged misconduct to superior management is a responsibility of all Australian Public Servants. The Commonwealth Ombudsman provides guidance for managing a Public Interest Disclosure (PID). Serious misconduct to the Australian Federal Police.

The National Anti-corruption Commission (NACC) was established under Commonwealth legislation in 2022⁴⁸ as an independent agency to detect, investigate, deter, and report on serious or systematic corruption in the Commonwealth public sector. The powers of the NACC extend to investigation and reporting of the alleged or potential corrupt conduct of any person or public official engaged in roles or functions of the Commonwealth, including contractors. It extends to the processes in procurement, grants and funding agreements

The NACC can investigate conduct of:

⁴⁴ <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/accountability-and-transparency/index.html>

⁴⁵ The ANAO may conduct a Performance Audit on probity related allegations, see for example the ANAO audit into the OneSKY procurement on which a Probity Advisor and Probity Auditor had been engaged <https://www.anao.gov.au/work/performance-audit/procurement-iccpm-onesky-australia-program>

⁴⁶ The AGS provides these as commercial services and competes with other law firms for Probity Services.

⁴⁷ Following successive unsuccessful cases against government administrative procurement decisions This legislation now exposes commonwealth administrative procurement decisions to redress, injunctive relief and compensation.

⁴⁸ *National Anti-Corruption Commission Act 2022*

- any person that adversely affects a public official’s honest or impartial exercise of powers or performance of official duties
- a public official that involves a breach of public trust
- a public official that involves abuse of office
- a public official or former public official that involves the misuse of documents or information they have gained in their capacity as a public official.

3.10.2 Queensland:

The Public Sector Ethics Act 1994 outlines five fundamental ethical obligations of Queensland Government employees. The standards of public sector employee conduct are further governed by a common Code of Conduct, and various Government directives and policy guidelines. The common code of conduct also applies to contractors, consultants, researchers, students, and volunteers working in public sector services.

The *Crime and Corruption Act 2001* (C&C Act) defines ‘**corrupt conduct**’ of persons holding an appointment in a unit of public administration whether by election or selection. The C&C Act requires a public official to notify the Crime and Corruption Commission (CCC) of any complaint or matter which may involve official misconduct⁴⁹. The public can report suspect misconduct of public officers to the CCC, including local government employees and councillors. The *Public Interest Disclosure Act* (Qld) provides the whistleblower framework for public officers. Guidance is provided by the Ombudsman.

The *Integrity Act 2009* establishes the office of the Integrity Commissioner, with powers to provide advice to Ministers, senior government officials, and the Opposition on ethics and integrity issues. The Integrity Commissioner’s role is reactive to requests for advice and has no powers to investigate issues of alleged misconduct. The Integrity Commissioner also has responsibility for the State’s Lobbyist Register.

A Code of Conduct for the Queensland Public Service is issued by the Public Service Commission; and its application extends to persons employed as consultants and contractors, volunteers, and students.

3.10.3 New South Wales:

The New South Wales (NSW) Code of Practice for Procurement is issued by the NSW Government. It applies to all procurements for which tenders are invited. The NSW Government Procurement Policy gives effect to the Code of Practice.

The NSW Independent Commission Against Corruption (ICAC) is established under the *ICAC Act* (NSW) to protect the public interest, prevent breaches of public trust, and guide the conduct of NSW public officials. The ICAC Act requires a Minister or head of a department to notify ICAC of alleged or suspect corrupt conduct⁵⁰.

The NSW Ombudsman⁵¹ also has responsibility for handling complaints about NSW government departments, agencies, local government authorities, corporations, statutory bodies, tribunals, and universities. The Ombudsman also can examine complaints related to Local Government staff, councillors and administration. On procurement, grants and sponsorship related complaints, the Ombudsman also will collaborate with ICAC where corruption is alleged or suspected.

The *Public Interest Disclosure Act* (NSW) provides the whistleblower framework for public officers. PID guidance is provided by the NSW Ombudsman.

⁴⁹ *Crime and Corruption Act 2001* (Qld), includes definitions and notification requirements

⁵⁰ Ibid, Corrupt conduct is defined in the Act.

⁵¹ <https://www.ombo.nsw.gov.au/>

3.10.4 Victoria:

The conduct of Victorian Government employees is established by the Commissioner for Public Employment under the Victorian Public Service Code of Conduct, and is administered by the State Services Authority. Codes of Conduct are established for both public employees and employees of public sector special bodies. Contravention of the Code of Conduct constitutes ‘misconduct’⁵².

The Victorian Ombudsman⁵³ investigates and reports on the ethical conduct of procurement within the public sector, including local government. As well, the Independent Broad-based Anti-corruption Commission (IBAC) is established to strengthen the integrity of the Victorian public sector, and to act on corruption within the misuse of public power or position⁵⁴. IBAC includes under corruption:

- taking or offering bribes,
- dishonestly using influence,
- fraud,
- theft,
- embezzlement, and
- misuse of information.

The *Protected Disclosure Act* (Vic) provides the whistleblower framework for public officers. PD guidance is provided by the Victorian Ombudsman.

Victoria also has established a Local Government Investigations and Compliance Inspectorate to investigate alleged integrity breaches in Victorian local government authorities.

3.10.5 Tasmania:

The Tasmanian State Services Act 2000 incorporates the ethical principles and Code of Conduct for public sector employees. Corrupt conduct also is defined under the *Public Interest Disclosures Act* 2002⁵⁵.

Tasmania has a Tasmanian Integrity Commission (TIC) established under the *Integrity Commission Act* (Tas) 2009, which can investigate claims of corruption or misconduct in public sector matters. Its charter is to act independently of government in investigating claims of misconduct or corruption, including those relating to procurement and grants. The Commission has investigatory powers, and may refer matters to prosecution if the Commission has evidence of a criminal offence. It also may refer matters back to an agency with recommended action.

The Ombudsman Tasmania is established to investigate and report on complaints against the administrative actions of government including Government agencies, statutory bodies, state owned commercial enterprises, University of Tasmania, Local Government Authorities, and Water, Sewerage and Electricity utilities.

The *Public Interest Disclosures Act* (Tas) provides the whistleblower framework for public officers. PID guidance is provided by the Ombudsman Tasmania.

3.10.6 South Australia:

As well as the probity and ethics requirements of the South Australian Government issued in their Procurement Board guides, see [3.2.6], the legislative framework in South Australia

⁵² Public Administration Act 2004.

⁵³ <https://www.ombudsman.vic.gov.au/>

⁵⁴ <http://www.ibac.vic.gov.au/>

⁵⁵ Public Interest Disclosure Act 2002, (Tas)

has various pieces of legislation that impact upon the ethical conduct of public officers. A public officer “acts improperly”, (or a person acts improperly in relation to a public officer or public office) *“if they knowingly or recklessly act contrary to the standards of propriety generally and reasonably expected to be observed by ordinary decent members of the community”*⁵⁶. This is a powerful statement that reaches beyond the public officer and into the behaviour of suppliers or contractors or consultants engaged in a procurement or contract. Undue influence and lobbying may be referred to and investigated by the Office of Public Integrity.

The anti-corruption body in South Australia is the Independent Commissioner against Corruption⁵⁷ (SAICAC), established under the ICAC Act 2012. The SAICAC exercises its role through the Office of Public Integrity. It investigates alleged maladministration as well as alleged corruption. The ICAC Act also defines misconduct as well as maladministration.

Many of the offences created by the *Criminal Law Consolidation Act* rely upon an element of impropriety for the offence to be established.

The South Australian Ombudsman receives and investigates whistleblower complaints under whistleblower legislation. It is expected that South Australia will introduce Public Interest Disclosure Act after 2018.

3.10.7 Western Australia:

The Public Sector Commission (PSC) under the *Public Sector Management Act* establishes the Code of Conduct and Code of Ethics for public officers issued under the PSC Commissioner’s Instruction. It emphasises the behavioural requirements for integrity and accountability.

The WA Department of Finance publishes a Procurement Practice Guide⁵⁸, which is expected to be followed by Government Agencies, and includes an Appendix ‘Probity and accountability’. Specific attention to probity is required for procurement over \$250,000. Local Government procurement is supported by a Pest Practice Guide which emphasises the essentials for probity, accountability and transparency.

The State Supply Commission is more specific in its guidance to procurement practice, and publishes the Probity and Accountability Policy.

The WA Corruption and Crime Commission (CCC) is established under the *Corruption and Crime Commission Act 2003*. It has the same powers as a Royal Commission and a charter to investigate and pursue serious misconduct. In 2015 the *Corruption, Crime and Misconduct Act* was introduced to differentiate between ‘minor misconduct’ and ‘serious misconduct’. The CCC investigates serious misconduct and the Public Sector Commission investigates minor misconduct. The scope covers all public entities, agencies, local government WA public universities, statutory bodies and commercial entities.

The CCC WA also publishes guidance for public sector officers and agencies for avoidance and management of misconduct or corruption⁵⁹. Misconduct occurs when a public officer acts with dishonesty or a lack of impartiality which could affect their official capacity and which could result in dismissal under the *Public Sector Management Act*. The CCC WA also publishes the Government’s policy on gifts and benefits⁶⁰.

⁵⁶ *Criminal Law Consolidation Act 1935* (SA) defines the scope of improper conduct

⁵⁷ <https://www.icac.sa.gov.au/>

⁵⁸ The Procurement Practice Guide embodies probity and accountability principles across all procurement

⁵⁹ <http://www.ccc.wa.gov.au/Reporting/WhatIsMisconduct/Pages/MisconductResistanceFramework.aspx>

⁶⁰ http://www.ccc.wa.gov.au/PreventionAndEducation/MRPFForums/Documents/Forum_01July2010/OPSSC%20Gifts%20and%20Benefits.pdf

Whistleblower protection is under the *Public Interest Disclosure Act* (WA).

3.10.8 Australian Capital Territory:

The *Public Sector Management Act* 1994 (ACT) provides the legislative framework for the professional and ethical behaviour of ACT public officers, including the values and principles of the public administration. The Act lists the principles as:

- Service to the Public,
- Responsiveness to the Government and the public needs,
- Accountability to government,
- Fairness and Integrity, and
- Efficiency and Effectiveness.

The Office of Public Sector Management of the ACT Government publishes Guidelines for Dealing with Fraud and Corruption in the ACT Public Service. The Chief Minister's Department issues a guide, "ACT Public Service Code of Ethics" which provides both the ethics framework and guidance, and the Code of Ethics. The Code of Ethics details the probity issues and expectations of a public employee.

"Ethics help us to decide whether our actions are right or wrong"
ACT PS Code of Conduct [2.1]

An ACT Integrity Commission ⁶¹is established under the Integrity Commission Act 2018 (ACT) to investigate and report on corruption, maladministration and other ACT public sector integrity issues. Where misconduct is not covered under an employee agreement, the *Public Sector Management Act* includes other disciplinary instruments.

3.10.9 Northern Territory:

In the Northern territory, public officers are expected to act in the public interest. The Information Commissioner is the independent officer appointed to oversee the Freedom of Information and Privacy provisions of the *Information Act*. The Commissioner is also appointed as the Commissioner for Public Interest Disclosures and has responsibility for the implementation of the *Public Interest Disclosure Act (NT) 2008*.

The Department of Business publishes the Government's Procurement Principles under a 'Procurement Direction' which includes 'Ethical behaviour and fair dealing' as a key Principle.

The conduct of NT Public sector employees is governed by the Code of Conduct under the *Public Sector Employment and Management Act* (PSEMA) and its subordinate legislation. The Code of Conduct includes probity issues of:

- Misuse of information,
- Integrity and security of information,
- Use of resources,
- Disclosure of interests,
- Gifts and benefits,
- Fairness and equity,
- Improper exercise of power, and
- Disclosure of wrongdoing.

⁶¹ <https://www.integrity.act.gov.au/>

Under the *Independent Commission Against Corruption Act 2017* (NT), the NTICAC⁶² role is to prevent, detect, and investigate improper conduct in the NT public sector, local councils, and other related bodies.

3.10.10 Local Government:

In each state or territory jurisdiction with Local Government or Local Municipal Authorities (LGA), the related *Local Government Act* or equivalent addresses the legislative requirements of the LGA, as well as the ethical behaviour and Codes of Conduct for Council members (Councillors), Officers, and employees of the local government authority. Some jurisdictions have local government integrity investigating bodies⁶³.

Broadly, integrity requirements are embodied in legislated Codes of Conduct which address matters of an individual's ethical behaviour in respect of their employment, public values, and public responsibilities. Some LGAs have separate Codes of Conduct for the Councillors and the Employees. Whether or not a code of conduct is defined in the related legislation or regulations, the public would reasonably expect a local authority to comply with robust public sector governance standards.

3.10.11 Private Sector:

Private sector Corporations, their Directors, and their employees are liable to litigation for corrupt conduct if proven under Competition and Consumer laws, or by common law action taken against them. Employees who breach their fiduciary duty for unethical behaviour may be prosecuted by the Corporation/employer.

In the international environment, Corporations and their employees may be liable for prosecution under international laws such as the UK Bribery Act, or the US Foreign Corrupt Practices Act; and/or locally under the Criminal Code provisions for foreign corrupt practices.

Corrupt conduct of a Buyer or Supplier which is intentionally unethical, fraudulent, dishonest, or misleading may be illegal if proven. Some related legislation differentiates between civil offences with prescribed penalties, and criminal offences which may incur fines or imprisonment or both.

There exists in law a fiduciary duty⁶⁴, a duty of trust between an individual and their employer. The private and public sector entity managers rely on that fiduciary duty; but also have a responsibility of good governance to embed and permeate ethical values and/or rules within the organisation to establish the organisation's ethical culture. It is essential that the culture is led by the 'tone at the top', i.e. a top-down demonstration of ethical conduct⁶⁵.

The *Corporations Act (Cth)* also prescribes whistleblower protection policy requirements of private sector corporations, with ASIC enforcement and penalties for non-compliance.

⁶² <https://icac.nt.gov.au/>

⁶³ For example, in Queensland - the Office of the Independent Assessor; Victoria - the Local Government Inspectorate; NSW - the Office of Local Government; etc

⁶⁴ Box and Forde, Op. cit. [4.14]; *Breen v Williams* at CLR 92, ALR 273

⁶⁵ HB 325, ibid, [1.2]

3.11 Getting it wrong



Figure 7. Integrity gets blurred or breached

When public officials misuse their positions for self-gain, self-interest, or simply the exercise of personal power, they breach the duty of trust by placing self-interest ahead of the public interest. When left to flourish, fraud, bribery, hidden commissions, obfuscated benefits, and other misconduct can lead to skewed decisions on procurement that are economically unjustified, and the potential for prosecution for misconduct or corrupt conduct.

The adjunct adverse impacts of unethical behaviour include:

- internal friction, suspicion and lowered morale;
- poor managerial decision-making and potential waste of resources;
- damage to the agency's public image, reputation, and trust, and potentially of the government;
- failure to obtain value for money; and
- less effective procurement outcomes.

At an individual level, there may be increased stress and loss of personal reputation, together with disciplinary action and possible prosecution. It may lead to damaging loss of professional recognition and registration, and may have a consequential impact on future employment. It also can lead to confiscation of assets inappropriately acquired, and/or the loss of employee benefits and superannuation.

Public officers are expected to act in the best interest of their employer - the Government, or otherwise their agency which acts for the Crown. This is their fiduciary duty, which connotes trust. Public officers are trusted to act with integrity.

Persons who are not Public Officers but who may be a contractor to government may have a fiduciary duty to their employer⁶⁶. Individuals engaged 'in trust' to perform tasks within the functions of government have a fiduciary duty to act in the interests of the agency in which they are engaged. This may present a conflict of interest, particularly where their self-interest may be inconsistent with either their employer's interests or with the government or the agency.

It is important also that public officers, and individuals engaged in public roles or functions, understand that it is not their responsibility to determine or act in what they believe to be the 'public interest'. See also the discussion at [4.7].

The 'public interest' is determined by the government of the day, by those elected public officials who form the government⁶⁷.

⁶⁶ Several pieces of Case Law note the Fiduciary Duty is between an individual and the Principal they are perceived to represent

⁶⁷ For the Australian Government, a public servant is liable under s70 of the Crimes Act for unauthorised disclosure. See also the Criminal Code relevant to each Australian Jurisdiction.

In the private sector, Corporations usually do not set out to act unethically despite that commerce and competition revolves around a reasonable degree of commercial self-interest. While corporate codes of conduct aspire to establish the entity's integrity principles, breaches of integrity are usually by individuals⁶⁸, due to:

- breach of fiduciary duty, or
- inadequate procedures to embed an ethical culture in the organisation.

3.12 Getting it right

*"Government is a trust, and the officers of government are the trustees; and both the trust and the trustees are created for the benefit of the people".
Henry Clay 1829*

Procurement constantly exposes situations where there may be no predetermined or obvious course of action but which nonetheless require a person to act ethically in resolving the

It is expected that Probity Service Providers are aware of how to handle an ethical dilemma whenever the occasion arises, and are able to provide sound and timely advice to agency staff.

issue. An ethical dilemma⁶⁹ poorly handled can quickly become an issue of media interest.

The principle of 'what is reasonable' is applied, albeit that the assessment of reasonableness may have some subjectivity. This requires sound judgement as a core competency of the probity specialist. See *Figure 3*.

If a Probity Service provider is not sure whether a proposed action is legal, they should always check with a legal advisor. However, checking the legality of an action will not always provide the right ethical answer. A party may assert its legal rights but they may not be acting ethically or be morally correct. It is therefore important to have a practical way of resolving ethical dilemmas in procurement.

Ethical behaviour is coupled with sound judgement.

Information for agencies and public officers on management of ethics issues is readily available. The Australian Government has an Ethics Advisory Service to assist public officers and those representing the government or the public service. Other jurisdictions have similar services to assist agencies and accountable persons in the management of probity, integrity and ethics. Other reference bodies are established on ethics both in academic institutions or privately⁷⁰.

Dealing with an ethical dilemma requires rational thought and reasonable judgment. A person should obtain the facts and examine the possible realistic solutions. Idealistic

⁶⁸ Box and Forde, Op. cit. [5.10-5.16].

⁶⁹ *Ethical Dilemma* - A situation caused by a conflict of values, requiring a person to decide on one course of action over another.

⁷⁰ For example: The Institute for Governance and Public Policy, and the National Forum on Integrity in Government at University of Canberra; The Griffith University (Qld) Centre for Governance and Public Policy; The Ethics Centre, Sydney; the Centre for Business and Public Sector Ethics, Cambridge UK.

solutions often do not fit well with commercial reality and what is reasonable and rational; but sometimes the high moral ground is preferred position of zero tolerance. What is reasonable is what meets the Objective Test, situated to the public or private environment.

Ask the following questions about the options for handling the issue:

- *Is what I might do legal?*
- *Is what I might do honest?*
- *Is it consistent with Government (or the organisation's) policies?*
- *Is the action consistent with the organisation's goals?*
- *Does it reflect the organisation's Code of Conduct?*
- *Is it the right thing to do?*
- *What will be the outcomes for:- the agency/organisation, work colleagues, other parties and the individual?*
- *Can the action be rationally justified and defended if needed?*
- *What would happen if the action were to be openly scrutinised and challenged?*
- *Would the action or outcome pass the 'newspaper' or public media test?*

3.13 Mobilising appropriate skills

An ethical and accountable organisational culture will come from the practice of high standards of ethical behaviour, beginning with the organisation's leadership, and including the agency employees and contractors⁷¹. See also the discussion at [7.8].

Probity in procurement requires all involved staff, individually and collectively, to:

- exercise good judgement and consistency in decision-making,
- perform their duties impartially and objectively,
- not accept or solicit gifts or benefits,
- ensure their private interests do not conflict with their fiduciary duty,
- not entertain approaches which may be seen as attempts to influence,
- maintain appropriate confidentiality,
- engage in processes which are defensible and support transparency,
- act with fiduciary duty and in the best interests of the organisation, and
- call on additional expertise when needed.

Persons responsible for procurement processes must ensure those processes are conducted using staff with:

- procurement management and support skills,
- technical, conceptual and analytical skills and capabilities to evaluate often complex and conflicting requirements;
- communication skills in preparing precise written advice, and articulating clearly and unambiguously;
- research skills to access information and analyse documentation and specifications;

⁷¹ The *Bribery Act* 2010 (UK) requires corporations to have Adequate Procedures in which Principle 2 is a Top-down commitment to anti-corruption and probity

- ❑ flexibility to cope with changes in technology and the operating environment;
- ❑ the ability to apply initiative and exercise sound business judgement on a daily basis; and
- ❑ contract development and management skills.

The need for an appropriate mix of technical expertise and administrative and decision-making skills are among the key ingredients of the processes and committee structures commonly found in procurement.

Even the best probity processes do not guarantee that a project or activity will be immune from probity dilemmas or criticism. Mistakes, delays, and disputes can still arise despite the best efforts to ensure good management of probity risks. However adopting best practice procurement procedures will minimise such situations and limit the potential adverse consequences.

Cited: Qld Government, Ethics, Probity and Accountability in Procurement 2006, Procurement Guide, (p3)

Depending on the circumstances, risk, and sensitivity of the procurement, the advisory inputs may warrant the use of both probity services and legal services, i.e. internal or external probity services to provide independent probity assurance, and legal services particularly for procurement and contracting conditions.

Note: For rationale, see [7.1]

- A probity service provider cannot also act as a procurement advisor.
- A legal advisor cannot also act as the probity service provider.

3.14 Redress

Where a party to a public sector procurement process is dissatisfied, there are courses of redress. These might be:

- A formal Complaint under an entity's Complaints Handling processes⁷²;
- Judicial Review, if the decision or process is made under an enactment⁷³ other than Judicial Review under the *Government Procurement (Judicial Review) Act 2018*⁷⁴.
- Complaint to an anti-corruption statutory body in a jurisdiction;
- Complaint to an Ombudsman;
- Seeking information under Freedom of Information or similar legislation;
- Action under public interest disclosure laws;
- Under a contract, Notice of dispute under the contract conditions; or
- Litigation under Common Law; or an injunction under Administrative Law.

Private sector complainants may seek redress by:

- A formal complaint under an entity's Complaints Handling processes;
- Litigation under the Competition and Consumer laws;

⁷² Government policy in most jurisdictions requires government entities to have a Complaints Management Policy, and more generally corporations should have a complaints handling process compliant with ISO 10002, *Complaints Handling*.

⁷³ Administrative Decisions (Judicial Review) Act 1977, s3, the decision must be under an enactment to be reviewable. As a general principle, the conduct of individual administrative procurement activities in government agencies is not under 'an enactment'.

⁷⁴ This Act enables judicial review of administrative procurement decisions under the Commonwealth Procurement Rules (CPR).

- Litigation under Common Law;
- Under a contract, Notice of dispute under the contract conditions;
- A police complaint if the alleged malfeasance is a criminal offence;
- Action under a Commercial Disputes Tribunal, or
- Alternate Dispute Resolution processes either privately or court-ordered⁷⁵.

Redress may be sought by entities or individuals that claim they have been or will be affected detrimentally by maladministration by a unit of public administration. The extent to which a party might seek relief within a public procurement process may be more limited than for other public sector administrative processes.

Public Sector agencies are required to have an active policy and service for receiving and handling complaints, with the objective to reach a reasonable and fair resolution.

Judicial Review may only be available in a procurement process under limited circumstances⁷⁶. This may include an error law or a breach of natural justice. It is commonly held that procurement conducted under the normal administrative processes of government is not procurement made under an enactment, despite the statutory provisions that give force to the policies and rules for the conduct of procurement.

Injunctive relief under statutory or administrative law is uncommon due to the costs and liabilities of the action.

Roles and responsibilities of an Ombudsman are usually limited to investigation of a complaint regarding an administrative process and any recommendation for amendment to a process; but not to overturn an administrative decision⁷⁷. This does not diminish the significance of an Ombudsman's role or powers in respect of procurement integrity.

A complainant is usually seeking a remedy. These matters are predominantly legal by nature; and the role of the probity practitioner is to observe and advise on the integrity of a procurement process, which might not obviate the seeking of redress by a party, but should ensure that a defensible process and integrity framework is in place, including the right to redress.

A unit of public administration should not confuse or discriminate what is fair from what is lawful. The objective should be to achieve BOTH.

In the same way that public sector agencies are accountable for their activities, public officials are accountable for their procurement decisions. They represent the Government in an important relationship with the public and must be accountable for the effectiveness, efficiency, legal and ethical manner in which they carry out procurement.

⁷⁵ For example Mediation or Arbitration through the Resolution Institute or via private mediators.

⁷⁶ Box and Forde, Op. cit. [8.13]; Other than procurement under the *Government Procurement (Judicial Review) Act 2018*

⁷⁷ Ibid, [8.25]

4. Procurement probity

4.1. Basic principles

In addition to complying with accountability requirements in legislation, policies, standards, codes, and other directives, the key integrity principles underpinning procurement probity have been identified as:

- fairness and impartiality,
- accountability and transparency,
- confidentiality and security,
- managing conflicts of interest, and
- always acting ethically in the public interest.

The last point embodies honesty and acting in good faith. See *Figure 8* as the constructs of probity and integrity.

Complying with these integrity principles should support the integrity expected in the conduct of procurement; and also similar processes such as sponsorships, grants, activity funding agreements, or endorsed supplier agreements.

Applying these key principles is consistent with the corporate governance standards for probity assurance in Australian Standard AS8000⁷⁸.

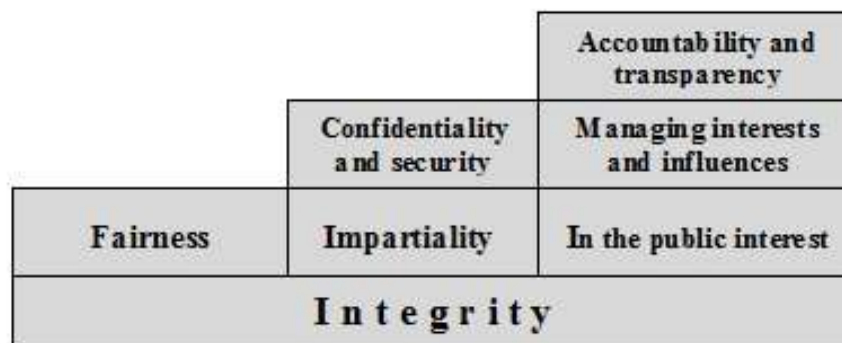


Figure 8. The constructs of probity

4.2. Identifying probity risks and vulnerabilities

Effective risk management needs to take into account:

- the scope and type of procurement,
- the agency's operating environment, and
- the context of individual involvement in the process.

The ideal procurement planning model is at *Figure 9*.

⁷⁸ Standards Australia, AS 8000 – Governance, Handbook HB 325-2008, *Assuring probity in decision-making*

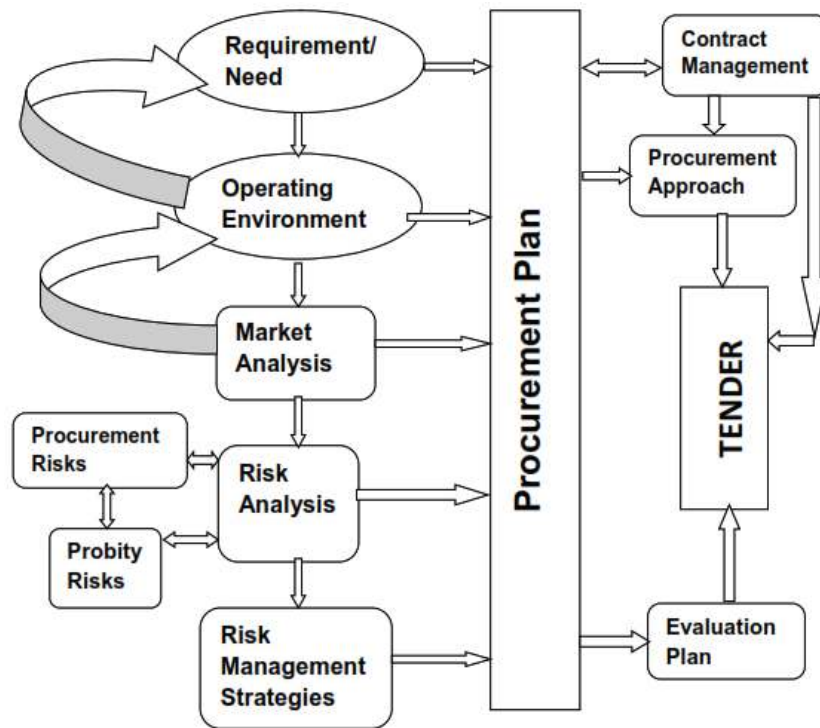


Figure 9. The procurement planning model

Although many issues may be similar, the risks and remedies are organisation-specific and ultimately rely on individual ethical behaviour⁷⁹.

Dealing with probity in procurement is practical risk management. It requires evaluation of the likely risks, assessment of their consequences, and the adoption of suitable practices that eliminate the potential adverse impacts or reduce them to levels acceptable within the agency's administrative frameworks. Procurement risks are any vulnerabilities or actions that may deliver sub-optimal results. Dealing effectively with the procurement risks will contribute to dealing with the probity risks.

The probity risk is more than ensuring no supplier, third party, employee, or public officer receives an unfair advantage or benefit. It is to ensure integrity, fair and consistent dealing, and acting in good faith.

4.2.1. Probity risk management

Probity risk management supports the integrity of the procurement process, including:

- effective planning for the procurement processes, the requirements, the market approach, the evaluation, validation of information, due diligence and vendor viability, contract negotiations, the contract, and debriefing;
- ensuring impartiality, transparency, accountability, defensibility, confidentiality, and information security;
- focus on impartiality and objectivity;
- adherence to approved processes from the commencement of the procurement, through to the conclusion of the contract;
- effective communications protocols for both internal and external communications;
- demonstrable consistency throughout the procurement processes;

⁷⁹ Box and Forde, Op. cit. [5.5-5.9]

- the use of persons with appropriate skills to effectively manage the procurement, conduct evaluation, and to provide specialist advice;
- equity and fair dealing with suppliers and the supply market, and
- identifying and ameliorating undue influence in the processes and/or outcomes.

The supply market and the behaviour of particular vendors may present procurement and probity risks. This is not only through attempted bribery, or other corruption; it includes fraudulent, misleading, or unsubstantiated claims of vendors, and some unethical strategies, perpetrated in the guise of competition⁸⁰. Organisations must have appropriate processes in place to detect and manage potential fraud or corruption, whether internal or externally perpetrated. A Fraud Risk Assessment and Control Plan should be an essential requirement⁸¹. Procurement processes should be developed to prevent corrupt or dishonest, fraudulent, or misleading behaviour of vendors and staff. This will be enhanced by an understanding of the nature and characteristics of the suppliers in the relevant market(s).

In many cases, the probity risk in procurement may not imply an obvious benefit or advantage. Evading controls or procedures are probity breaches, for example:

- wrongly classifying a purchase as urgent when it is not,
- splitting orders to bypass delegation limits, or
- ‘order creep’ to place several small orders to avoid process thresholds.

Such breaches should not be condoned. Subverting any procedure is a breach of integrity, and may be the catalyst for a more serious act or inappropriate behaviour. If a policy or procedure is wrong or unnecessary, it should be amended or removed; but not ignored or subverted.

Case Study – Risk Planning:

An organisation concluded a procurement for some hi-tech expensive medical equipment. The specifications allowed for innovative technology solutions. The evaluation of the offered solutions relied on technical data sheets and demonstrations; however when it came to demonstrations, one supplier with apparently superior technology was not able to demonstrate the equipment because it claimed that a test unit was unavailable at the time. They warranted the performance and Referee checks were generally supportive. The buyer accepted the solution.

When the equipment was commissioned, it failed the technical performance. Dispute led to costly litigation for fraudulent misrepresentation. It should have been avoided through appropriate risk planning.

Case Study – Risk Planning (2):

In another case of a significant enterprise equipment maintenance service tender, the ‘skills and experience management team’ was a significant evaluation criterion.

The buying enterprise applied time and resources to risk planning which included a structured process in the evaluation phase to assess and verify the capability and availability of each tenderer’s offered team, and its commitment.

This resulted in not only strengthening of the successful supplier’s team but also it embedded in the contract strong performance measures. It was most successful through the life of the tender and saved the buying organisation several \$million over previous supply arrangements.

⁸⁰ Ibid, [5.10-5.15]

⁸¹ Examples of this are the Commonwealth Fraud Control Guidelines; and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD 2010.



Figure 10. Some probity risk areas (not exhaustive)

The challenge is to identify those areas where there is a potential for a breach of probity. It may involve particular persons directly such as the need to maintain confidentiality, or avoid any conflict of interest; or it may involve broader roles and responsibilities in the process e.g. consideration whether to provide approval for attendance at a supplier-sponsored function or site visit. It may also involve understanding the supply market and apply zero tolerance for unethical behaviour of suppliers.

To identify the probity and procurement risks in any specific complex procurement requires good reflective thinking skills of a potential risk, the cause, and effect. In traditional risk modelling, the likelihood and consequence are relevant; but with probity risks the likelihood and consequence may be obscure. In the public sector, good guidance material is available⁸².

4.2.2. Probity Risk Areas

Without being exhaustive, some of the areas that commonly generate higher risks in procurement are:

a. *Process irregularities and impropriety:*

- ▶ Lack of substantiated need for the goods or services (requirement planning).
- ▶ Invalid, biased, or inappropriate specifications and selection criteria.
- ▶ Circumventing threshold policies e.g. order ramping or splitting.
- ▶ Improper use of exemptions or reasoning e.g. for sole or limited sourcing.
- ▶ Improper application of preferences, priorities, or weightings.
- ▶ Inadequate or skewed evaluation of offers.
- ▶ Questionable credibility of the evaluation and/or selection personnel.

⁸² For example: NSW ICAC *Ethics, the key to good management* 1998; Qld *Ethics, Probity and Accountability in Procurement* 2006; WA *Supply Policy Probity and Accountability* 2007; ACT *Probity and Ethical Behaviour* 2007

- ▶ Undue influence and/or conflicts of interest of one or more individuals.
- ▶ Bypassing or over-riding established procedures.
- ▶ Not demonstrating value for money e.g. ineffective assessment and evaluation.
- ▶ Breaches of security or confidentiality.
- ▶ Inadequate market and supplier research.
- ▶ Inadequate maintenance of supplier registers.
- ▶ Contracting for requirements inconsistent with the procurement.
- ▶ Inadequate monitoring of supplier and contract performance.
- ▶ Inadequate reasoning for the defensibility of a supplier selection.
- ▶ Inadequate documentation to support transparency.

b. ***Supplier-based issues***⁸³

- ▶ Collusion between suppliers (setting of ‘floor’ prices, cover pricing, or ‘laying-off’ from submitting a bid).
- ▶ ‘Straw-man’ competition (dummy organisations and multiple bids).
- ▶ Association with disreputable individuals or practices.
- ▶ False claims, measurement and quality control issues.
- ▶ Conflict of Interest.
- ▶ Bribery, corruption, or the offer of gifts or benefits inconsistent with policy.
- ▶ Providing additional new information during clarification or after offers close that changes the substance of the offer.
- ▶ Making false or dishonest claims about their competitors.
- ▶ Subverting the offer close or tender box process by providing tender documents to directly individuals, or dishonest reasons for late lodgement.
- ▶ Subterfuge by making frequent contacts with the evaluation or selection staff during the tender.
- ▶ Attempts to get ‘inside information’ from people associated with the procurement processes.
- ▶ Misuse of intellectual property.
- ▶ Offering gifts, benefits, hospitality, etc to ‘curry favour’.
- ▶ Offers of employment to the technical or procurement staff.

c. ***Individual behavioural issues***⁸⁴

- ▶ Receipt of improper gifts, benefits, or hospitality (forms of influence or even bribery).
- ▶ Bias - lack of impartiality.
- ▶ Deceptive or dishonest dealings with suppliers.
- ▶ Lack of objectivity – not keeping a balanced, open mind.

⁸³ Box and Forde, Op. cit [5.10-5.15]

⁸⁴ Box and Forde, Op. cit. [5.5 – 5.9]

- ▶ Hidden commissions and incentives.
- ▶ Collusion with a supplier (e.g. seeking employment or a personal benefit).
- ▶ Offering unfair advantage to individual suppliers.
- ▶ Not acting in good faith, being misleading, deceptive, or dishonest.
- ▶ Inconsistent and/or improper post-offer negotiation.
- ▶ Real or potential Conflict of Interest (disclosed or undisclosed).
- ▶ Bribery and corruption.
- ▶ Breach of confidentiality.
- ▶ Breach of security.
- ▶ Ignorance of required procedures and processes.
- ▶ Acting with undue influence.
- ▶ Breach of fiduciary duty.

Principal among these are the disclosure and management of conflicts of interest, and the receipt of gifts and benefits.

See *Appendix 9 – Probity Plans*.

4.3. Lobbyists

Individuals who act as lobbyists to Government can assist government in its relationships with business; but lobbying also presents ethical and probity risks for government, procurement, and projects, and be an unwarranted hidden cost in a procurement. Some governments have acted to establish lobbyist codes of conduct and registers. For example, with the Australian Government’s Lobbying Code of Conduct, any lobbyist who wishes to contact a Government representative for the purpose of lobbying activities must be registered and must agree to comply with the requirements of the Lobbying Code of Conduct⁸⁵. Similar regulated requirements exist in other jurisdictions

The usual classification of the lobbyist is the person or organisation that advocates to government on behalf of another party or parties. A party or parties lobbying for themselves is outside the classification of a lobbyist. Religious, philanthropic, community, and similar not-for-profit organisations are not classified as lobbyists. Industry bodies generally are not lobbyists. Broadly, lobbyists are those which act for a party or parties in a commercial representative relationship in anticipation of a commercial transaction; and which charge a fee to the party or parties for their lobbying services. This broad ‘definition’ is a guide only and the classification of a lobbyist should be verified or tested according to the nature of the circumstances and commercial interests of the parties: and as defined in related legislation.

4.4. Upholding fairness and impartiality

The measures seen as significant in achieving fairness and impartiality essentially involve processes that will ensure equity and transparency. They include:

- *equitable access to materials and information;*
- *specifications which encourage competition, unless otherwise fully justified;*

⁸⁵ Lobbyist Code of Conduct and Lobbyists Register of the Department of Attorney-General Australia

- *requirements which are clear, unambiguous, and based on reasonable assumptions;*
- *fair and reasonable time for suppliers to bid competitively;*
- *clearly defined conditions of offer/tender;*
- *impartial and unbiased dealings with all parties⁸⁶;*
- *fair and consistent communication processes;*
- *timely written notifications of amendments and clarifications;*
- *open and inclusive briefings;*
- *clarity between mandatory and non-mandatory attributes;*
- *avoidance of excessive mandatory requirements in specifications;*
- *well documented and objective selection criteria;*
- *avoidance of any changes to requirements which might be indefensibly discriminatory, unfair, or in bad faith;*
- *avoiding admission of new information or changes to offers/tenders, particularly related to pricing;*
- *appropriate separation of functions of purchasing authority and procurement delegation; and*
- *contracting for only what was intended in the statement of requirements.*

4.5. Achieving accountability and transparency

*The robustness of the probity advice or audit should demonstrate the effectiveness of accountability and transparency, and the integrity of the processes. This is robust probity assurance.
Also See [3.6] for accountability and transparency.*

Whether in the public or private sectors, Accountability is a primary component of probity and integrity, whether in procurement or otherwise. It is the obligation to apply and perform the functions and processes (e.g. of procurement) consistent with policies, standards, directives, and statutory requirements; and that the outcomes are achieved within policies and approved practices. Transparency provides the demonstration of that accountability, and documented auditable evidence to demonstrate the justification of decisions, fair dealing, and actions in good faith. Inadequate accountability and transparency in procurement can lead to abuse and waste, inefficiency, unethical behaviour, and corruption.

⁸⁶ Note that objective bias is reasonable in use of information on supplier performance, or commercial risk. Information which is objective and honest, and not capricious or arbitrary can be used.

Case Study – Accountability:

The Organisation has 6 divisions of which 2 are business and administrative, and 4 are operational divisions. Each of the operational divisions has a brand identity for its service delivery.

One of those operational divisions is planning a program to go to market for a package of goods and services related to one of its functions. It intends to set up a supplier panel with a range of products, services and related pricing.

In the planning the division Program Director engages a small team of external consultants to develop the requirements, prepare the tenders, project manage the procurement, and set up the resulting contracts. The consultants challenge the Organisation's procurement policies, suggesting that they are too rigid, and an inhibitor to getting (what they interpret as) value for money. The Program Director is then convinced to bypass the procedures and follow alternative processes, one of which will allow suppliers to communicate individually with the project steering committee before tenders close and present their 'intellectual property' confidentially. They can also negotiate the terms under which the IP can be used.

The market seizes the opportunity to lobby their solutions individually while the tender is still open so that the tender and evaluation might be influenced towards their solutions.

Despite the division staff engaged in the meetings taking minutes, the minutes become Confidential.

The market becomes full of perceptions for unfair dealing, and there is the apprehension of bias, as well as unfair market positioning for the current tender and future demand and technologies.

The smaller suppliers in the market feel disenfranchised, and the integrity of the Organisation is damaged, albeit more in perception.

Demonstrated accountability and transparency reduces the likelihood of bias, corrupt dealings, and/or fraud. It also has the potential to deter collusion through reporting of suspected anti-competitive behaviour. Accountability and transparency are fundamental to integrity, and are among the most powerful tools for achieving best value for money.

Procedures to enhance accountability and transparency include:

- *firm policies and procedures open to public scrutiny;*
- *compliance with established procedures, legislation and guidelines;*
- *standardised documents and conditions;*
- *openness, predictability and separation of functions;*
- *adherence to stated selection and value for money criteria;*
- *use of probity service practitioners where appropriate;*
- *robust reporting and documentation;*
- *objective evaluation supported by independent approval;*
- *a focus on consistency in processes, dealings, and communications, and*
- *regular and systematic monitoring of performance.*

4.6. Maintaining confidentiality and security

The integrity of competitive procurement hinges on maintaining appropriate confidentiality that will give suppliers the confidence to do business with the buying organisation.

The need for confidentiality applies across the many facets of procurement, and includes the protection of intellectual property and commercially sensitive information. The confidentiality of tender/ offer submissions, and the evaluation process, is particularly

important prior to the awarding of a contract, with information shared only on a ‘need to know’ basis. Confidentiality and security involve such matters as:

- *knowing what information is confidential and what needs to be protected;*
- *established physical security arrangements and controlled access to all confidential materials;*
- *effectively controlled electronic information management;*
- *robust tracking and control of documents / information;*
- *limiting information access to approved personnel on a need-to-know basis;*
- *obtaining specialist security and system advice;*
- *explicit provisions to protect intellectual property and commercially sensitive information.*

The confidentiality of information that is designated as confidential, or would normally be expected to be confidential, is retained until it is authorised for release. This means that in procurement, the confidentiality of the tender and evaluation processes and related information survives the process and award of any contract. Also see [5.3.3□] for confidentiality in communications.

A Probity Guide is at **Appendix 2 – Probity & Confidentiality Guide for Communications with Vendors**.

Case Study – Confidentiality: **Memory Sticks**

The evaluation panel for a large sensitive public contract was provided a secure intranet portal for the submissions and the evaluation working files. One panel member needed to travel during the time for individual evaluation assessment and scoring, so downloaded the tenders and evaluation files onto a memory stick to use in their Notepad PC in transit.

While busy at work in the flight lounge, when the flight was called, the panel member hurriedly shut down the Notepad, withdrew the memory stick and thought they dropped it in their bag, except that it fell out on the floor.

Another passenger picked it up, took it to a computer, saw what the files were, and allegedly in the public interest, contacted the media and gave them the memory stick. As a consequence, the tender process was wholly compromised.

4.7. Conflict of interest

Conflict of interest figures prominently as a procurement risk. Together with the receipt of gifts and benefits, conflict of interest generates the greatest number of complaints and constantly creates ethical dilemmas for individuals and managers.

A conflict of interest arises when there is a conflict between a person’s duty to serve the public interest, and the person’s private interests⁸⁷. In the private sector, it is often the conflict between a person’s fiduciary duty to their organisation, and their private or associated interests.

Conflict of interest is probably the most misunderstood and obfuscated of all probity issues because, aside from ‘honesty’, conflict of interest becomes such a personal moral issue. It becomes a classic ‘wood-from-the-trees’ issue to many individuals.

⁸⁷ See for example OECD Guidelines for Managing Conflict of Interest in the Public Service, September 2005

The significance of conflict of interest warrants special attention, and in the public sector, publications on guidelines for managing conflict are available⁸⁸. The subject guidelines in all jurisdictions are reasonably consistent.

Case Study – Undue Influence:

External Influence:

During the conduct of the evaluation of a tender, at certain times, one of the Panel members claimed they need to attend to their mobile phone, and on several occasions left the room. It was soon observed by the other evaluators that the person seemed to be trying to influence the assessment after each time returning to the evaluation room.

The person was confronted by the Chair but denied any breach of confidentiality or contrary conduct.

After some careful investigation, there was reasonable belief that the person was contacting a member of their industry association, allegedly about association matters. There existed business relationships between the industry association and suppliers to the industry; and one particular supplier was a strong contender in the procurement under evaluation.

All parties denied any improper communications, and short of a forensic investigation, it was difficult to prove. Several evaluation panel members believed the evaluation was comprised with the potential for unauthorised release of confidential information, and refused to endorse the evaluation report as it recommended the particular supplier without rational justification.

The management reported the incident to the Ombudsman as suspected misconduct, but also terminated and recalled the tender, with the appointment of a new Evaluation Panel.

There are three types of conflict of interest to be aware of, each of which can present a bias or the apprehension of bias within the related circumstances:

- An **actual** conflict of interest – where a person’s **objectivity is influenced** by their private interests. Their interests are inconsistent with the requirements of the job. This also is referred to as actual bias, or partiality.
- A **perceived** conflict of interest – where a person’s **objectivity appears to be influenced** by their personal or associated interests. Their interests are perceived to be inconsistent with the requirements of the job. This is also referred to as apprehended bias or perceived partiality.
- A **potential** conflict of interest – where a person **may** be actually or perceived **in the future** to have private interests or associations which might influence their impartiality or objectivity or be perceived to do so in the context of it being inconsistent with the requirements of the job.

⁸⁸ <http://www.icac.nsw.gov.au/preventing-corruption/knowning-your-risks/conflicts-of-interest/4897> ; <http://www.ccc.qld.gov.au/research-and-publications/publications/prevention/conflicts-of-interest> ; <https://www.apsc.gov.au/conflicts-interest>; https://www.integrity.tas.gov.au/types_of_ethical_risk/conflict_of_interest.

Actual bias and the allegation of bias is “a grave condemnation of the ability of the decision maker to discharge his or her functions with impartiality”⁸⁹. Whereas apprehended bias, or perceived conflict of interest, is established by what is apparent to a reasonable person (an appropriately informed and fair-minded lay observer) on the inferences drawn from what is said or done and from the conduct under the circumstances⁹⁰.

A perceived conflict is the most common conflict of interest complaint or assertion. An alleged actual conflict of interest is often difficult to prove.

A conflict of interest might arise directly with the person, or indirectly within the person’s family or significant associates. A poorly-managed perceived conflict of interest can be just as damaging as a poorly-managed actual conflict of interest. Public officers, and persons engaged to perform services for the public sector, must not only behave ethically, they must also be seen to behave ethically; that means in the public interest rather than their personal interests.

Private sector organisations likewise are exposed to real, perceived or potential conflicts of interests whether in doing business with the public sector, or in their commercial business activities. The fundamentals of competition cannot exist without the exercise of corporate interests. Yet in a procurement process, when a corporation cannot warrant that their corporate interests, or the personal interests of their employees, do not conflict with the public interest, they incur a conflict of interest. Public sector contract terms often include a condition as such, and/or a form of disclosure in the returnable schedules. However, despite disclosure or otherwise, corporations would act with a conflict of interest during a procurement process if they act unreasonably. It is recognised that normal commercial interests can be a conflict of interest if the exercise of the interests is unreasonable or the commercial behaviour is unethical.

Other ways a conflict of interest can arise in procurement can be:

- Self-dealing, e.g. using an official position to secure or influence a contract for a supplier in which the procurement person (or an associate) has a pecuniary or other material interest.
- Offering, soliciting, or accepting gifts or benefits may set up a real or perceived conflict of interest, e.g. conference travel and/or accommodation at the expense of, or with a supplier. See Gifts and Benefits at [4.10].
- Undue Influence, e.g. acting for benefits or gain in exchange for applying influence to advance the interests of a supplier (or other party), or skewing an evaluation to favour a supplier; or unreasonable influence in a process for self-interest, or disguised direct or indirect benefit or compensation.
- Secret commissions, such as accepting or offering any undisclosed payment in any form, intended to influence a public interest outcome, e.g. in property development approvals, permits, or contract awards. See also Secret Commissions at [4.10.2].
- Misusing assets and/or information for private advantage, e.g. using confidential information (inside information) for advancement of private interests; or ‘piggy-backing’ on supplier contracts; or unauthorised or improper personal use of resources.

⁸⁹ Von Doussa J, *SCAA v Minister for Immigration and Multicultural Affairs* [2002] FCA 668, at [37], and Kenny J in *VFAB v Minister for Immigration and Multicultural Affairs* [2003] FCA 872 at [18, 19].

⁹⁰ See for example *Gascor v Ellicott* [1997] 1 VR 332, Headnote.

- Moonlighting or other conflicting employment, e.g. setting up a business or taking another job that has conflicting commitments, or which may have related business dealings with the agency; or independently training third parties in the use of equipment where the equipment supplier rewards you for doing the training.
- Contrived post-separation employment, e.g. using your position in the organisation or in the procurement process to seek a position for yourself in a supplier's firm, or to go into business with a supplier and improperly use privileged information. It also can occur where, in post-separation the ex-employee sets up a business to supply back to his former workplace, using his 'mates' to secure work or to create bias against competitors.
- Technical relationships, e.g. sitting on a panel for product selection and also occupying a technical advisory role with a vendor, or being in a position to unfairly influence the selection of a technology requirements while also holding a technical role with a supplier.
- Equity interests, i.e. holding significant equity (investments/ financial interests/ shares/etc) in any company bidding for a government contract in which the individual has a role or influence in the evaluation or selection process, or acts as a Delegate.

Case Study – Impartiality:

The Assessment Panel had appointed a Senior Manager as its Chair. The manager has skills and experience in the requirements of the procurement. At the commencement of evaluation, the manager makes disclosure that he is familiar with most of the bidders and their strengths and weaknesses, and he is most familiar with one in particular who has been a regular supplier over recent years.

The manager discloses that he has had social meetings with several of the suppliers. He is adamant that it all has been in the interests of normal business practices and all dealings have been in the normal course of business, including the social encounters at business functions. Some of these have been 'product release' or product demonstrations where food and drink is liberally provided.

The manager discloses all of the dealings he has had that he can recall over the last 2 years.

He claims that he can be objective and impartial in his responsibilities.

The objective test of apprehended bias may be important to his continued role and it is not the Senior Manager's decision as to whether he should or should not remain the Chair.

To help identify a conflict one should consider the outcomes of related decisions or actions. The answers should then be considered in the light of the earlier general methodology for resolving an ethical dilemma⁹¹.

The general principles and rationale for disqualification of a decision-maker for bias or lack of impartiality are established in law⁹². The reasonableness of an apprehension of bias is

⁹¹ Getting it Right, at [3.12]

⁹² Webb & Hay v The Queen (1994) 181 CLR 41 per Mason CJ and McHugh J. The test is "reasonable likelihood of bias or apprehension of bias"

based on the ‘the Objective Test’. It is often loosely referred to as ‘the pub test’ or ‘the omnibus test’.

The **Objective Test** defined as:

The opinion of a fair-minded member of the public reasonably informed of the available facts.

4.8. Managing conflict of interest

In many cases, a conflict of interest, once known, disclosed, and understood, can be managed. Sometimes:

- a person may find themselves in a situation where they are not even responsible for a conflict of interest; or
- no conflict exists early in a procurement activity, but emerges as the activity matures; or
- a conflict is reasonably perceived, or sometimes unreasonably as frivolous, capricious, or vexatious.

The objective test means that a credible person other than the person with the possible interest should determine whether a conflict is likely to exist or can be managed. The individual with the interest should not determine that they can manage the conflict.

Questions for consideration:

- Does the person, a relative, friend or associate stand to **gain or lose financially**?
- Does the person, a relative, friend or associate stand to **gain or lose in reputation**?
- Has the person contributed to the matter in a **private capacity** in any way?
- Has the person made **any promises or commitments in a private capacity**?
- Has the person received **a benefit such as a gift or hospitality** from someone who stands to gain or lose from related decisions or actions?
- Is the person a member of an **association, club or professional organisation**, or do they have particular ties and affiliations with organisations or individuals, which stand to gain or lose from the matter?
- Could there be **benefits for the person (or their family or associates) now or in the future** that might cast doubt on their objectivity?
- Would a fair and reasonable person perceive that the person was **influenced by their private interests** in performing their public duty or fiduciary duty?
- Does the person feel they need to **seek advice** or discuss the matter with an objective party?
- Is the person confident of their ability to **act objectively and impartially, and in the public or fiduciary interest**?
- Does the person understand the **possible penalties** if they do the wrong thing?
- Would the person have any concern if their **colleagues and/or the public became aware of their association or connection**?

What constitutes a conflict of interest is often misunderstood by either the person with a conflict or their managers. So it is prudent to establish a common understanding of what constitutes a conflict of interest at the outset of a procurement and refresh that understanding during the process. For a Concise Guide to use, see **Appendix 8 – Conflicts of Interest Concise Guide**.

However, if the person acts unethically, if he or she fails to disclose that conflict, or the person or the agency fails to deal with it in the organisation's (or the public) interest, it can have serious effects on the administrative processes of the organisation, the public perception, and also the person. These issues are most sensitive in the public sector; but can also be sensitive in a private corporation.

4.8.1. Resolving a conflict of interest

It is most important to disclose, identify, and manage conflicts of interest so that decisions are made, and are seen to be made impartially, and for accountability and transparency.

To resolve a conflict of interest situation the official guidelines recommend six major mechanisms which may be used alone or in combination according to the severity of the risk and the effects of the interest, *Figure 11*:

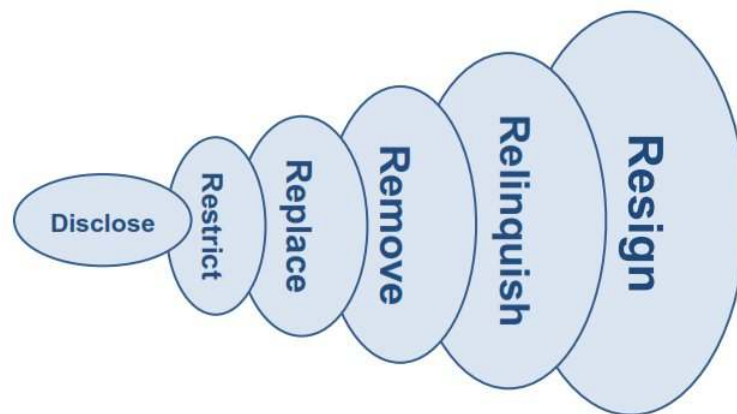


Figure 11. Escalation of action in managing conflicts of interest

- **Register (or disclose)**
 - ▶ the details are disclosed and documented. This is the most common immediate action and may suit low-risk situations. It is an important step in accountability and transparency.
- **Restrict (or isolate or quarantine)**
 - ▶ Restrictions are placed on the person's involvement in the matter. It may require a 'Chinese Wall'.
- **Replace (or superimpose)**
 - ▶ A third party is used to undertake or oversee part or all of the process. That could be an alternative person, or the oversight of a probity officer.
- **Remove**
 - ▶ The person is removed from the matter either by choice or direction.
- **Relinquish**
 - ▶ The person relinquishes the interest creating the conflict.
- **Resign**
 - ▶ The person resigns from their position or role; usually as a last resort.

Note that the escalation model at Figure 11 is not a linear process but may step from disclosure to another level by necessity based on the nature and risk of the conflict.

Procedures for disclosure of conflicts of interest should be documented as required by the organisation's Code of Conduct and/or Conflict of Interest policy, and properly communicated to staff. In addition, suppliers should be required to divulge all potential conflicts of interest at the time of any offer or as soon as any conflict becomes apparent.

4.8.2. Supplier conflict of interest

Every supplier has a commercial conflict of interest which is their interest in their own business ahead of their competitors or others who would mitigate the potential for profitability of the business. It is natural and innate in the world of commercial business and competition. Every Not-for-Profit (NFP) organisation and non-government organisation (NGO) have a conflict of interest which drives the purpose and objectives of their enterprise.

If a supplier has a real, perceived, or potential conflict of interest, it is best to obtain a disclosure before entering into a contract. While contract conditions usually require disclosure, any conflict of interest is best known beforehand.

In a tender process, if a supplier makes a conflict of interest disclosure, grounds to exclude them from the process may be tenuous. If not managed with prudence, it could result in unfair or inequitable dealing. The disclosed conflict should not be dismissed, and warrants a fair consideration of the risks and ability to manage the risks. It is important that the objective test also applies, but the consideration processes may well warrant legal advice, particularly if exclusion from tendering is contemplated.

Case Study – Perceived Conflict of Interest:

The Department went to tender for supply of a patrol boat to be designed and built. The Department officers preparing for the tender held consultation with the industry, where one potential supplier orally stated that the business owner was a relative of the Minister responsible for the Department. The officer made a file note.

When the tender was released, the tender documents included Conditions of Contract which stated a disclosure requirement for conflict of interest. The firm concerned sent a clarification to the contact officer as to whether the relationship would affect their tender. The clarification was referred by the contact officer to the Chair of the Evaluation Panel who referred it to the Division head, whose advice was to take no further action. The firm was then told in writing that it would not affect their tender.

The firm was successful in winning the tender on a fair basis. When the Minister was informed of the tender award in a departmental memo after the contract had been signed, no mention was made of the underlying relationship; but the Minister was aware that his relative was a major owner of the firm, albeit that the Minister had no beneficial relationship in the firm. The Minister sought a response from the Department's CEO on the probity of the process. The CEO's investigation found that, while there was no conflict of interest, there was a perception which should have been subject to the objective test, but not by the Division Head.

It should have warranted a probity risk management strategy at the point where the firm was the preferred tender. and the risks and the objective test be documented and disclosed before the contract was awarded.

4.9. Chinese Walls

Isolating or quarantining a person or persons from a real, perceived or potential conflict is often an appropriate strategy, commonly called a ‘Chinese Wall’. The Chinese Wall should demonstrate the separation of the person(s) from the matter⁹³, allowing the process to otherwise function effectively. Chinese Walls can be complex, and sometimes difficult to demonstrate for their effectiveness. In creating a Chinese Wall, it is most important to have a sound and robust strategy and arrangement for its creation, existence, and management. As well, effective management may need to include a broad awareness of the existence of the Chinese wall to persons who contribute to the maintenance of its integrity, i.e. staff are informed that they must not discuss, or provide information or access information on the matter with the quarantined person.

With an incumbent supplier, a Chinese Wall is the preferred way of ensuring fair dealing in a competitive market. See [4.10.4]. With an incumbent supplier, it is necessary to deal with probity risks in Confidentiality, Conflict of Interest, bias, and undue influence. The Chinese Wall needs to address all of these issues to be effective and demonstrable.

The evidence of an effective Chinese Wall between family members would be difficult to justify or demonstrate.

4.10. Gifts, benefits and hospitality

An issue commonly encountered in and about procurement is the giving or receiving of various gifts or benefits. These benefits may take many forms including gifts of: bottles of alcoholic beverage, meals, entertainment, hospitality, personal gifts, travel, conference fees, sporting event tickets, and token mementos such as pens, cups, or calendars. Sometimes the gifts are provided in-kind or disguised as “scholarships”, or supplier-funded fact-finding missions, or even “loans”. Discretionary grants⁹⁴ from a government office also can reflect undue bias and unfairness.

An important probity issue here is whether a gift or benefit offered or received becomes a bribe, an attempt to influence, or simply relationship-building.

It commonly is said, “There is no such thing as a free lunch.” In procurement or similar administrative processes, the provision of gifts, benefits, or hospitality by suppliers to buyers (or prospective buyers) can be perceived contemporaneously as ‘normal commercial marketing practice’ or ‘relationship building’. Whether the gift, benefit, or hospitality is to build relationships or for facilitating the provision of information, or for some other underlying purpose, gifts and benefits are mostly an attempt to influence to some degree or purpose. In the procurement environment, the provision of gifts or benefits, whatever they might be, is directly or indirectly meant to influence. The receipt of gifts has the potential for either a real or perceived conflict of interest, and can present a challenge to the real or perceived integrity of procurement⁹⁵. Understanding and managing gifts, benefits, and hospitality is most important to probity and integrity⁹⁶.

⁹³ See Lord Millet in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222. The principle of using a ‘Chinese Wall’ for separation someone or some entity from a conflict of interest is now well founded in law.

⁹⁴ These are grants which are not provided competitively. They are provided ostensibly within policy but can be contentious as ‘pork barrelling’ or for political rather than policy reasons. Also see Glossary

⁹⁵ See discussion at Box and Forde, Op. cit. [2.29-2.31]

⁹⁶ For a goof guide to understanding and managing gifts, benefits and hospitality, see https://icg.wa.gov.au/sites/default/files/documents/gifts_benefits_and_hospitality_a_guide_to_good_practice.pdf

Despite whatever is the intention behind the gift, the acceptance of it may influence the recipient to feel obligated to the donor, and hence influence the impartiality of the recipient. While the underlying motive for gifts by suppliers to government officers and representatives is to influence the person in some way, business sees this as “marketing”. For example, the provision of marketing brochures is contemporaneous commercial practice, whereas the provision of marketing items such as mugs, stubby-holders, promotional clothing items, pens, stationery, etc (sometimes referred to as a ‘token’), whether or not it has the marketing identity of the giver, can be seen as an attempt to influence, albeit that it is still common practice. Even conference satchels and other forms of conference sponsorship are tools of marketing, and influence. Also see [4.10.5].

4.10.1 Gift Policies.

In Australia and most western democracies, public and private organisations have guidelines and policies on Gifts, benefits and hospitality. The primary test of the appropriateness of a gift or benefit is to determine the purpose of the gift or benefit; and the next best test of the offer of a gift or benefit is whether the receipt of it is in the best interest of the recipient Organisation, not the individual.

Good practice of ethical conduct in respect of gifts or benefits is a zero tolerance policy. This means no gift or benefit is accepted without executive approval⁹⁷. Also see [4.10.6].

Public policy differs across government and Australian jurisdictions. In some jurisdictions, gift policies still permit the acceptance without disclosure of a ‘token’ which intrinsically has no nominal value; and some define it as something below a ‘nominal value’. The ‘nominal’ value may be set in policy, directives, or guidelines⁹⁸. Most of the items seen as tokens, probably have some value, however small. This is discussed further at [4.10.2]. Most require that all gifts, benefits, and hospitality are declared, and any gift or benefit valued at a nominal threshold value (e.g. \$150) is recorded on a Gift Register. However, the acceptance of any personal benefits may be a breach of gifts and benefits policy or Code of Conduct. In other offshore jurisdictions, the ‘rules’ may differ, but the principles are similar.

⁹⁷ For example, following successful litigation against BHP Billiton in the US over its hospitality packages to the Beijing Olympics, BHPB reviewed their gifts and hospitality policy.

⁹⁸ For example, in Victoria, see <https://vpsc.vic.gov.au/html-resources/gifts-benefits-hospitality-policy-guide/3-definitions/>, and [4.5.1]; The definition of a ‘token’ gift varies across public and private entities, from a gift ‘less than \$50’ to a ‘pen’, or ‘box of chocolates’, etc. Some private corporations have a ‘no pens policy to eliminate the token ‘value’.

4.10.2 Testing the ‘gift’.

To a greater or lesser extent, a gift could be seen as a form of ‘bribe’. That having been said, government and organisation policy may allow some discretion; but it is important that an organisation has an effective gifts policy. Among the tests that should be applied in dealing with the offer or receipt of any gift or benefit are the following:

- **Purpose** – What is the purpose or intention of the gift?
- **Rules** – What are the agency rules and policy regarding gifts and benefits?
- **Openness** – How open and transparent is the giving?
- **Value** – What is the realistic value of the gift?
- **Ethics** – What is your personal ethical view on accepting gifts?
- **Identity** - What is the identity of the giver? (e.g. relationship to role)
- **Timing** – Is the timing of the gift-giving intended to influence?
- **Perception** – Is the benefit likely to be reasonably acceptable in public or market perception?

The broad range of issues associated with gifts and benefits are explored in the Gifts and Benefits Policies in most jurisdictions⁹⁹ and corporations. Some governments and most private sector corporations have (or should have) corruption prevention guidelines which employees would be expected to follow.

4.10.3 Secret Commissions.

Among the dangers of accepting or giving gifts and benefits is that it may imply or lead to secret commissions or bribes; it may increase the risk of extortion; it can generate ethical dilemmas and actual or potential conflicts of interest; it is an area for exercising undue influence; and it may result in individuals being placed at risk through any omission or lack of proper care and attention in declaring and recording such benefits.

A secret commission arises through lack of transparency in seeking, accepting, or obtaining a benefit, usually a capital benefit, for some undertaking which is associated with bribery or corrupt behaviour in both the public and private sectors. The giving or receipt of a secret commission for any purpose, in particular in gift, benefit, offer or solicitation, is corruption and is illegal¹⁰⁰.

4.10.4 Business Relationships.

The probity and ethics in establishing business relationships is not a simple issue. There is a general public and business perception that fostering business relationships requires a measure of social interaction that almost inevitably involves some form of hospitality. There is also a legitimate need for public sector officers to maintain their expertise and conduct product and market research which may entail travel and conference attendance or site demonstrations and supplier-based training.

To help understand and manage communicating with suppliers, see *Appendix 2 – Probity & Confidentiality Guide for Communications with Vendors*.

⁹⁹ For example: Victoria State Public Sector Commission, *Gifts, benefits and hospitality policy framework*, 2016; Australian Public Service Commission *APS Values and Code of Conduct in Practice* 2018; Queensland Government, *Gifts and Benefits (Directive 22/09)*; and similar policies/directives in other jurisdictions

¹⁰⁰ *Secret Commissions Act* (Cth) 1905; *Crimes Act* 1958 [s176, 179]

One area of business relationships which is in the normal course of business yet present potential probity issues in procurement is with the matter of the incumbent supplier. It is not unusual that an incumbent supplier will have a degree of beneficial information about the buyer's organisation, business practices, individual behaviour, and culture.

As soon as it is contemplated that a procurement may occur which affects an incumbent supplier, the organisation must take steps to ensure a fair and equitable process develops and occurs, particularly in respect of confidential information. It may be necessary to establish arrangements to screen information to the incumbent supplier and/or to establish some 'Chinese Walls'. Despite the apprehension by competitors that the incumbent supplier will have an unfair commercial advantage, the buyer should be able to robustly demonstrate that effective competition has been preserved and all communications at all times before, during and after the procurement has not unreasonably provided any advantage to the incumbent supplier.

4.10.5 Conferences, Seminars and Workshops.

Agencies and organisations should not plan their budgets for conferences, seminars workshops and the like with financial reliance on their suppliers. It is expected that organisations will ensure that budgeting for conference, seminars and the like, and its associated travel is planned within their budget planning provisions, with no expectation that this is provided by suppliers unless it is identified accountably and transparently in that planning¹⁰¹. If a purposeful sponsorship for these activities is contemplated, it is a form of sponsorship, with the sponsorship arrangement planned in accordance with a sponsorship policy.

Similarly, any supplier-funded procurement support, e.g. information workshops, is expected to be transparent and fully disclosed in any supplier supported arrangement. The participating parties in such a case should be determined by the organisation's management, and not by the supplier or a participant. It should be based on genuine need using a documented and transparent process. The organisation should test the acceptability of supplier-funded support, its disclosure and transparency, its necessity, and its value. The organisation should view any unplanned supplier supported conference or similar activity in the context of their gifts policy.

Ask the questions "Who really benefits and could the information or support be obtained more objectively?"

In attending conferences, seminars or workshops where one or more suppliers of the related requirements are actively marketing or sponsoring the activities, a buyer or a person who might have an influential role in a procurement process or decision, should observe the following principles:

- Do not discuss any proposed or contemplated procurement activity.
- Do not discuss competitor products and capabilities with a supplier. Any discussion about comparative features should avoid naming suppliers or brands.
- Always be in control, and avoid alcohol consumption.
- No gifts or benefits should be accepted. If unavoidable, ensure compliance with the organisation's related policy.
- Do not respond to any overtures, bonus offers, or solicitations.

¹⁰¹ It is not unusual that tenders will include requirements for suppliers to include training, conferences, seminars and technology or procedural updates in their offers, sometime under the area of 'Value-added components of a tender.'

- Disclose any offers of employment, particularly if it seems coincidental with any contemplated procurement.
- Refrain from taking or pursuing any equity interest in the suppliers, particularly if any related procurement is contemplated.
- Revisit the conflicts of interest disclosure if benefiting by any supplier paid hospitality or gift, or it is intended to take employment or personal relationship with a related supplier, or any related equity is acquired.

Sponsored events can bring particular probity sensitivities since corporations sponsor events importantly for brand marketing and its identification with a customer to enhance or establish its credibility in the marketplace. Care should be taken that this does not lead to undue influence, conflicts of interest, and/or apprehended bias. Sponsorships do not occur without the building of relationships between a supplier and a customer. Those relationships have the potential to influence both buyer and supplier behaviour in procurement activities¹⁰².

For a probity guide to these activities, see *Appendix 1 – Probity Protocols for Industry Functions, Conferences, & Seminars*

4.10.6 ‘Zero Tolerance’.

Some government organisations and even some corporations have a ‘zero tolerance policy’ (colloquially also referred to as a ‘no pens policy’). In order to set the benchmark, a good principle is that all gifts, benefits, or hospitality of any value are refused by anyone with a role in procurement because of:

- the difficulties in interpreting the likely impact of gifts or benefits,
- the “shades of grey” that may arise in rationalising acceptance,
- the public perceptions and its objective test¹⁰³, and
- the potential risks of receiving minor gifts and benefits becoming the thin edge of corruption.

¹⁰² Box and Forde, Op. cit. [5.5 – 5.16]

¹⁰³ Would a reasonable member of the public in possession of the facts see it as a gift intended to influence? There is a risk that the objective test may be canvassed through the media.

5. Managing the procurement process

5.1. Organisation probity culture

Probity has significant systemic and organisational implications for all organisations in achieving good governance¹⁰⁴, and in procurement value for money in procurement. Probity should be built-in to procurement and not be an add-on; and be seen to be integral to the procurement. Probity risks and related control issues should not be addressed as last minute concerns such as when things go wrong or are likely to go wrong; but rather at the earliest stage of procurement planning. Best practice requires an holistic risk management approach that embodies probity considerations across the organisation's procurement systems and procedures at all stages.



Figure 12. Procurement requires a probity foundation and culture

The effective integration of probity will provide the probity assurance essential for good governance¹⁰⁵. Assured probity in procurement should lead to optimal contract outcomes.

Organisations should plan for strategic, tactical, and fiscal procurement consistent with a Corporate Procurement Plan and Corporate objectives; followed by specific procurement plans that provide measurable outcomes. It is in this structured context that probity gets built-in. There should be clearly established lines of accountability, and tools that will demonstrate that procurement activities and decision-making is rational and transparent.

Organisations should have clearly defined administrative structures and documented procedures that identify credible responsibilities for:

- authorising the plans and documents which set the framework for the procurement process;
- the governance for the different decisions needed at various stages in the process;

¹⁰⁴ See Figure 1. The probity assurance environment

¹⁰⁵ The relationship to governance is in Australian Standard 8000, Handbook HB325, *Assuring probity in decision-making*

- evaluating offers, preparing recommendations and making shortlisting and selection decisions;
- managing internal and external communications and information;
- managing negotiations; and
- resolving probity and process questions and dilemmas as they arise.

The security and confidentiality arrangements must be reflected and applied across procurement. Security involves not only robust physical and electronic controls, but also prudent management of information on a need-to-know basis with strict observance of confidentiality undertakings and communication protocols. Structural arrangements, process controls and personal behaviour all combine to create an environment in which both organisation stakeholders¹⁰⁶ and suppliers can have confidence in the integrity of the competitive bidding process. An organisation should embrace and reflect a reputation for ethics and fair dealings across its complete operations including its procurement and contracting activities.

5.2. Process issues

As noted above in [5.1], and diagrammatically at *Figure 12*, structural and process factors are closely related to accountability and transparency, and inextricably linked to the ethical outcomes. The separation of functions and controls, which provide checks and balances in decision-making, go hand-in-hand with the structural arrangements within an organisation. They collectively determine how procurement processes are both governed and executed within an integrity framework.

The procurement processes and procedures undertaken may give rise, or be perceived to give rise, to procurement risk and probity risk¹⁰⁷. These risks extend beyond basic matters of confidentiality, receipt of gifts or benefits, or conflict of interest. They centre on the integrity of the processes and procedures undertaken, the consistency of the application of the processes, the fairness and consistency of all dealings, and the fundamental demonstration of accountability and transparency.

5.3. Procurement Processes

There are several steps to be undertaken in any procurement process. In most Australian public sector jurisdictions, while the procurement processes are governed by regulatory and policy requirements, the procurement procedures are not proscriptive. In some jurisdictions there are prescriptive requirements (see [3.2]); but in all cases the underlying procurement policies often are supported by practice guidance material.

Private corporations usually will have a procurement or supply manual. These vary between highly prescriptive to non-prescriptive; but procedural guidance is often supported by document and process templates.

Probity Service Providers should become familiar with the procurement guidance materials of their respective public entity or corporation. Guides may or may not be policy or prescription; but tendency is towards non-proscriptive and policy guidance, which defers the accountability under legislation to an agency CEO[3.2]. However there is reasonable public expectation of accountability that the guides will be applied, and public sector organisations should have defensible reasons if they act outside the guidelines. Hence, agencies will

¹⁰⁶ In **private sector** it is principally Shareholders, Boards, senior management, and to some extent the Public; in the **public sector**, it is the public, the government (or local authority), the CEO and senior management, government Boards, and directors.

¹⁰⁷ Qld Government, *Ethics, Probity and Accountability in Procurement Guide*, (pp 14 – 17).

normally have the Agency Procurement Policy which may be more prescriptive to the agency operation, governance, accountability and transparency. Probity Practitioners will need to refer to these policies.

The Probity Service Practitioner should **not** be expected to have a comprehensive understanding of specialist or technical issues; but if the probity service provider accepts an assignment associated with a specialist or technical area, particularly those referred to in [5.3.16], then there is reasonable customer expectation that the service provider is aware of the essential compliance requirements. This is more poignant when acting in a Probity Adviser role, where the service provider can alert the customer to the need to address the technical requirements if there is no technical advisor. However the probity practitioner cannot act as a technical adviser.

Case Study – A Need to Know:

A procurement requirement was particularly sensitive as it impacted on a law and justice matter in dealing with serious or repeat offenders. The matter was of acute public interest and media interest.

The requirement involved a system of products, software, support and maintenance, and justice reporting, all of which was intended to regulate the behaviour of offenders. The solution costs were reasonably high; but the public interest, the responsibilities of the government, the interests at all levels of the justice system; and the effectiveness of the solution were more significant than the cost. At least 4 government agencies were affected by the requirement, and one would undertake the procurement.

This was not peculiar to any jurisdiction, and suppliers worldwide were particularly interested in offering a range of solutions and costs. The lobbying for selection as well as the scrutiny of the selection processes were clear signals of the need for probity assurance.

The responsible Minister was under pressure from the public through the media and public groups to be transparent, and also was being lobbied directly and indirectly by suppliers. As well, the Cabinet and the Ministers of the other affected agencies expect to be kept informed on the conduct of the procurement.

The responsible Minister was briefed on the progress by the Department, but when the tenders closed, the Minister asked to be told who had tendered. The confidentiality of this information is normally protected until tenders are assessed for conformance, and then evaluated.

In this case there exists an ethical dilemma – should the Minister(s), who need to ensure they are not subjected to lobbying or other areas of influence, be informed of the names of those who tendered, and then potentially who is shortlisted through the procurement evaluation? There is a basis of Cabinet confidentiality that, in principle, should protect the confidentiality.

At least the Minister may be informed of the numbers tendering, and the numbers shortlisted, and if necessary, the names of the tenderers. It is the government of the day which is responsible for determining the public interest, and it may be a reasons to provide details of the suppliers, - provided the information is always under caveat of the need for probity and the confidentiality, and the commercial and process sensitivities. This will ensure those responsible for the public interest are fully aware of the probity risks.

Managing or avoiding the probity risks requires an emphasis of the importance of:

- *Consistency and continuity in the entire procurement process;*
- *Protocols for communication with Respondents;*
- *Conditions of offer and deadlines;*
- *Competitive and effective invitation to offer documentation;*
- *Evaluation processes which are consistent, effective, and accountable;*
- *Process for finalising the contract which are consistent with the procurement objectives and processes;*
- *Briefing and debriefing sessions which are confidential and equitable;*
- *Documentation which supports transparency;*
- *Supplier probity and ethical behaviour, as well as:*
 - *Probity issues of:*
 - *confidentiality and security,*
 - *conflicts of interest, objectivity and impartiality,*
 - *gifts, benefits, and hospitality, and*
 - *undue influence.*

The following sub-paragraphs highlight **some** of the probity aspects related to the procurement process. The comments below are neither comprehensive nor exhaustive of the related probity, process or accountability issues. Probity practitioners in procurement should have a robust core of understanding of the procurement processes that may apply to the acquisition of any product, equipment or service. These are found in both the related policies and guidelines. The related probity and accountability issues should be in the context of compliance, risk management, prudence, and sound judgement.

5.3.1. Procurement Planning

In Government, State and Commonwealth procurement policies require that agencies undertake procurement planning (or business case/ planning) consistent with the government's objectives and agency corporate plans, financial plans, and budgets. Agencies are expected to classify their procurement by value and risk. This process is the subject of procurement guides in some jurisdictions. In the private corporate sector, business planning for projects and significant procurement is a routine function using a Business Case planning model.

Plans for significant value or high risk procurement require a level of attention which includes consideration of the probity issues and risks. It is in the development of these procurement plans that early consideration should be given to the engagement of probity services, the timing of any such services, and either the requirement for a discrete Probity Plan, or the inclusion of probity risks and requirements in a Procurement Plan/ Business Case.

The procurement planning process¹⁰⁸ should have as an outcome the strategy for approaching the market, i.e. whether the procurement will be staged (e.g. Expressions of Interest prior to a Request for Offer), and whether the supply market approach might be

¹⁰⁸ See Figure 9 at [4.2]

open (i.e. by public invitation) or restricted (e.g. sole source/ direct single supplier or an identified limited source.

The Procurement Plan/ Business Case should detail and justify the recommended acquisition strategy. The procurement planning process should include a market scan or the findings of market analysis. In significant procurement with complex markets or market structures, a Market Analysis should be conducted in prelude to the Procurement Plan, and as part of the planning process. That Market Analysis should determine the acquisition strategy, and is likely to inform the probity plan and probity risk assessment¹⁰⁹.

Examples:

- *Expressions of Interest (EOI) or a Request for Information (RFI) are used to obtain information from or interest of the suppliers in a market, usually in the development of requirements; and may be stage 1 of a multi-stage procurement.*
- *A Request for Proposal (RFP) may not be seeking binding offers but seeks proposals from which negotiations or firm offers might develop.*
- *Request for Tender (RFT), Request for Offer (RFO), Request for Submissions (RFS), or Invitation to Offer (ITO) may be seeking committed offers or submissions which will be binding on the supplier.*
- *Best and Final Offer (BAFO) can be a stage in a multi-stage procurement as part of or in preparation for supplier selection and pre-contract negotiation(s).*

In Corporations, procurement planning/business case development will be a natural part of operational planning which will have its foundation in the organisation's commercial plans, financial plans and cash flows. In best practice procurement, the processes and structures would vary little between planning in the private sector or the public sector.

5.3.2. Governance

The procurement plan or business case must detail the activity's governance, including processes and responsibilities. The governance structure should include the communications flow and escalation process. In particular, the communications and reporting between the probity service provider and the project should be clear, including the escalation path for probity issues. This structure should be articulated in the terms of reference for the probity service provider. The ideal relationships are shown in **Figure 13** below.

¹⁰⁹ See [Figure 9](#)

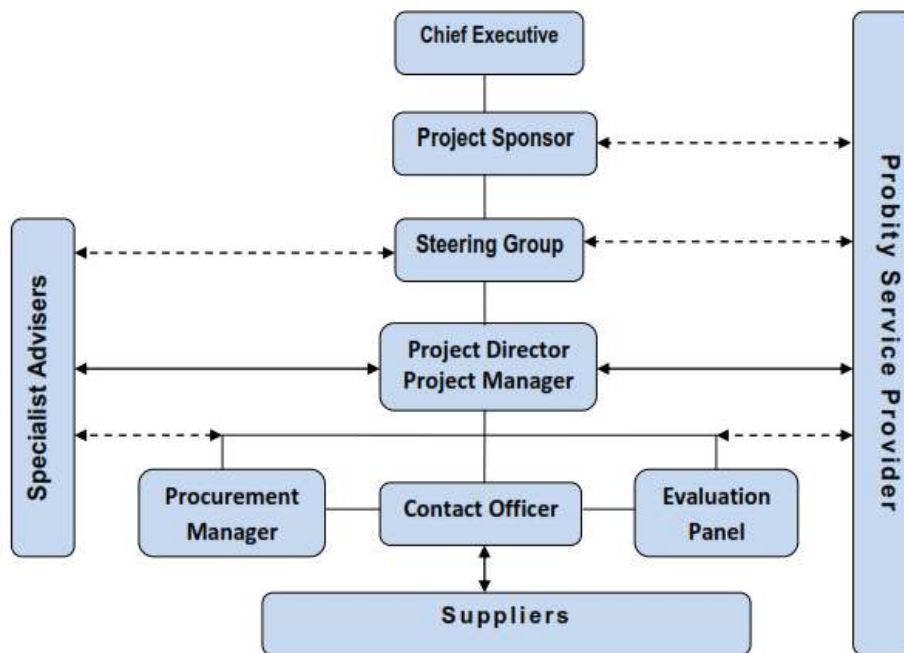


Figure 13. Example procurement project governance model

5.3.3. Markets and Supplier Information

Buyers have a responsibility to be fully informed on the nature and characteristics of:

- *the products, technologies, or services they may require, and*
- *the vendors and capability they need to obtain value for money.*

To achieve that, it is necessary to communicate effectively with vendors and the relevant supply chains.

It is important to communicate with the supply market in a fair manner in collection of information and the development of the requirement. This does not mean that the buyer has to communicate with all suppliers; but only to the extent that the buyer obtains fair and objective information on the market capabilities, capacity, dynamics, and technologies. The objective is to gather the information impartially and objectively, in order to inform the procurement plan and process. This is an exercise in objectivity and fairness, not equity. See **Appendix 2 – Probity & Confidentiality Guide for Communications with Vendors.**

Some public officers may not be as ‘commercially savvy’ as buyers in the private sector; and therefore they need to recognise that, within the supply market, individuals in marketing and sales have well-developed skills in both soliciting intelligence from public officers, and unduly influencing them towards a particular solution.

It is normal commercial practice that vendors need to represent their capabilities and capacity to buyers. Organisations, public and private need to establish fair arrangements for vendors to supply information in the normal course of business. However, during a procurement, the behaviour of one or more vendors might see attempts to unduly or unfairly influence the process, directly or indirectly, by subversion, circumvention, or corrupt activity. Other unacceptable practices are collusive activity, and/ or anti-competitive behaviour. The Probity Services provider should be alert to the risks and potential for these; provide advice that this sort of behaviour is unethical and inappropriate, and possibly to seek legal advice. This requires sound judgement.

While there is some flexibility in the communications processes in obtaining market information, once a formal approach to the market is made either in staged procurement or as a single stage approach, the probity protocols for communications the procurement should be applied.

HINT:

Dealings with and within supply markets do not always have to be equitable; but they always should be fair and objective.

- **Market Analysis**

In the procurement of new requirements or technologies, in formulating a requirement or specifications, the collection of market and technical information will probably commence before the procurement plan is finalised. Where the buying organisation is familiar with the market, supply solutions, and the technologies it requires, its market scan or analysis might be relatively brief. However in significant procurements, the procurement plan/business case should be adequate to demonstrate the Buyer's knowledge and understanding of the supply market.

- **Forecasting**

In repetitive procurement or in traditional and well known competitive markets the buyer might not approach the market until it releases the tender. Commonwealth and State planned procurement must be advertised on an eTender online¹¹⁰. Also in most local government jurisdictions, the relevant authority is required to post future significant supply requirements on a tenders website. These advance notices of future procurement are encouraged in order to stimulate local market competition and to support transparency. Other jurisdictions may also have similar mandated requirements for forecasting significant procurement.

For grants and funding arrangements, agencies also may notify these programs on their agency website, and while the Victorian Government has a website for centralised grants, designated Victorian government departments administer their own grants programs.

The private sector has a less structured approach; but nonetheless is focussed on communicating with the market during its procurement planning with the same objectives as obtaining appropriate information to fully inform the procurement process towards obtaining the best value outcomes.

- **Getting information**

The probity in dealing with vendors becomes more acute when a public officer is communicating with suppliers or prospective suppliers, and is involved in, or potentially involved in a procurement development, process, or decision. Some information collected, and information about the prospective procurement may be confidential. All public officers and Contractors representing the Public entity in the procurement, have a responsibility to protect confidential information whether that is related to the procurement processes of the agency, or information provided in confidence by a vendor.

¹¹⁰ It is a mandated requirement for Commonwealth procurement at or over the CPG Div 1 threshold that the planning for procurements includes advance notification and tender award on AusTender; others also e.g. 'QTender' Qld, or 'eTendering' NSW, or 'Tenders Vic', or 'Tenders WA', etc.

It is all well that public officers foster relationships with industry. If the behaviour of the public officer or representative is ethical then the public officer/representative has a defensible position, and is able to develop successful long term and respected relationships with suppliers and the market.

- **Contact Officer(s)**

By establishing protocols for communicating with vendors before, during and after the issue of the tender, and during evaluation and contracting processes, one probity risk is controlled or minimised. It is essential to ensure that those few persons authorised to communicate with vendors are aware of the communication protocols, as it relates to their responsibilities within the procurement process in order to focus and control the fairness and equity of communications during the procurement processes¹¹¹.

Preferably a single person (Contact Officer) is designated in the tender notice and documents as the contact person for all communications regarding the specific procurement. This single point of communication may change later when it is necessary to involve others in communications during interviews, demonstrations, and negotiations.

Vendors must be restrained in their channels of communications to only the designated individual(s)/ Contact Officer(s). Failure by a vendor to comply might well breach the probity of the process, and may invalidate the vendor's offer for unethical behaviour.

Ideally, the 'Contact Officer' should not be an evaluator or decision maker in the governance flow for the procurement. This should ensure that undue influence in the evaluation and selection is minimised or obviated.

- **Lobbying and influence**

As well, in the public sector, there may be requirements under statutes for the conduct of persons acting within the administrative processes of government, and for non-government persons whose conduct is contrary to the good order and accountable administrative processes of government. Hence there exists, more or less, requirements for the behaviour of a lobbyist¹¹². Distinction between lobbyists, business representatives, and advocates can sometimes be obscure, and hence the existence of policies or statutory provisions in some jurisdictions, which are intended to provide some clarity. The distinctions are not necessarily harmonised across jurisdictions, in Australia or overseas, so some obfuscation still exists.

Because lobbyists are often in positions of power or influence, definition and management of lobbyists is politically sensitive. The important issue however is whether a 'lobbyist' or like representative advocating for a party in a project or procurement does so on a commission or success fee, and the consequential effects on transparency and public expenditure. This is discussed also at [4.3].

¹¹¹ An example of communication protocols is in *Appendix 9 – Probity Plan*

¹¹² For example, the Australian Government *Lobbying Code of Conduct*, 2008; Queensland Government *Integrity Act 2009* Part 2 Registration of Lobbyists; Western Australia Government has a policy requiring lobbyist registration, and a code of conduct for related dealings

5.3.4. Developing Requirements

The procurement planning stage should have determined whether the agency has enough information on its requirements to go direct to tender or whether a staged procurement process is necessary¹¹³.

Developing requirements should always have in front-of-mind the question of how the requirement will be evaluated

As the requirements and specifications are being developed, document writers should be thinking of how these will be evaluated; not just the evaluation criteria, but also the evaluation method, and the relative significance of one criterion against another, and whether the evaluation of a requirement can be qualitatively or quantitatively evaluated¹¹⁴. This should lead to an evaluation method which will be able to objectively differentiate the responses. It establishes the core consistency between the requirements and the evaluation.

If the characteristics for objective differentiation are not confidently achieved in the statement of the requirements, it is likely that more work needs to be done, or the procurement needs to be staged.

In developing requirements, consider early what the contract, agreement, or supply arrangement will look like, and how it will be managed.

The extent of understanding of the requirements and the market for supply, will be germane to determining the most appropriate market approach, i.e. whether a multi-stage or single stage process, and whether an open market or limited market, or otherwise it may establish a case for a sole/ direct source.

Also in developing requirements, another front-of-mind issue will be what the contract will look like (particularly if it is a competitive tender). Many procurements are flawed by uncertainties which emerge and which are clarified through the procurement; but then are not translated into a contract condition, e.g. performance indicators, or achieving a certified standard, etc. These matters should be considered in developing the requirements and specifications.

Any statement of a mandatory requirement, or something that ‘*must*’ apply needs some rational and critical thinking. Specifications and requirements that have a high number of mandatory requirements usually also have the effect of limiting competition; or can also result in processes or behaviour which lacks accountability and transparency, often because the mandatory requirements cannot be applied, or are applied inconsistently, or lack judgment in application or are ambiguous. Overstated mandatory requirements in technical specifications also limit flexibility in negotiations or contracting, and can lead to indefensible outcomes, i.e. where the technical requirements are inconsistent with the specifications and the justification for the market approach.

Statements of mandatory requirements which are subsequently ameliorated to something less than mandatory or subjective are often issues for complaint and even litigation, and are matters of probity in the procurement process. They also draw on the sound judgement of the probity service practitioner in consistent, fair and reasonable interpretation. The

¹¹³ Some types of staged procurement are in [5.3.1]

¹¹⁴ Most useful is the Paired Analysis model. See *Appendix 12 – Paired Analysis*

principle therefore is to robustly debate the mandatory requirements at the stage of the requirements development. Further discussion is at [5.3.7.c].

For structured procurement, the procurement plan/ business case should determine the approach to the market considering issues including:

- *the market analysis,*
- *the risk assessment,*
- *assessment of the corporate objectives,*
- *any political imperatives,*
- *the urgency of the requirement,*
- *the technical appreciation of the requirement, and*
- *the in-house technical and procurement skills.*

5.3.5. Inviting Bids

The approach to the market to invite bids, i.e. whether it is sourced from a single supplier, open tender, or from a restricted selection of suppliers; and whether it is by a request for proposal, expressions of interest, or a form of invitation to offer, should be derived and determined in a procurement plan. There may be policies which influence the approach to the market, such as whether it is a single or multiple staged approach, whether the procurement can be satisfied from some standing offer arrangement or multi-use list, or other policy environment affecting the market approach¹¹⁵, including whether particular attention should be given to Small and Medium Enterprises (SMEs)¹¹⁶, particular sectors such as indigenous businesses, local content or local support¹¹⁷, or special care or industry sectors¹¹⁸.

Where purchases are low value and low risk, and the corporate policies support purchasing via charge card or petty cash, purchasing procedures should define the circumstances where the approach to the market can be generally informal. This does not obviate any requirements for probity and ethical behaviour; and purchasing procedures should define the circumstances where the approach to the market can be generally informal, e.g. low value and low risk purchases¹¹⁹.

Where any form of market approach and procurement is other than by open competition, reasonable justification is necessary to support the approach selected.

The probity service provider must examine the decision for the selected market approach to ensure it is reasonably well founded and justified.

For commerce to operate competitively, business will have an inherent self-interest. The extent to which individuals might go to exploit that may cross the line of ethics

¹¹⁵ For example, the CPR includes market approach considerations in Mandatory Procurement Procedures

¹¹⁶ SME is defined in government policy and is consistent with procurement aspects of trade agreements.

¹¹⁷ Australia has local content requirements in its procurement policies, and those policies are not consistent across jurisdictions, however are expected to be consistent with trade agreements.

¹¹⁸ For example, there is a national Code of Conduct for the Clothing Textiles and Footwear suppliers which is mandated in government procurement of related goods; There are national codes of tendering applicable to sectors such as building and construction.

¹¹⁹ For example, several Anti-corruption bodies have undertaken investigations into low-value purchases where unethical and corrupt behaviour of the buyer(s) has led to prosecution of the individuals for corrupt conduct. These actions are reported publicly by the respective Anti-corruption bodies (e.g. ICAC, IBAC, CCC)

5.3.6. Anti-competitive behaviour

Vendors who use their market power or market influence in anti-competitive behaviour may breach the *Competition and Consumer Act 2010* which incorporates the *Australian Consumer Law*¹²⁰ (ACL); or otherwise act in ways inconsistent with sound procurement and the preservation of fair competition. Buyers, including public sector agencies, who participate in or encourage procurement processes which permit the use of market power in anti-competitive procurement processes, are acting unethically, and may well also breach trade practices. The misuse of market power by suppliers whether or not condoned by a buyer may be represented in many ways in a procurement process, and both buyers and their probity service providers must be alert to the potential for these situations and seek legal advice where they are suspected.¹²¹ A probity adviser should not provide legal advice on issues of anti-competitive behaviour; but should draw the principal's attention to such a problem, and refer to any ACCC Notices or Guides.

Forms of anti-competitive behaviour are likely to be forms of corruption.

Another practice which is prohibited under the *Competition and Consumer Act* (CCA), and also unethical and anti-competitive, is Third Line Forcing (or Full-line Forcing or Exclusive Dealing). This is where a vendor forces the buyer to purchase from a third party under arrangements which restrain or prohibit competitive supply, e.g. the buyer must exclusively use the third party for supply of requirements, such as 'the clothing product warranty is only valid if a particular laundry is used'. There are some differences in cause and effect of anti-competitive behaviour depending for example if the third party is an Agent; and/or whether supply of requirements is purposely bundled. These issues in Third-line Forcing and Exclusive Dealing can be legally complex as these require interpretation of the CCA.

Collusion and Cartels are not only anti-competitive, but also corrupt, illegal and unethical¹²². The CCA includes provisions for prosecution of cartel or collusive activity; but it is usually the Buyer that first detects or is exposed to the effects of cartel/ collusive behaviour in tenders. Collusion is a complex legal area and while both Buyers and their probity service providers must be aware of and alert to collusion in tenders, it is likely to require legal advice or opinion. As well, Buyers should note the Australian Competition and Consumer Commission (ACCC) guidelines on cartels and collusion¹²³.

5.3.7. Conditions of Tender or Submission

The Conditions are a critical component of integrity and accountability. They are the terms or rules for the conduct of the tender. They protect the interests of the parties, particularly the buyer; and establish the principles of the tender process, both stated and implied, including the good faith and fair dealing of all parties.

It is essential that any invitation to offer, tender, proposal, submission or other request inviting a response from a supplier or service provider should include the terms and conditions for responses. For grants and funding applications, the 'rules' might be

¹²⁰ The ACL is Schedule 2 to the *Competition and Consumer Act 2010*

¹²¹ Misuse of market power may result in a breach of the ACL. See for example *General Newspapers Pty Ltd and Ors v Telstra Corporation* (1993) 117 ALR 629.

¹²² CCA 2010, s44ZZRD

¹²³ ACCC *immunity and cooperation policy*, 2019

differently formed, but nonetheless there still needs to be some fundamental terms and conditions set for applications.

The act of inviting offers or tenders or submissions is generally an ‘invitation to treat’, i.e. that it is not a commercial contract in itself, and is generally a solicitation. The inclusions of conditions or terms in the invitation may include a statement that the buyer is not bound to effect a purchase, and other exclusions from buyer liability. The terms and conditions provide the accountable and legal framework for the response, and the obligations of the parties, i.e. they set the rules, and provide the basis for compliance or disqualification of the offers/ respondents. The Conditions will state, or it otherwise implies the intention to act in fairly and good faith, for both the buyer and the supplier. Courts in Australia and overseas have held that, despite an invitation to treat, the invitation still binds the buyer to deal fairly and in good faith¹²⁴. Attempts to not be bound by this obligation have been uncertain, and unsuccessful in court judgements¹²⁵.

These Conditions establish also the baseline for what is known within common law as the ‘Process Contract’. Also see [5.3.7.d and 11.1]. A process contract is expected to be formed irrespective of whether the Conditions include that there is no intention to establish a contract¹²⁶. Both public and private sector entities would normally include conditions relating to the conduct of the activity, the response, and often conditions of a proposed contract, agreement, or arrangement.

Some government jurisdictions have developed standard form Conditions. These may be mandated or as a guide; or might vary for certain types of activity, e.g. conditions for one-off purchase of goods or services, or for multiple purchase/ supply arrangements; or for building and construction procurement; or for Information Technology (IT) procurement. These provide some consistency with dealings with agencies within a jurisdiction. Those government jurisdictions that have mandated standard Conditions for tenders have done so to assist agencies to protect themselves fairly and legally in the procurement process. Most government jurisdictions have requirements for standard conditions. It is prudent that these should be applied, and agencies using their own or old forms of conditions would well be advised to ensure consistency between the standard forms and their own. Special conditions of tender or submission are commonplace, and should be appended to the requirements.

The Probity Service Provider must be familiar with the Conditions of submission, not only to understand the ‘rules’ which apply, but also to ensure they are unambiguous, fair and relevant.

In the private sector procurement, public (or listed) corporations usually establish their standard conditions and response requirements as it is their primary set of rules for the parties. These can be even more onerous than government conditions. Additionally in the private sector there are industry sector standard conditions such as in building and construction which provide some level of risk protection for the buyer, but more-so in the contract framework than the tender process. It is important therefore that the best risk protection for the buyer is in selecting the most appropriate tender rules, particularly to control costs and to avoid project and contract disputes.

In both government and private sector corporations, as well as the Conditions of Submission, the tender may include Conditions of the Contract or Arrangement, or form of

¹²⁴ For discussion and case law, see Box and Forde, Op. cit. [1.1]; In *Ipex v State of Victoria* [2010] VSC 480, Sifris J.; Also deceptive, misleading or unconscionable conduct under Australian Consumer Law s18 and s20.

¹²⁵ For examples, *Cubic Transportation Systems Inc v New South Wales*[2002] NSWSC 656; and *Tercon Contractors v British Columbia* [2010] SCC 4. “Government should be the morals exemplar”

¹²⁶ Ibid.

Agreement. Why would this be prudent? It is too late having selected a preferred supplier to find that the supplier will not accept your form and conditions of contract; or otherwise the time to negotiate some arrangement outstrips the time for implementation. These are matters of prudence and accountability.

The Conditions of Contract/ Agreement have force when the contract is executed with the successful supplier(s); hence conditions which pre-date the contract may not necessarily be enforced as a Condition unless they are included in the Conditions of tender/submission. It is important to ensure that all Conditions which are to apply to suppliers in the submission and evaluation processes are in the submission Conditions, e.g. requirements for conformance, timely lodgement, validity, and pricing rules; and also requirements to disclose any conflict of interest in the response, and not just later within the contract.

a. Conformance, Compliance, and Completeness

A sensitive issue for probity is the reasonableness of the process and decisions in checking conformance and completeness of responses (offers/ submissions/ tender/ quotes, etc). This is an area where a breach of the Process Contract can occur in admitting responses which:

- fail to conform to a mandatory requirement; or
- fail to submit at closing some information that “must” have been submitted at closing; or
- are incomplete with information that was reasonably expected to be lodged at Closing; or
- contained information which could not be evaluated due to some inconsistency with the information required in the response.

Some procurement managers try to define ‘Conformance’ as relating to the stated Mandatory Requirements, and ‘Compliance’ as relating to other ‘must’ type of response requirements. While this may be acceptable differentiation, the same probity risks of a breach of the Process Contract will apply.

Some procurement managers also try to differentiate between an ‘inadvertent error’ from incompleteness in failing to provide necessary information. They are essentially synonymous and present probity risks in accepting a deficient submission for evaluation based on a breach of the Process Contract.

All deficiencies in conformance, completeness or compliance should be identified at the opening of submissions, or otherwise as early as possible in the evaluation process. The decision to progress any submission which is deficient in any such area should be documented along with the rationale for accepting the probity risk. Also see [5.3.9.b].

b. Late Submissions

This is one issue which is confusing and contentious. Commonwealth procurement is firm on the unacceptability of late submissions (or offers)¹²⁷, whereas more broadly across public and private sector procurement buyers and advisers do not apply consistent rules. There is a preponderance of public sector procurement rules which mandate on late submissions, but which allow discretion to admit a late submission; or even allow a ‘grace’ period of time after the Closing date/ time. In this environment suppliers may be inclined either to exploit the situation, or ignore the fundamental requirements of the tender closing time and date.

¹²⁷ CPR Div 2

Among the many considerations that might apply to late submissions, there are two important probity considerations:

- *Test of fair dealing* - The opening and any progressing a late offer/ submission, however late it might be, may introduce an element of unfairness or inconsistency against those received on time and an advantage to the late offer¹²⁸; and
- *Scope for discretion* – The wording of the tender Conditions on late lodgement may or may not provide any discretion. Whether or not the Conditions provide that the buyer might consider a late offer/ submission, the decision to do so still must be based on sound and fair reasoning, be consistent and in good faith, and defensibly justified and documented.

The widespread move to and reliance on electronic/ online tendering is predicated on reliability of the internet and its infrastructure. Frequent outages can jeopardise the timely submission of an eTender lodgement. An arbitrary position on late tender rejection may not recognise the deficiencies in internet reliability; and a disadvantaged supplier affected by that may have reasonable grounds for unfair dealing. In that case it would be the responsibility of the supplier to prove the details of intended timely lodgement.

The acceptance of a late offer in itself requires sound judgement; and if accepted for evaluation, the decision to select a late offer over a timely offer also requires sound reasoning for defensibility.

Electronic tender lodgement systems are evidently clear about the closing time. Despite that it gives suppliers more time than if lodgement is by physical delivery, suppliers may leave it until too late to upload their files, and not allow for internet speed and reliability, or the size and number of files. If the upload is incomplete by the lodgement time, the response is late.

Problems can arise with courier services. For example, international tenders using international courier services have little control over the timeliness of delivery. Circumstances of natural disasters or unpredictable environments present uncertainty with physical and even electronic delivery. It is essential that fairness and sound judgment prevail in these circumstances. It is reasonable and prudent to seek robust evidence of the circumstances.

NOTE:

The rationale for accepting and considering a late tender should be fully documented.

¹²⁸ See *Trencon v IDC 2014 ZASCA* (Sth Africa) where late bid was accepted

Case Study – Understanding the Market:

A tender process was preceded by a market sounding for supply of a particular type of high technology equipment. The research determined that there were four local suppliers. This equipment produced highly sensitive regulated products ('widgets') which are used in advanced scientific tests and research. The equipment was manufactured offshore and there were five original equipment manufacturers (OEM) worldwide. The four local suppliers sourced their equipment from one of the OEMs as the local Agent of the OEM.

The lead Agency determined that it needed to source a supplier of the Equipment worth >\$2.5 million, to supply, own, and operate it. The arrangements for the supply and distribution of the 'widgets' was a different requirement to the supply and operation of the production equipment.

The Agency undertook a select tender to the four local suppliers and provided 3 weeks to tender. One local supplier declined to bid; and one submitted their tender 4 days before closing time. Then two days prior to closing, another local supplier advised that their tender would be submitted by their offshore parent (OEM) and requested an additional five days to tender, as the complexity and financial arrangements could not be concluded by closing time. Their request was refused. At 6 hours before closing, the fourth local supplier claimed their business activities precluded getting their tender lodged on time and requested 24 hrs extension. The request was granted, and the tender was received. Two tenders were evaluated and the late (extended time) tender was preferred.

These decisions resulted in the failure of the procurement, and the termination of the tender as it was flawed not only due to the inconsistency in granting extension of time, but also in the flawed market assessment.

c. Mandatory Requirements

A mandatory requirement should not have subjectivity. It should be able to be answered as yes/ no, pass/ fail, present/ absent, does/ does not, etc.

Compliance with mandatory requirements can present complex issues. Some mandatory requirements may be technical requirements, and others can be related to standards or accreditation, while others can relate to completeness and conformance with instructions, or matters such as insurances and warranties. Buyers can unfairly exclude or include tenders if they do not properly understand the nature and effects of mandatory requirements. This leads to inconsistent and unfair dealing.

Statements in a tender such as “*shall*”, “*must*”, “*will be required*”, “*is to*” and the like, have compliance implications whether or not they are prescribed as mandatory in a tender. Good judgement and prudence must be applied to these issues, and importantly they must be fully considered when preparing tender requirements and conditions.

It also must not be ambiguous as to when a mandatory requirement is to apply, i.e. with the lodgement, or prior to contract or under the contract, etc. Likewise, where documentary evidence is mandated, it must be clear when the respondent must provide the compliant evidence, e.g. as to whether the evidence is provided with the submission at close, or at or prior to contracting, etc. Too often the statement of

mandatory requirements is not thought through and the wording of intent of each mandated requirement can be unclear, ambiguous, or even discriminatory. It is essential that the tender is reasonably clear when it is issued and not reliant on differing interpretations by vendors of what the requirements actually mean and when the compliance takes effect. It is part of the probity service provider's role to check and advise on mandatory requirements; or in a probity audit, to comment on the appropriateness of them.

Where requirements may have variability or subjectivity in compliance, the requirement should not be mandatory. If the circumstances of, e.g. complies/ partially complies/ does not comply, as used in an evaluation or response, anything other than full compliance is a failure to meet the mandatory.

d. Process Contract

There are implications for buyers to apply the principles of the 'Process Contract', i.e. in processing tenders, the buyer is bound to act in good faith, act fairly, and to conduct the procurement consistent with the related procurement documents including the tender, evaluation, and contract (See also [11.1]). Australian courts have demonstrated that the Process Contract applies to tender processes whether or not traditional 'non-binding' clauses are included.¹²⁹

***In principle, the Process Contract has 2 components:
An implied term to deal fairly and act in good faith, and
A 'contractual' term to do what is stated in the procurement governing documents.***

A Probity service provider will be required to monitor or audit compliance with Process Contract principles, and this is another area where legal advice may be required if in doubt. Further information on the Process Contract will be included later in this publication at [11.1]. Whereas under the ACL s18 a corporation or government commercial business can be prosecuted for deceptive and misleading conduct, the equivalent redress against a government Agency would be for failure to comply with the implied or 'contractual' terms of the Process Contract.

e. Validity

The validity period for a tender submission to remain valid, unless the submission/ offer is withdrawn, is an important condition. If the procurement process is not determined by the validity date, or any extension thereof, the procurement process is terminated in principle. Despite that it is not uncommon that buyers extend the validity date both before and after its expiry, it is bad practice. It is inappropriate practice for a procurement to continue beyond the validity date if it has not been properly extended. The Buyer has the right to extend the validity date, but in doing so, and particularly if the validity has expired, the supplier has the right to withdraw or amend their offer under the conditions of its submission at the time.

A Buyer needs to take care in deciding to extend a validity period that it may introduce unfairness, or inequity, or limit competition, particularly with small enterprise. Any decision to extend validity without consideration to the implications of issues such as Foreign Exchange Rate variations, and technology or model changes, may be acting unreasonably or unfairly.

¹²⁹ *Ipex v State of Victoria* Op.cit.; *Cubic Transportation Systems v State of NSW* Box and Forde Op. Cit.; *Tercon v British Columbia*: In that case, the exclusion of liability clause was discussed with the implied and express obligations of fairness arising from a tender process.

f. Vendor Conflict of Interest

In some tenders, a specific Condition clause relates to Vendor Conflict of Interest where, in submitting a tender, the vendor/ supplier warrants that there is no conflict of interest, and may be obligated to disclose any emergent conflict of interest. While superficially reasonable, it should be assumed that most suppliers fail to appreciate the implications or scope of a conflict of interest, or otherwise ignore them. The Buyer should not assume that the supplier understands the areas of interest or the nature of any conflict. If considered appropriate in the interests of both common understanding and disclosure, it is appropriate to include a Disclosure of Interests response form in the tender documents. If however an interest is disclosed in a tender, great care should be exercised in the equitable consideration of the tender as there may be little or no basis to exclude the tender on that basis.

In some tender processes, e.g. Public Private Partnerships, and forms of Collaborative procurement or Relational Contracting, vendor disclosure of conflicts of interest are integral to the tendering processes. This is discussed later at [10].

g. Debriefing/ feedback

Whether public or private sector procurement the offer of debriefing of unsuccessful offers is a sound strategy to maintain credibility with the supply market, enhance transparency, and to encourage competition. Public sector procurement policies usually require that unsuccessful suppliers are provided a debrief by on request. Whether public or private sector procurement, a vendor's entitlement to debrief, if unsuccessful, usually is stated in the Terms and Conditions. Unsuccessful supplier debriefing is also discussed at [5.11].

The principles of post-tender debrief are to:

- Maintain confidentiality of the procurement processes and the information from competing tenders;
- Advise vendors on the strengths and weaknesses of their submission and performance;
- Tell them the name of the successful tender if it is not already public information, not who else tendered or participated;
- Never speak in comparative terms;
- Debrief is only for vendors who submit an offer, whether complying, timely or otherwise; and
- Preferably provide only oral debrief as interpretation of written debriefs can trigger disputes and even litigation under the Process Contract or Judicial Review.

A dissatisfied vendor in the public sector has information rights under Freedom of Information (or similar) legislation; and also access to the agency's Complaints Management system. Probity service providers should ensure that suppliers have access to debrief. The probity service provider should only be involved in debriefs when the Buyer feels the need for their presence to support probity assurance.

See *Appendix 3 – Probity Guide to Debriefing Suppliers*.

5.3.8. Integrity in Evaluating and Assessing Offers

Evaluation of offers and any clarification and subsequent negotiation must be carried out scrupulously in a planned structured process to ensure that all respondents are treated fairly and according to the conditions of the invitation¹³⁰.

Among the key evaluation measures to adopt are:

- *objective assessment using selection criteria which has been approved prior to opening offers;*
- *timely communications with respondents;*
- *fair dealing with clarification of information to suppliers;*
- *full, frank and confidential negotiation with offers based on the terms and conditions of the requirement; and*
- *strict observance of confidentiality.*

a. Impartiality

Whether in the private or public sector, persons charged with the responsibility for evaluation of tenders for the acquisition of goods or services are expected to act in the best interests of the Buyer. They are expected to act with integrity, to act objectively and impartially, and preserve the confidentiality of information. It is prudent to refresh the awareness of those persons of these obligations. While it is not unusual that these persons are expected to sign a form of acknowledgement of their obligations, or a Deed as such, including any declaration of related interests, it is reasonable that in a probity briefing, those persons can be made aware orally of the obligations and to make disclosures. In some jurisdictions, agencies and organisations have policies requiring such disclosures, and where these exist the disclosure compliance is a requirement of the process. In many public and private entities, the code of conduct requires disclosure, whether or not that is ad-hoc or applicable to a procurement event. While written acknowledgements or deeds are part of the procurement records, it is prudent that a file record is taken of oral acknowledgements or disclosures. It is good practice that a sensitive procurement documentation includes an 'Acknowledgements Register' listing all who have completed the respective form; and note any related disclosure(s). The probity service provider should sight and consider the Register and disclosure statements.

b. Evaluation Panel Composition

The credibility of the evaluation panel is critical to the integrity of the evaluation. The composition of the panel must have demonstrated skills, competence and numbers to be objective, and to effectively and transparently conduct the evaluation. As a general statistical principle, at least three independent assessments are necessary to begin to ameliorate personal subjectivity. The greater the number of independent evaluators, the more the subjectivity is reduced.

c. The Evaluation Plan

An Evaluation Plan should be developed concurrent with the tender requirements. It should define an effective and structured process and methodology to enable fair differentiation of the submissions; and which considers every meaningful functional, technical or commercial aspect in the context of the Selection Criteria, Sub-criteria, or other element within the specification, and on basis of its priority/ significance¹³¹.

¹³⁰ Embodied in the 'contractual' and implied terms of the Process Contract

¹³¹ Box J. *Evaluation Methods Guide*©, Rev. 5, 2013

It will be important to ensure that all elements of the specification and terms of the requirement are able to be evaluated by either quantitative or reasonable qualitative methods, or a combination. Requirements that are not or cannot be evaluated are of little value.

The Evaluation Plan should address at least the content of - *Appendix 13 – Evaluation Plan Content Guide*.

d. Weighted Criteria

Simple mathematics show that the weighting applied to a score determines substantially the order of merit. Weightings which are unsubstantiated against the organisation's priorities and the evaluation/ selection criteria significance can produce the wrong outcome and potentially a less than optimum value for money.

Weighting of evaluation/ selection/ assessment criteria is often poorly done, often arbitrarily and without rationale or defensibility. Where the selection/ evaluation criteria have different priorities, weightings should be assigned which reflect both the significance and risk of a criterion to the corporate objectives. The total of weightings of the Selection/ Evaluation Criteria must total, but cannot exceed 100%. It is not uncommon that the price component is not weighted, but rather the criterion is applied is a cost benefit/ value for money formula¹³².

The weighting method is not a matter for the Probity Service Provider, but rather that the process for determining the weightings is well reasoned. A Probity Service Provider may present one or more options or methods for deriving the weightings but the outcome and ownership is the priorities of the Agency

The process for determining weightings should be defensible. The weightings should be rationally justified, preferably by some structured thought process and reasoning. One method of determining this is the Paired Analysis process, which can be basic or differentiated. The simplest Paired Analysis method is in the Evaluation Methods guide at *Appendix 12 – Paired Analysis*.

Weightings should be finalised in the Evaluation/ Selection Plan. Change to the weightings after the plan is signed off is high probity risk, and if not in the signed-off Plan, it should not be added later.

e. Evaluation/ Assessment Methodology

As discussed previously, the best practice is for the evaluation criteria and the apposite evaluation method to evolve during the requirements development. However it evolves, a planned and structured evaluation methodology should be approved within the governance framework, and best practice is to have the Evaluation Plan with its related methodology completed by the time the tender is invited. Poor practice is to delay the completion to closing time or to defer opening of submissions awaiting finalisation of the Plan. Timely completion underpins the objectivity, impartiality and confidentiality of an evaluation methodology, especially the determination of weightings. The closer it gets to the closing date if no Evaluation Plan has been signed off, the greater the perception of partiality.

¹³² Box J., Ibid

The reason for aiming to finalise the evaluation methodology and plan before the invitation is released is primarily to:

- demonstrate the robustness of the procurement development process; and
- close the loop on the potential for any security or confidentiality breach which might leak the methodology and/or weightings before any potential supplier evolves their solution.

It usually is inappropriate to change or add weightings, including any sub-criteria weightings, once an evaluation has commenced.

The Evaluation Methodology should demonstrate consistency. There are two principal areas for maintaining consistency:

- in applying the requirements, references, specifications, priorities, expression, processes, and information generally; and
- in dealings with the respondents throughout the processes.

The first establishes an overall integrity and resilience across the procurement processes. The second is an aspect of fairness, equity and reasonableness in dealings with vendors or comparative consideration of offers.

An evaluation methodology can be quantitative, qualitative, or a combination of both. A sound understanding of the methods available and which is most appropriate is an area for professional development of probity service providers as well as procurement advisers and procurement practitioners¹³³.

The important responsibilities of a probity service provider in this regards is to ensure that the evaluation methodology is well reasoned, logical and rational, and it can robustly lead to both differentiation of the submissions and the defensibility of the outcomes. Often, the inclination is to ‘do what has been done before’ without giving adequate thought to the need for sound reasoning and defensibility of the evaluation outcomes.

5.3.9. Validation of information

An important principle of accountability in tenders is that the buyer takes all reasonable steps to validate the information provided by the supplier, and applies due diligence.



Figure 14. Caveat Emptor

“Caveat Emptor” is expressly the warning to both buyers and suppliers to be sure they both parties clearly understand the risks and liabilities in the procurement and contract. Buyers in particular should take reasonable care and their own due diligence to validate and verify the claims of suppliers. Reliance on contract or consumer law for protection may be too late

¹³³ An Evaluation Methods Guide is at www.roomtorun.com.au/publications

when things aren't what they appeared to be^{134 135}. Suppliers sometimes fail to read and understand the Conditions and requirements, and make unwritten assumptions without seeking clarification.

It applies to both public and private sectors. While the public sector buyer has the accountability for prudential expensing of public money, the private sector buyer equally has responsibility for the prudent expensing of company and shareholder funds. It is the buyer's fiduciary duty to ensure that the procurement process considers allocated risk¹³⁶.

A buyer's failure to undertake reasonable due diligence in the procurement process is administrative neglect¹³⁷. It may militate against a successful remedy claim against the supplier later if litigated. It seems many buyers take prima facie that what a supplier says is valid, and do not consider the need for validation, confirmation or verification; perhaps believing that it will become contractual and enforceable. Yet when it is found later that the buyer has been misled, it is an expensive and lost time exercise to correct the situation, often with litigation or dispute resolution involved. If a supplier has fraudulently misrepresented in their tender something pivotal to the procurement outcomes, the buyer should still demonstrate that reasonable due diligence was applied, otherwise in any litigation, successful remedy may be tempered by allocated risk.

Only in repeat regular procurements might it be appropriate to minimise or eliminate the need for verification of supplier's tender information. The Evaluation process brings with it the need for verification, even of simple things like the corporate status and registration of the supplier. Simple checks early can avoid subsequent aggravation, dispute, or litigation.

a. Clarification

The clarification process is the conduit for verification of information in a tender or in the tender/invitation documents. Clarification of information in the invitation documents is a usual happening; but often one which creates probity issues if there is inconsistency or ambiguity in how the matters are handled. Again, it is a matter for fair dealing and consistency, rather than an issue of equity. Poorly managed pre-close clarifications reflects poorly on the buyer

The Invitation to tender or offer should include the nomination of a Contact Officer for dealing with enquiries from potential suppliers seeking clarification of the tender/invitation documents. This is prudent to separate suppliers directly from the governance decision makers.

Once tenders have closed, it is good practice and prudent that all clarification requests, Notices to Suppliers, or Request for Information on any submission should be channelled through a designated Contact Officer. This will separate any direct communications between the evaluation panel and a supplier.

HINT:

Do not confuse 'clarification' with 'negotiation' to rationalise communication with a supplier.

¹³⁴ See *Royal Botanic Gardens & Domain Trust v South Sydney City Council* [2002] HCA5; and *Box & Forde Op. cit.* [3.17, 3.19]; where the HCA applied caveat Emptor in the contract dispute.

¹³⁵ See *Makucha v Sydney Water Corporation (No2)* [2011] NSWCA 249, where Baston JA found that Mr Paul Makucha could not rely on a defence that Mr Ed Harvey from Sydney Water had the authority to grant him rights to use the Brand.

¹³⁶ See for example *Cassa di Risparmio della Repubblica di San Marino S.p.A v Barclays Bank Ltd* [2011] EWHC 484 (Comm). The court confirmed the principles of Caveat Emptor and shared procurement risk.

¹³⁷ *Ibid*, *Royal Botanic Gardens v South Sydney City*.

Clarification of a tender response can occur at any stage after tenders close, including for example, at interviews; demonstrations, trials etc, at post-tender negotiations; at reference checking or site visits; or before and during the evaluation.

In each case both before and after closing date, the Contact Officer protects the governance and the evaluation panel from undue influence.

Probity Protocols:

The underlying protocols in the processes of clarification in all forms are to:

- **Clarify** the functional, technical, process, and management issues in a tender submission as it relates to the specification, conditions, and response;
- **Confirm** understanding of information provided in the Vendor's submission and any successive Clarification questions;
- **Establish** the Vendor's functional, technical, process, and management performance relative to the requirement; and
- **Protect** the confidentiality of the process and information in other tenders.

Any assumption must be rational and well-reasoned.

b. Additional Information

Some public sector buyers seem to avoid important aspects of post-close clarification for fear that the information received in verification may be new information¹³⁸ and inadmissible. Both the buyer and the probity service provider need to have a good understanding and appreciation of the difference between verification based information and new information in the clarification process. This is another area which requires skill and judgement to avoid unfair practices.

It is important to differentiate between information required in verification or clarification, and information missing from a tender, i.e.:

- new information that changes the substance of the tender, or
- which should have been provided in the tender.

One principle here is important. If there is reasonable belief that the information missing is inadvertent and can be quickly obtained on the basis that it was prepared prior to tender closing, then it may be reasonable to obtain the missing information, providing it does not introduce any bias towards the 'recalcitrant' supplier. If there is reason to believe that obtaining the information will provide any unfair advantage over another supplier, then it is not prudent to pursue it. Sound judgement and skill are required in considering this process.

Where a tender fails to provide enough information for it to be effectively evaluated against its competitors there are reasonable grounds for it to be eliminated. Again, this is an area for skill and judgement.

Obtaining, correcting, or inviting resubmission of pricing after tenders close is high probity risk¹³⁹.

¹³⁸ Also referred to as Additional Information.

¹³⁹ In *Maystar General Contractors v Newmarket Town* [2009] ONCA 675, it was found that the action by Newmarket Town Corporation in correcting the pricing schedule of a tender was unfair as the change made the efficacy of the pricing schedule uncertain at Close.

c. Interviews, Presentations, Demonstrations, Site Visits

The requirement for validation of tender information may not be known when the evaluation plan is finalised. If additional steps in the evaluation process are necessary for validation of information, e.g. planned or unplanned interviews with one or more suppliers, then it is reasonable to do so. Care must be taken with managing the fairness of the conduct of interviews, presentations, demonstrations or site visits; but these steps are all part of the validation, verification and confirmation of information processes, and require good documentation for defensibility and justification.

Where interviews, presentations, demonstrations or site visits are held there are both confidentiality principles and probity protocols to apply:

Confidentiality Principles:

To observe requirements for safeguarding the confidentiality of commercially sensitive information:-

- **Never** reveal or discuss any aspects of any nature of one vendor's offer with any other vendor; or
- **Never** speak in comparative terms of any one vendor against another or others;
- **Never** informally indicate to a vendor that its offer is likely to be accepted or rejected, either on the basis of what is demonstrated or presented, or on any preceding elements of evaluation, or
- **Never** provide any opportunity for a vendor to see evaluation sheets of any kind.

Remember that all Offer documentation and evaluation information is Confidential.

See *Appendix 4 – Probity Guide for Interviews, Presentations, and Demonstrations*; and *Appendix 15 – Probity Guide to Validating Information*

5.3.10. Vendor Viability

Inadequate due diligence is a failure in accountability

It is not uncommon that supply contracts fail because of inadequate due diligence assessment of a supplier's commercial and corporate characteristics. A supplier's viability or commercial resilience can be affected by circumstances including:

- Financial weakness or instability;
- Failure of a key supplier in their supply chain, or unethical supply chain vendors;
- Prospects for a takeover or merger;
- Legal issues with the Principals/ Owners/ Holding Company of the vendor company;
- The ability or otherwise to effect dispute resolution in a jurisdiction affecting the supplier;
- Financial exposure or weakness of a pivotal stakeholder;
- Prior bankruptcy or financial failure of the vendor company directors;
- Dependence on offshore or even local financial or technical support;
- Legal control from an offshore jurisdiction;
- Instability in the retention of key staff;
- High financial dependence on too few customers;
- Limited or no diligence in the supplier's compliance and risk management;
- Existence of contract disputes with other customers;
- Questionable or suspect environmental and sustainability policies or implementation;

- No or poor social conscience and community support;
- Poor safety record, and
- Poor industrial or environmental consciousness.

These issues, both individually and collectively, can present a commercial risk. They are not peculiar to the public sector but are all relevant to both. The non-government corporate sector sometimes handles this better than the public sector.

Accountable procurement should include vendor due diligence¹⁴⁰ to ensure that the vendor:

- is of substance,
- is of acceptable integrity and reputation, including the integrity of its governance,
- is reliable, capable and has the capacity to supply including its supply chains,
- is financially viable including the viability of its key supply chain suppliers, and
- meets all regulatory requirements, including licences, permits, and authorities.

An area often overlooked or treated poorly in the submission evaluation is the conduct of due diligence and assessment of vendor viability. It appears that, because these steps are usually left to the end of evaluation and mostly with the preferred or shortlisted vendor(s), the rush to contracting neglects the importance of the commercial assessment of the supplier. The conduct of vendor viability (or supplier due diligence) is one which should be conducted by persons with good commercial skills. In many areas of procurement including complex or high value procurement and projects, specialists in commercial assessment should be included at the latter stage(s) of the evaluation/assessment process. Often, and particularly with high value and/or high risk procurements or projects, a third party organisation is engaged to report on the vendor viability as part of the due diligence process. Buyers need to ensure their third party assessors have an appropriate level of professional indemnity insurance. A buyer would be expected to have conducted reasonable due diligence of all of the associated parties if ever there was litigation over the outcomes.

Probity issues arise when actions are taken under the contract to compensate for inadequate due diligence in the pre-contract process; and these may represent unfair dealing with others in the tender process.

If reasonable commercial assessment of a vendor discloses issues of commercial or legal risk, then these must be addressed either through contract negotiation, or by determination that the risk is not negotiable and it is necessary to revisit the evaluation of other vendors. This seems common sense, but unfortunately it is an aspect commonly ignored or treated cursorily in tender selection. The “baby has gone with the bath water” when the buyer is unhappy with the selected supplier in negotiations or contracting. The probity service provider should be satisfied that adequate checks of vendor viability and due diligence is applied in the selection process.

See *Appendix 5 – Vendor Due Diligence Information Guide*.

5.3.11. Selection approvals

It is both prudent and for division of governance to have the selection approval process independent of the detailed evaluation of the tenders. The selection approval may be the approval to enter into a contract with the selected supplier(s), or to enter into contract negotiations with the selected supplier(s). In some complex tenders, it may be approval of the shortlist, e.g. where a land development, alliance or other collaborative/ relational procurement, or Public Private Partnership (PPP) is involved. The selection approval process should be considered still in the context of the evaluation framework, and a pre-

¹⁴⁰ For example, ICAC NSW *Supplier Due Diligence: a guide for NSW Public Sector organisations* June 2020

cursor to contracting. The selection approval process may resolve to continue further evaluation prior to any approval for contracting. Care should be taken not to convey any implied contract with a supplier prior to formal contracting, i.e. when the contract has been executed by both parties.

In the public sector, a financial delegate is the approving authority with advice from the evaluation panel or a higher level steering (or executive) committee. In many cases of grants or funding agreements, the Minister is the approving authority. The private sector has similar governance and approval structures and delegations up to and including the Board.

The Delegate's authorisation may establish negotiable parameters even within limits or variables

Persons engaged in the selection and approval process also need to be aware of their responsibilities for confidentiality and conflict of interest. They should always be acting in the fiduciary interests of their organisation and with the same level of objectivity and impartiality as those on the evaluation panel. The panel members must be prepared to dissent either individually or collectively. It is prudent for a probity service provider to ensure that those responsible for evaluation, selection, and approval are aware of their obligations.

Also see *Appendix 11 – Probity Briefing Guide*

5.3.12. Post-submission (Pre-Contract) Negotiation

The pre-contract negotiation process is one which is often fraught with probity risks, see also discussion at [5.8]; but one in which frequently the Probity Practitioner is not directly engaged. Under these circumstances it becomes a constraint on the Probity Services which should be identified in the Probity Report (see *Appendix 14 – Probity Report Content Checklist*). However the Probity Practitioner should contemplate the risks and identify those in a Probity Risk Assessment and Plan.

Also referred to as post-offer negotiation, there are no predefined models for negotiation at the post-submission or pre-contract stage of procurement; however strong probity principles must apply, including fair dealing, acting in good faith, and maintaining consistency with all of the tender and evaluation processes including documents, policies, statutes, and standards. Post-offer or pre-contract negotiations are fundamental to ensuring best value for money.

For inexperienced negotiators, it is prudent to obtain robust legal advice to mitigate the risk of making any implied commitments, either absent from the contract or in binding commitments before the contract is executed.

Negotiations can include the terms and conditions, validation of all or aspects of the response to the specifications and requirements, warranty, logistics, payment terms, quality, and price, amongst others.

The key issue is to test whether any change might induce any unfair dealing in the tender or evaluation processes, and this requires good judgement.

It is not unusual that there may be need for some moderation of the requirement and related pricing for affordability to be able to enter into a successful contract. Care needs to be taken

if the negotiations are likely to substantially change the requirement(s). There is no room for ‘Dutch auctions’¹⁴¹.

The selection and negotiation process may or may not include a Best and Final Offer (BAFO) process. This is a process where the final shortlist is given a moderated statement of requirements against which to resubmit their best and final offer. It may be with one or more of the vendors shortlisted on the basis of the evaluation and selection process. It may be iterative and may include negotiating the contract terms.

In some collaborative/ relational procurement processes, e.g. Alliance contracting, Spiral Development contracting, Early Contractor Involvement (ECI), and Early Tender Involvement (ETI), it is quite likely that a shortlist of tenders will be invited to a form of BAFO which also may be iterative.

Some buyers balk at conducting any BAFO process, largely for concern that the moderated requirement might be inconsistent with the original tender requirements. This is another area for skill and good judgement, i.e. the reality or perception of an inappropriate level of inconsistency. The fundamental tests are:

- whether those who are included in the BAFO will always have been the superior offers for the BAFO requirements; and
- would the market response have been likely to have been competitively different if the BAFO requirements formed the original tender/invitation requirements?

Similarly these processes risk the potential to introduce new material that was not part of, or substantially changes the supplier’s submission. See discussion above at [5.3.9.b].

Post-submission negotiations need to be well planned, well documented, and well executed. Negotiation is a specialist skill, and failure to apply sound negotiating skills can lead not

Negotiations require a robust approach to accountability, transparency, and confidentiality.

only to not obtaining value for money, but also to a flawed procurement due to the contract being inconsistent with the procurement requirements or other processes. The Probity service provider in procurement needs to be confident that the contract entered into is, or will be consistent with the rest of the procurement.

Care needs to be taken if the tender Conditions required that price must be submitted in any particular form, e.g. particular currency, or apply specified factors, e.g. GST inclusive or exclusive. Also arithmetic errors in a price schedule should not provide scope to change the price. Clarification or verification that provides opportunities for a supplier to change, even to correct the price, or arithmetic, or GST, or price conditions, may not be permissible¹⁴².

Can I negotiate the price? This is a vexed question to some buyers, to which the generic answer is “maybe”. Also see Pricing at [5.15]. It can depend on factors including:

- what was stated in the Conditions of tender;
- what is expressed as the intentions of the buyer;
- the type of tender model such as whether the tender may not be seeking a form of pricing or otherwise seeking capability against a predetermined price or schedule of rates;
- will any changed pricing change the order of merit; or

¹⁴¹ Box and Forde, Op. cit. [5,39-40].

¹⁴² Op. Cit. *Maystar v Newmarket Town* [2009] ONCA 675.

- generally will it induce any unfair dealing, bad faith with any party, or inconsistency?

In the general form of tendering, negotiation of price is reasonable to obtain value for money, providing it can be demonstrated that the outcome of the negotiation and selection would not be different or unfair.

In seeking value for money the selection process should consider whether the price is fair, reasonable, and offers value for money in the holistic view of the tender and the response(s). See [3.3]. The preferred approach can be to undertake a BAFO. In the case where the negotiated price is high or low, it is prudent negotiate the price to confirm the relativities, and ensure clarity by both parties. Take care that, if the consequence of the price negotiation is unfair in the procurement process, or cannot demonstrate that the negotiations would not otherwise lead always to the same clear outcome, then negotiating a changed price would be unreasonable.

In ECI, Alliance, and other types of relationship type tenders, negotiations are undertaken with the Respondents selected from the tender evaluation process. These negotiations are a defined stage of the procurement. With ECI tenders, a contract to enter into negotiations is entered into with one or two selected Respondents. These negotiations include workshopping the requirements, pricing and risks, leading to the submission of a Risk Adjusted Price (RAP). Relational or Collaborative Procurement and ECI tenders are further discussed at [10.3].

5.3.13. Financial and related approvals

The conduct of procurement is an expensive activity for all parties. While a supplier submits a bid at their own risk and expense, they would expect that there is reasonable substance to the procurement, and not a frivolous exercise. Despite that the invitation to bid is an ‘invitation to treat’, Suppliers expect a buyer to act in good faith with reasonable financial resources to fund the outcome should the procurement proceed; and also that the persons who appear to be conducting the process have the authority to do so¹⁴³.

It is unreasonable for an organisation to enter into a tender, sponsorship, grants or funding application process unless an appropriate delegate had given approval based on reasonable expectation that the availability of funds exists, or there is a reasonable probability that financial or other approval will be obtained. Both in the public and private sectors, financial or operational circumstances may change, which also may impact on the continuity of a tender or similar process. While the Conditions usually include terms that the ‘Principal’ might terminate the process without liability, this is no reason to be misleading.

Within an organisation, the approval delegations for the persons or appointments to authorise a procurement or funding arrangement will be in accordance with the organisation’s procurement delegations and policies. In public sector procurement, a Chief Executive and other approvers of public expenditure must be satisfied that the proposed expenditure is an economic, efficient, and ethical use of resources in accordance with the policies of government¹⁴⁴. The procurement or similar process should not commence unless there is reasonable expectation of obtaining approval for the commitment of resources to the procurement process, and the potential incurring of expenditure. For fraud prevention, the authorisations for the subsequent expensing the incurred costs is a separate delegation.

¹⁴³ Op. cit., Makucha v Sydney Water.

¹⁴⁴ See for example CPR; and Op. cit. AS8000 HB325.; State and local governments have similar demands on a public sector CEO.

Despite this, it is not unusual that prior financial approvals are unknown or potentially inadequate to cover the costs realised from the procurement. It is important that no contractual commitments are entered into or implied until appropriate funding is secured. If the costs of a procurement might not be fairly known when the procurement process commences there is a case for staged procurement to obtain indicative costs in stage one or a market scan; or otherwise to be transparent about the funding. It is not uncommon the complex procurements conducted over extended periods require ‘Governor-in-Council’ approval for funding.

Probity service providers should review the approval arrangements:

- ensuring that they are consistent with a fair and accountable processes prior to inviting submissions;
- that there is reasonable confidence that the outcomes of the procurement can be funded; and
- that it is clear and transparent that there is the potential not to proceed.

Caution:

Any strategy to retender with a ‘price shopping’ intent is poor probity practice and may be unlawful.

The probity service provider should be confident that the appropriate financial authorisations are in place or can be obtained from the authorised delegate prior to contracting.

It is not uncommon that the cost of the best offer(s) exceeds the approved funding or budget. **The risk of this should be identified beforehand**; but in any event, a strategy needs to be in place to avoid circumstances where suppliers are not unjustifiably committing resources and cost to procurements that cannot be appropriately funded. It is unreasonable to rely on Conditions that state that ‘suppliers tender at their own cost and risk’ if there is no reasonable confidence that the procurement can proceed with reasonable funding. Any exceptions need good justification. Despite reasonable planning, circumstances may arise with public expenditure that militate against accepting the costs of the preferred tender, and the procurement is aborted until some future time, if appropriate. This is an appropriate commercial risk of tendering except if the public entity is simply ‘bid shopping’. The expensing of public funds is unsupported if it is not in the public interest.

In the public sector at times of government election(s), there are conventions which apply on the progressing of tenders, the obtaining of financial approvals, or the entering into of contracts. At these times, probity service providers need to become familiar with the ‘Caretaker Conventions’ that might apply, and ensure they are adhered to.

5.3.14. Authorisations and Delegations

Under corporate governance, both government bodies and private sector corporations have policies which designate the appointments in the organisation which have Authorisations and Delegations, and the respective financial levels. These are often referred to as a Delegate. These authorisations appoint office holders or employees to either enter into a process of contract, e.g. a procurement process, or the approval of the expensing of funds, e.g. payment approval. Some persons are authorised for both, but for sound accounting practice it is inappropriate for a person to exercise their delegation to both contract and make payments. This is for the prevention of embezzlement, fraud, theft or other misappropriation.

An Organisation’s authorisations and delegations policies may allow a delegate to sub-delegate under set rules; but the same principles of separation of delegations apply, i.e. that one person should never both authorise the contract and approve the expenditure.

The probity service provider should ensure that the procurement processes have the required financial approvals to proceed, and that the person authorising the contract has a delegation appropriate to the value of the contract.

It is the total contract value that applies to the level of delegation, even when repeat orders or contract extensions occur.

Additional financial delegation issues arise where the approval is for the extension of a contract, since the value of the extension in aggregate may exceed the previous delegation. It is the aggregate value of the extended contract which applies to the level financial authorisation.

5.3.15. Contracting

It is not uncommon that probity in a contract fails due to lack of consistency between the procurement and contracting processes, leading to failure in understanding the foundations of the contract¹⁴⁵. It also is not uncommon that important requirements of the procurement are not delivered because the contract management fails to exercise them; or that the contract does not engross all that was in the procurement and negotiated arrangements.

The contract establishes the legal basis of a supply relationship. A contract may be a purchase order, an agreement, or other form of ‘offer and consideration’ i.e. one party agrees to provide something while the other party provides the agreed return; usually payment for goods or services. The laws of contract are lengthy and complex and a specialist area of law. Probity service providers have three principal obligations in getting to the contract stage:

- a. to ensure the contract is consistent with the lead-up procurement processes, requirements, and negotiated outcomes;
- b. to ensure the validity is still current; and
- c. that reasonable consideration has been applied to how the contract will be managed.

5.3.16. Specialised procurement or technology

As discussed earlier, there are many areas of specialised procurement or technologies which prefer that a probity service provider has prior experience in the nature of the specialist areas. The probity service provider does not necessarily have to hold technical qualifications in the related areas.

While probity principles are generic, some areas present probity risks which require a higher level of experience and skills of the probity service provider. They include:

- Medical or clinical equipment or services;
- Information and Communications Technologies (ICT);
- Building and construction;
- Relational contracts/ Collaborative Procurement;
- Aviation equipment or services;
- Transport, marine, or specialist vehicles;
- Specialist machinery, equipment, engineering services, or engineering processes;
- Sponsorships;
- Grants and funding agreements;

¹⁴⁵ For example, the 2013 Queensland Health Payroll System Commission of enquiry cited significant failure between the procurement requirements for testing, what was in the Contract, and what occurred. It noted that no probity advisor was invited to advise on the risks of the inconsistencies.

- Public Private Partnerships;
- Nature conservation and environment;
- Integrated planning;
- Leasing; and
- Disposals.

Many of these have particular compliance requirements in standards, policies, and/or legislative implications; and there often are inter-relationships which all demand a higher level of consideration, attention, and accountability. Some of these specialised areas are addressed in Section 5.15.

5.3.17. Related policy issues

Particularly in public sector procurement, the probity service provider needs to be alert to special policy issues which some agencies might see as ‘road bumps’ to avoid, yet accountability requires that they be addressed. Some examples are:

- a. Quality Assurance;
- b. Workplace Health and Safety;
- c. Building and Construction codes, and engagement frameworks;
- d. Privacy/ Information Privacy;
- e. Grants and Funding Agreements;
- f. Sponsorships;
- g. Disposals;
- h. Leasing;
- i. Policy Standards for a wide range of requirements such as information security, ICT, etc;
- j. Local Industry Policy;
- k. ICT Contract standards;
- l. Small and Medium Enterprise (SME) participation;
- m. Sustainability;
- n. Indigenous employment;
- o. Ethics and Conflicts of Interest;
- p. Training and other industrial related policies; and
- q. Australian and international compliance standards.

The probity service provider should consider and seek out the relative policies and/ or standards and ensure the required compliance. Most jurisdictions will have policies relating to all or most of these areas. Likewise, private sector corporations will have policies for many of the above list.

5.3.18. Other Statutory or Regulatory issues

As well as mandated statutory compliance with requirements such as Workers Compensation, and Information Privacy; the conduct of certain tenders or procurement can require that statutory or regulatory requirements are imposed, such as:

- a. Integrated Planning Act;
- b. Environment Biodiversity and other environmental statutes;
- c. Nature and Conservation Acts & Regulations;
- d. Competition and Consumer Act and the Australian Consumer Law;
- e. Trade Agreements (national, bilateral, and multilateral);
- f. International conventions on public sector procurement¹⁴⁶.

¹⁴⁶ For example, Australia is a signatory to UN and OECD conventions relating to public sector procurement as well as other anti-corruption conventions or agreements.

To ensure accountability, the probity service provider should seek assurance to confirm that the necessary legislation is applied in procurement, and not assume that it has.

5.4. Consistency and continuity

Consistency and continuity provide important elements of fair dealing, reliability and confidence in the procurement process. Consistent procedures and evaluation processes developed in advance of the procurement offer process prevent any impression of actual or perceived discrimination, and build a reputation for ethics and fair dealing.

This is an important area of probity risk as noted in [4.2.1] and [5.2]. Areas requiring attention to consistency are at [5.3] and at [11].

Consistency and continuity is achieved by ensuring procurement:

- is conducted accountably, and in accordance with relevant policies standards, procedures, and statutory requirements;
- provides fair and reasonable access to information for all entitled parties;
- deals fairly with all parties; and
- adopts transparent and auditable procedures, evaluation processes, and decisions.

It is fostered by having well briefed staff with the capability and skills to effectively manage the often complex and competing technical and commercial issues; and a strong measure of continuity in the personnel who make up the procurement/project team and its advisers.

5.5. Confidentiality

Persons in a procurement exposed to confidential information should know or expect to know what information is confidential without the confidential information being marked ‘Confidential’¹⁴⁷. Other confidentiality issues are:

- Privacy and Information Privacy laws will impact on confidentiality;
- Freedom of Information (or related laws) will affect what information can be disclosed and when¹⁴⁸;
- Beware of ‘loose lips’ around the workplace, at social events, or when discussing confidential matters where it may be overheard;
- Have a sense of what might be Intellectual Property (IP), or seek legal advice on possible IP;
- Have a clear statement of who can access the confidential information and under what circumstances¹⁴⁹;
- Confidentiality requirements are heightened when an incumbent supplier exists;
- Confidentiality is a requirement of Codes of Conduct and Fiduciary Duty; and
- A breach of confidentiality can be misconduct or inappropriate conduct.

¹⁴⁷ Note however the NT Local Court Katherine June 2017 where Judge Greg Smith exonerated Stewart McCulloch, an NT Public Servant for breach of ‘secrecy’ in an NT Tender process as documents were not marked “Confidential”.

¹⁴⁸ The Government Procurement (Judicial Review) Act allows the release of certain information during a tender process under the CPR; also Common Law rights may see the release of confidential information under laws of discovery when litigation is undertaken.

¹⁴⁹ Data Sharing laws in jurisdictions may permit information sharing within and across Government entities. The key principle is a “Need to know”.

The confidential and secure management, handling, and storage of commercially sensitive information (vendor submissions and evaluation documents) are essential. That confidential information can include:

- The entity's information which is not for public or uncontrolled release;
- Information from bidders or potential bidders that is or is expected to be confidential; and
- The evaluation (or selection) process including the Evaluation (or Selection) Plan – note that information from the evaluation and selection process remains confidential and survives the process.

Confidentiality and probity principles are:

- **Never** disclose information which identifies as Confidential or which would reasonably be expected to be Confidential.
- **Never** provide any particular prospective vendor with timelines of a planned procurement activity;
- **Never** speak in comparative terms of any one vendor against another or others;
- **Never** indicate to a vendor that any offer/ product/ solution is more or less likely to be accepted or rejected or preferred;
- **Never** provide a vendor with, or provide any opportunity to obtain, privileged information of any kind;
- **Never** accept gifts, benefits, or solicitations of any kind;
- **Always** act ethically, objectively and impartially, and
- **Always** ensure confidential information is secure.

Confidentiality of information in private sector procurement is likewise sensitive to the requirements of integrity, ethical behaviour and fair dealing.

Attention also must be applied to the administrative handling of documents – both the procurement and evaluation documents and the bids/ responses received. It is easy for an inadvertent administrative error to occur where confidential or commercial-in-confidence information is mishandled, and a breach occurs. Administrative staff and also consultants and advisers must be made fully aware of the confidentiality and security of information requirements.

5.5.1 Communication with Suppliers

There is reasonable public expectation in government procurement, and by stakeholders and shareholders in private sector procurement, that those responsible for managing and advising within procurement processes are appropriately informed of all relevant information necessary to achieve value for money. To achieve that, effective communication with suppliers and other information resources is necessary. Also see [5.3.3, 5.3.9, and 5.3.12].

Before tenders close and during evaluation and selection, communication that provides the necessary information to relevant suppliers objectively and without bias is critical to fair dealing for all participants. Communication may take many forms (written, telephone, briefings etc.). In a procurement process, most forms of communication are possible during the procurement stages; but the process and related communications always need to be able to demonstrate that integrity has not been breached by lack of transparency, inconsistency, or unfair dealings.

Best practice applies:

- ***robust communication protocols,***
- ***detailed meeting agendas,***
- ***reliable and complete records,***
- ***authorised designated contact persons,***
- ***fair dealing and equitable information, and***
- ***appropriate attention to probity and ethics;***

as well as procedures to effectively review and assess all written communications with suppliers.

During the evaluation of offers/submissions, procurement staff may be exposed to contact with the respondents. To prevent any risk of an inadvertent ‘implied contract’ or breach of confidentiality through discussions with a respondent, careful protocols on what is communicated either explicitly or implicitly, must be applied; and all communication with a supplier regarding the procurement should be channelled through the contact person nominated in the documents. This normally would occur unless the evaluation includes respondent interviews, demonstrations, presentations or site visits, when in a controlled environment, the evaluators can question a respondent.

With the evaluation panel members, strict non-disclosure principles must be applied, and the confidentiality of the process survives the outcomes.

Clear procedures for handling communications with respondents are therefore needed for all stages of the procurement process.

For a probity guide, see ***Appendix 2 – Probity & Confidentiality Guide for Communications with Vendors.***

These issues are more poignant when an incumbent supplier exists. The incumbent will naturally endeavour to obtain information advantageous to their continued relationship; and buyers may not be either alert to leading questions or to ensure information security.

Case Studies – Confidentiality:

Case 1. A procurement was being conducted to establish a multi-user supply panel. A lead business unit was appointed to conduct the procurement. At the later stages of evaluation and selection, three suppliers were shortlisted. One of the organisations business units needed urgently to access the requirement but the supplier panel appointments and agreements were not yet in place.

It was agreed that the shortlist details could be provided to the business unit by exception under an internal confidentiality agreement. That Business Unit then engaged a reputable consulting firm to seek offers from two of the three shortlisted, the best fit to their requirements. The Consultancy received bids, and prepared a list of questions for clarification on the two offers. Inadvertently, they crossed over the lists of questions so that each bidder received his competitor's questions. This exposed commercial-in-confidence information of both bidders.

It created not only significant embarrassment, but the potential to invalidate the entire multi-user panel procurement. It was resolved by both suppliers acknowledging the sensitivities, and both entering into a non-use and non-disclosure agreement. As well, the breach had to be informed to the organisation's Board (if it was a public sector procurement, to the Minister).

Case 2. In establishing a multi-user panel arrangement for multiple low value items, only two suppliers were shortlisted, both of which the only suppliers of all items were market leaders and strong competitors. Each bidder was required to provide an itemised price list of the supply price plus quantity discounts and logistics charges. Both suppliers' pricing offers were quite different and competitive.

At the contracting stage, an administrative officer was required to send a copy of the contract for signature including the respective supplier's bid documents, as negotiated. Supplier A received his correct documents. Supplier B received his contract but it included Supplier A's pricing schedule, an inadvertent document assembly error.

Supplier B then refused to sign his contract, insisting on renegotiation of his bid, which was rejected. Supplier B also refused to sign any Non-disclosure Agreement. Supplier B was not included on the arrangement. The Buyer was obliged to make a disclosure to Supplier A.

Supplier A had suffered damages; but the scope was unquantifiable. The organisation's reputation was sorely damaged, and could never demonstrate value for money. Litigation for injunctions was taken by both suppliers; and while an injunction might have been sought by the buyer against Supplier B, the legal exposure was excessively damaging. The consequential legal costs would have well exceeded any savings by the buyer or profits by either supplier.

5.6. Security

In procurement processes, both the supplier submissions and the evaluation related information need strict attention to the security of all documents and related information. Security is another probity risk area. Important aspects of probity include the security and confidentiality of submissions, commercial-in-confidence information, the protection of intellectual property, the protection of privacy information¹⁵⁰, and the confidentiality of the evaluation documents and related information. Probity planning should address the security risks.

Submissions or responses should be held securely in a designated place (e.g. secure computer server or tender box) until the nominated deadline for close, at which they should be formally receipted or downloaded, registered, and checked for completeness and conformance prior to referral to the evaluation panel for processing. It is essential that this

¹⁵⁰ All submissions will include information which will be subject to information privacy laws.

receipt, and completeness and conformance checking be undertaken; as only the responses which are complete, and which conform to the submission Conditions must be considered ready for evaluation.

Registration should include the checking of documents to record what is actually received in order to avoid dispute about the status of the content of a submission/ response at the opening. It also should note that the lodgement requirements and other compliance, completeness, and conformance requirements have been met in accordance with the stated Conditions. The prevailing Conditions and requirements should clearly state the lodgement requirements¹⁵¹. The rules for lodgement are not only a compliance aspect of the procurement but also a security aspect.

There should be unambiguous and transparent stated requirements for copy control and access control systems, usually stated in a Business Case or Procurement Plan, or otherwise in an Evaluation/ assessment Plan; and managed throughout the procurement up to the recovery and disposal of documents, information, and tender materials in accordance with the organisation's disposal policies.

Throughout the procurement and evaluation stages, physical and electronic information security must be established and maintained. Hard copies when not being worked on should be held in secure storage. Documents (hard copies or electronic) in the possession of an individual are the responsibility of the individual. Access to secure storage should be controlled and restricted to only those who have a related role and responsibility.

- All offer and evaluation documents are to be held securely when not being worked on.*
- For document control, record Recipients of all documents issued.*
- No copies should be taken without appropriate written authority.*
- All copies are to be recorded and controlled.*
- All originals, copies and tender materials are to be recovered and accounted for at the end of the evaluation process.*
- No information on progress or short-listing should be passed outside the Evaluation Team without appropriate authority.*
- A secure working environment should be arranged where documentation is not easily viewed, conversation not easily overheard, and the room can be secured.*

5.7. Invitation documentation

The invitation to bid documentation establishes the fundamental requirements of the procurement. Once the invitation is released, the conditions of supply, the specifications, and the evaluation criteria should not be changed significantly during the course of the procurement, although they may be amended during the procurement if justified and transparent. It is necessary to test the sensitivity of any change to the fairness of the process; and that might extend even to the loss of chance to any potential bidder unfairly dissuaded by the change. A Condition clause that permits change is prudent, and without it, any change may jeopardise the procurement, particularly in open tenders. Changes to validity period were commented on at [5.3.7.e].

If there are legitimate reasons to modify the invitation documentation, any change should be authorised within the governance framework, and usually not by project managers or

¹⁵¹ Box & Forde, Op. cit. [5.33-5.35]; also see [5.3.7.a] Late Submissions

operational staff. To ensure fairness and consistency it even may be necessary to terminate the process and undertake a new procurement exercise.

During the invitation stage, any change must be notified to all potential participants. Minor changes may be foreshadowed in the Conditions. To avoid unnecessary major changes to requirements, and to be fair and competitive, the invitation request should be drafted to allow for competition in meeting buyer's requirements, i.e. functional specifications that describe the 'how' or 'what' rather than technical specifications that describe the 'which'. However, the requirements planning [5.3.4] and market analysis should effectively and fairly determine whether best value might be obtained from a competitive functional approach or invitation, against a limited source technical approach.

The underlying principle is that suppliers are entitled to submit proposals on the same basis and there should be no change in the requirements that can be perceived as favouring or disadvantaging a particular supplier or group of suppliers, unless fully justified in a Business Case or Procurement Plan.

No significant change in the nature or characteristics of the invitation/ request documents should be contemplated without first consulting the probity advisor/auditor (if appointed) and other qualified personnel for procedural and legal advice. As well, agencies may be legally exposed if they fail to follow the processes and conditions notified in a procurement activity.

5.8. Negotiation

Too frequently negotiation is trivialised in procurement, often because buyers, particularly government buyers are reticent to negotiate, particularly on price¹⁵². However negotiated outcomes are part of value for money providing they are planned and conducted in a structured way, and in good faith and fairly. Price negotiation can occur, maintaining the principle that any negotiated price will always continue to demonstrate that the particular Offer's negotiated price and its relativity to value for money will not change the ranking or merit order.

In significant procurement processes, negotiation with the selected or preferred supplier can mean more than simply agreeing on the contract terms. It should follow a well developed Negotiation Plan, and should be well documented.

*The probity advisor or auditor should review the negotiation plan and outcomes for consistency, fairness, transparency, and the logical reasons for decisions.
Assumptions should be relevant, rational, and documented.
Any constraints on the scope of service should be documented in the Probity Report.*

5.9. Performance Indicators

Frequently the statement of requirements includes Performance Indicators. Careful planning of these requirements is essential as unrealistic performance indicators may not only constrain competition but also be unfair and unenforceable, or be breached within the contract.

A performance breach under the contract is more a legal than probity issue when/ if it occurs. Should it occur, corrective action should be taken early on any breach of

¹⁵² See earlier discussion at [5.3.12].

performance indicators as failing to act immediately may constitute acceptance of different performance indicators resulting from the uncorrected behaviour of the parties.

5.10. Finalising the contract

“... A verbal contract is not worth the paper it is not written on ...” ????

This should not be relied upon as a contract might be formed according to the actions or behaviour, or implied intentions of the parties.

Whether or not a contract has been established is a legal matter; however even if a signed formal contract has not been implemented, the actions of the parties might have given rise to the establishment of a contract relationship as if a formal contract, or a Process Contract had been effected¹⁵³. Oral advice of acceptance of an Offer generally may not imply a contract has been established; but cannot in itself be relied upon to claim that no contract exists. These are matters determined by a Court, but prudent probity management may avoid the consequences.

Formal procedures for the contract approval process are required for accountability and transparency. The Conditions of the Request for Offer (or other like form of invitation to supply or submit) should specify exactly how and when the contract (or outcome) will be determined.

5.11. Briefings and debriefings

a. Industry Briefings

Briefings provide clarification and supplementary information to potential bidders, and may be held at different times during the course of procurement. A briefing also may be held during the market assessment stage of requirements development. Industry briefings are group briefings and if warranted may be iterative, or staged. In staged procurement, briefings may be initially with a market and subsequently with selected suppliers for the later stage(s). Briefings may also occur during the evaluation process with a shortlisted group; but if undertaken with individual bidders, the probity risk of inconsistency or partiality may be real or perceived.

Even with group briefings, probity risks include inconsistency of information, particularly inconsistency between what is published in publicly release, and what is stated at oral briefing. As well, all such meetings should be conducted with appropriate notice and other arrangements to enable fair and effective participation.

For a probity guide, see *Appendix 6 – Probity Issues for Industry Briefings*.

Occasionally during a tender during the ‘open’ stage before tenders close:

- suppliers may seek a ‘confidential meeting’ to present their claim of proprietary information – technology, ideas, or solutions¹⁵⁴. Alternatively,
- some organisations may believe that ‘advance information’ on a supplier’s solution is advantageous to the ultimate supplier selection, and invite ‘confidential’ meetings with suppliers.

¹⁵³ In *Dockpride v Subiaco Redevelopment Authority* [2005] WASC 211, the court found that despite the Conditions, the actions of the Subiaco Redevelopment Authority in allowing Dockpride to proceed through the tender and pre-contracting processes established a Process Contract; and that despite a contract not being executed with the successful tender, a contract was formed.

¹⁵⁴ Note Supplier conflicts of interest and the drivers, cited at [4.8.2]

These are high probity risk scenarios, yet they emerge too frequently. The Probity Practitioner must dissuade their ‘client’ from allowing these strategies citing the high risk of unfair dealing and undue influence, and to propose alternatives to dealing with these as real ‘ethical dilemmas’. Note that supplier claimed ‘intellectual property’ may be unrealistic, and pre-emptive legal advice is prudent.

b. Debriefing

Unsuccessful supplier debriefing is to an individual bidder, see also [5.3.7.g]. Normally, once the outcome of a procurement process is approved, all Respondents should be notified at the same time and be invited to request a for debrief¹⁵⁵. It may be fair and reasonable to notify unsuccessful Respondents once they are eliminated, and offer a later debriefing, particularly:

- in long and complex evaluation processes, and
- where supplier resources are significant to the selection.

At all times the project team must avoid revealing information which may be seen to compromise the commercial interests of any Respondent or stakeholder. Misleading or deceptive information given to a Respondent may result in the unsuccessful party seeking redress by way of judicial review or under the common law¹⁵⁶.

Debriefing of unsuccessful suppliers is supported in procurement in both the public and private sectors. Not only does it support competitive procurement processes and practice, but also transparency, and good faith, particularly to encourage improvement in market competition and behaviour.

Debriefing is a Condition ‘right’ only of a supplier that submits a tender. Others have no right to information other than any statutory right to information in public related tenders¹⁵⁷. Public resource efficient management expects that the offer of an unsuccessful supplier debrief falls within a reasonable timeframe where the feedback information is constructive, and timely. The principle that feedback is to improve the understanding of public sector tendering and to inform the supplier of the strengths and weaknesses of their submission, is not an invitation to provide relative ranking or competitive relationship data. Many complaints and litigation arise from information improperly provided at debrief, particularly when it is provided in writing.

For a probity guide, see *Appendix 3 – Probity Guide to Debriefing Suppliers*.

¹⁵⁵ For example, CPR [7.15]; and other jurisdictions have this as a requirement of public tendering

¹⁵⁶ Australian Consumer Law, s18; Op. Cit., Government Procurement (JR) Act

¹⁵⁷ For example through the statutory provisions of a Freedom of Information Act, or Right to Information Act or Public Interest Disclosure Act.

Probity Protocols for debriefings are:

- *The supplier can ask questions but the buyer does not have to defend the procurement, requirements, conditions, or its processes.*
- *Avoid discussing and debating the detail of the supplier's tender.*
- *Never breach the confidentiality of another's tender.*
- *The supplier should be offered debriefing and accept – it is not automatic.*
- *The content should address the strengths and weaknesses of the tender.*
- *Avoid comparisons or expressions which indicate comparison as it can be misleading.*
- *Avoid providing any 'ranking' as it is inconsistent with information to improve.*
- *A dissatisfied supplier can have access to the organisation's complaints handling processes.*
- *Avoid debating the rights or wrongs of any aspects of the tender or procurement process.*
- *Avoid written debriefs as the information can be inconsistent and/ or misleading; or*

5.12. Documentation

Good record keeping is essential for transparency, auditability, reporting, and for accountability. The outcomes of key discussions and decisions must be documented and retained in a form which allows anyone undertaking subsequent reviews of the process to clearly understand how, why, when and by whom the key decisions were made.

There are policies and regulations governing the disposal and retention of Public Records, and records apposite to a procurement process are no exception.

The same does not apply to private sector procurement records unless otherwise prescribed for taxation or financial accounting purposes; but private sector corporate policies should be part of corporate governance for audit, accountability, and transparency.

5.13. Supplier propriety

Regardless of how well the procurement process is conducted, a contract should not be awarded to a firm which has a poor reputation, or a record of illegal or unethical activity. Public sector procurement policies include this condition¹⁵⁸; and while private sector policies may or may not, good governance would generally uphold the principle.

Depending on the significance of the contract, consideration should be given to due diligence checking which should include evidence of ethical conduct of the supplier, its key staff and directors; and the industrial record and environmental consciousness of the company. Public money should not be spent on contracts with suppliers which would be considered by public opinion to be unethical or to lack reasonable integrity.

An ethical supplier should have a demonstrable code of ethics which reflects a top-down culture of commercial integrity, i.e. a trustworthy supplier

Usually corporations do not set out to be unethical suppliers, but the behaviour of individuals and their motives can breach ethics and integrity principles even to the extent of being illegal. The behaviour of suppliers, and behavioural profiling is a complex and

¹⁵⁸ For example, Op. cit CPR [6.7] and other jurisdiction policy where expensing of public funds to disreputable or questionable suppliers is inconsistent with Efficient, Effective, Economical, and Ethical procurement.

unpredictable issue; but some modelling has been done which should be important to probity service providers and procurement managers to understand better supplier behaviour.¹⁵⁹

The requirements for any probity conditions and potential vetting of respondents should be outlined in the request for tender (or like invitation document), e.g. conflict of interest disclosure, declaration of corporate integrity, confidentiality, and vendor viability checking.

In certain tendering process such as Public Private Partnerships, Alliance Contracting, ECI Contracting, other Collaborative/ Relational Contracting, and in particular construction projects, a Probity Deed also is included as an undertaking by a selected contractor for the probity of the project. Probity Deeds are referred to at [11.6]. Also see *Appendix 10 – Probity (and Process) Deed Guide*.

5.14 Reference checking

Referee checks and reference site visits have the potential to damage the integrity of the procurement process if not managed with care and attention to probity. These processes introduce potentially subjective and biased information, and create the environment for undue influence, and breach of confidentiality. Referees also might not be reasonably independent.

The purpose of conducting these activities is to collect information relevant to the evaluation and the requirement, or to validate supplier claims, and not to convey any information about the status or content of an offer. Confidentiality is a sensitive issue in these processes.

The processes applied to referee checks and reference site visits must be fair to all parties apposite to the stage of evaluation.

See *Appendix 7 – Probity Guide for Referee Checks & Reference Site Visits*.

Referee checks and reference site visits require good planning to ensure probity, effectiveness and relativity.

The approach to obtain the required information, and any associated materials must be fully relevant to the requirement being evaluated; otherwise the information collected will be potentially invalid, inconsistent, and/or unrepresentative.

5.15 Pricing¹⁶⁰

The integrity of a procurement process can be prejudiced by inadequate consideration of the pricing implications which leads to inconsistent assessment of pricing at evaluation, or in life costs, or in fair competition. Suppliers and service providers are compelled to differentiate their offers, and it is not unusual that this occurs purely in their pricing.

It is imperative that pricing becomes a headline issue in procurement planning. Pricing issues to be determined at the procurement planning stage include:

- what pricing models are traditionally used in the market and what variables might exist;

¹⁵⁹ Box & Forde, Op. cit. (Ch 5). This deals with both supplier and buyer behavioural characteristics and presents modelling of supplier behaviour. Also noted is a Jepson School of Leadership Studies report *Ethics and Moral Judgement*, 17th June 2008 which similarly profiles supplier behaviour.

¹⁶⁰ Also see Evaluation Methods Guide, Box J, 2013, <http://www.roomtorun.com.au/web/Publications.aspx>

- the variations which impact on price, including foreign and local price components, delivery, insurance, overheads, etc.;
- pricing risks;
- a price evaluation methodology which will facilitate consistent and fair evaluation;
- the Conditions (or terms) which will be required to ensure conformance and consistency in offers, and a definition of terms to ensure all supplier offers are pricing consistently, e.g. firm, fixed, variable, including/excluding GST, etc.;
- how price breakdown or visibility of the pricing components will be reflected in the response schedule(s).

Multi-stage procurement may wish to include a preliminary stage to seek indicative pricing for planning. In these cases, it is important to note that any indicative prices offered cannot be relied upon or evaluated.

Where pricing of services is influenced by professional and labour rates, skill-based rates, time, and materials, considerable variables and differentiation can occur which can make comparative evaluation difficult and inconsistent. This must be identified in the planning stage to ensure an eventual consistent comparative evaluation.

For transparency, within the invitation documents, it is prudent to explain the basis and intention of the price evaluation. In this way, all offers will be commonly aware of how you will conduct the price evaluation. Not only will you be then accountable for following your own methodology, but also will the suppliers be led to understand the essentials of conformance with your requirements.

Can you negotiate the price?

Yes, but subject to the sensitivity test: Would the preferred supplier always still be the highest rating irrespective of the price change?

Be aware of illegal uncompetitive pricing strategies such as Cover Pricing, Collusive Pricing, ‘Lay-off’ pricing, and other supplier strategies intended to reduce competition or to contrive an outcome.

Probity risks can arise from pricing issues such as:

- Bid shopping¹⁶¹,
- Correcting errors in a bid’s pricing schedule, e.g. for mathematical or GST errors¹⁶²,
- Varying the price when a material change occurs¹⁶³, and
- Incorrect price evaluation¹⁶⁴

These circumstances may be unclear as to whether or not a probity risk or breach occurs; and may require robust legal advice on the circumstances.

¹⁶¹ See *Halifax Reg’l Munic’y v Amber 2009 Nova Scotia Crt of Appeal 103* – Government is not obliged to award a contract if the pricing is considered inconsistent with public value for money.

¹⁶² See *Maystar v Newmarket Town 2009 ONCA* – the tender must substantially comply; tender price must be certain at close

¹⁶³ See *GRD Kirkfield [2003] NTCA01* - varying the price when a material change occurs amounts to an out-of-time bid

¹⁶⁴ *Ibid Trencon case where Trencon bid was incorrectly evaluated & disqualified*

In public funds expensing, whether in procurement, funding arrangements, or sponsorships, value for money is the key principle rather than the pricing, see [3.3]. Great care must therefore be taken to understand the effect of particular evaluation methodologies on loss leader/low ball pricing where the effect of price weighting or significance negates the relevance of non-price criteria in value for money evaluation¹⁶⁵.

Case Study – attempted collusion

A competitive tender for the long-term lease of a major storage facility revealed two major likely contenders and two or three minor unlikely contenders. The Project Manager of one major contender approached the other major competitor proposing a JV in which the JV would determine the lease price without effective competition. While JVs are not an uncommon approach, it is collusive if its intention is to unreasonably influence competitive pricing. The Principal was made aware of the approach and required the bidders to pre-disclose all JV intentions in a Statutory Declaration (or Probity Deed) as a new Condition.

5.16 Amending or Varying the Requirements or Process

During the procurement process, particularly during the evaluation, selection, and negotiation stages, circumstances may give rise to consideration of variation or amendment to the statement of requirements, the scope of requirements, or the documented processes. These are probity sensitive matters as they impact on issues of the Process Contract and even the credibility of what was stated in the market approach.

The key probity issues are:

- If the evaluation processes cause the requirement to vary, it may be necessary to go back to all or some Offerors; or even recall the tender.
- A variation causing a tender recall can introduce unfairness with those who did it right first time.
- Any change must be subject to a sensitivity test for fairness and consistency, e.g. with the change, would it change the ranking/ merit order in the evaluation.
- If the process causes a Supplier's response to vary, it might invalidate their submission.
- If the process varies unreasonably from what is stated in the process documents, it might breach the 'Process Contract'.
- If the process or wording is ambiguous, convoluted, unclear, or indefinite, then reasonableness, fairness, and consistency become significant issues to the ability to continue the procurement process.
- Variation to the validity date may be possible but have unexpected consequences which induce inequity. See also [5.3.7.e.]
- Truncating the requirement may be possible but care is needed to preserve reasonableness, fairness, and consistency¹⁶⁶, e.g. modified for a BAFO.

5.17 Contractors and their staff

A consequence of the machinery of government change in public service roles has seen outsourcing of many public service functions both administrative and operational¹⁶⁷.

¹⁶⁵ Evaluation Methods Guide 2013, Box J, see examples at Appendices 1 and 2.

¹⁶⁶ For example: Would the market response be different if the approach was for the truncated requirement?

¹⁶⁷ The ICAC NSW Report *Corruption and Integrity in the NSW Public sector*, December 2018 examines NSW and other jurisdictions the trends, events, and consequences.

Procurement of the outsourced services engages a principal contractor or Managing Contractor to perform the services. Similarly, NGOs will be contracted to outsource extension or alternative public sector services and functions. Frequently the principal contractor will appoint their staff or their engaged sub-contractors or partners to undertake the work either in-house or external to the Principal's facilities. These situations present probity risks, often more acute when the Contractors staff or representatives operate physically within the Principal's facilities and act on behalf of the Principal.

Due principally to the contrasting interests and objectives between the Public and private sectors [see 3.7], a Contractor or its employees or engaged subcontractors are likely to bring different integrity values to the management of public resources and interest, different understanding and disclosure requirements of conflicts of interest, and different appreciation of public sector accountability and transparency¹⁶⁸.

A contractor will usually have a confidentiality clause or deed within the contract terms; yet there may not be any direct binding fiduciary duty between the Principal and the Contractor's representatives on the job. A Contractor's representative(s) has a fiduciary duty to the Contractor/employer. Therefore, unless the Principal exercises some due diligence to also effect a fiduciary duty directly with the Principal in respect of the work being performed the Contractor's representative may not recognise their fiduciary duty to the Principal¹⁶⁹. This has some underlying conflicts of interest which must be managed. It is prudent that a Principal has an established policy and procedure for the engagement and management of Contractors and their Representatives.

With or without an established policy, the due diligence on the Principal is usually best met by establishing both a Confidentiality Deed and Agreement to comply with the Principal's Code of Conduct and other rules for ethical behaviour. These must be effected on induction of each and every contractor representative before any work commences. It is prudent also to ensure that the Contractor is fully aware of the fiduciary duties that the Principal will impose on their representatives.

While the contractor's representative(s) often will be expected to operate seamlessly within the Principal's operation, as well as the conflicting interest mentioned above, the individuals often bring complex other interests and influences which may present significant risks to a procurement process or contract. The Probity Practitioner must be alert to the potential for these to corrupt the process and/ or to expose and manage the risks. See [4.7].

6. Special Procurement Characteristics

6.1 ICT

Information and Communications Technology (ICT) procurement in both the public and private sectors brings security and technical risks and complexities, business operational sensitivities, information management sensitivities, and probity risks, just to highlight a few of the characteristics. Disputes, litigation, commissions of enquiry, and just failed contracts in Australia and overseas over ICT procurement are too common, and the related costs and losses are significant.

In an attempt to better establish confidence in ICT procurement where public money is involved, State and Commonwealth governments collectively had earlier formed a

¹⁶⁸ Ibid [p10], which includes examples

¹⁶⁹ Box and Forde, Op. cit. [4.14]; *Breen v Williams* at CLR 92, ALR 273

Government Information Technology Conditions (GITC) agreement. However currently, each jurisdiction and the Commonwealth have moved away from GITC and established their own ICT procurement and contracting protocols¹⁷⁰. Some core principles in acquisition of IT requirements are common. These include prequalification or pre-registration suppliers, and definition of particular ICT related service types. The application of ICT procurement within each jurisdiction is mandated usually under a Treasury or Finance direction. Only prequalified or pre-registered IT suppliers under the jurisdiction's ICT framework can contract with an Agency or eligible customer in the jurisdiction.

Public sector ICT procurements are significantly complex with security, technical, procurement, and probity risks, some of which are accountability and compliance risks, while others are behavioural due to the competitive nature of some suppliers. It is important that a probity service provider has a reasonable understanding of the applicable ICT procurement framework of the jurisdiction to provide appropriate and relevant probity services. Probity service providers also must recognise that these ICT frameworks have many differences across jurisdictions.

Private sector corporations also have ICT standards for their respective enterprise architectures; and have governance policies for compliance and risk management.

Also see [11.2].

6.2 Local Industry Participation

The Australian jurisdictions each have 'buy local' policies which are designed to assist local economic development and encourage local industry employment through government tendering processes and practices. Likewise the Commonwealth has a 'Buy Australia' policy. These 'local industry policies' in most jurisdictions are mandated under applicable and specific legislation, but are expected to be consistent with national and international government procurement agreements. The local industry policies in each Australian jurisdiction do vary; and the probity service provider must become familiar with the policies and implications in any jurisdiction where services are provided.

Some jurisdictions have procurement policy requirements for training of apprentices, for involvement of Small and Medium Enterprises (SME), employment of indigenous persons¹⁷¹, etc. These policies may or may not apply to particular procurements, depending on the policy and the nature of the procurement. However, where they are intended to be applied, there is certain compliance of which the probity service provider needs to be aware, and hold a responsibility to observe and advise in principle on the nature of the compliance.

6.3 Leases

Procurement planning is expected to consider the most cost-effective options for acquiring goods or services, sometimes referred to as 'lease or buy'. The only issues for the Probity Practitioner here is to ensure that the procurement planning has considered the applicable policies, and the transparency of the rationale behind the decision. Leasing may be an option, particularly with acquisitions involving assets.

¹⁷⁰ For example, MICTA/ICTA and ProcureIT (NSW), Digital Marketplace (Vic), QITC (Qld), BuyICT (Cth), ITC Procurement Framework (WA), etc

¹⁷¹ Some jurisdictions have specific preferences and/or legislation for government contracts with indigenous business

Because of the nature of risks and liabilities with leases, and that a lease is a legal document, it is a significant legal area. Leases introduce additional legal compliance and accountability requirements as leases are often involve specific licencing, and are governed by specific legislation. However the behavioural issues which emerge with leases induce probity issues.

Leasing has significant budgetary and finance implications for the public sector. It also presents asset maintenance liabilities, sureties, and warranties.

In planning to procure a lease or a lessee, or a service provider to manage the lease, an early point to establish is the type of lease to be considered:

- an operating lease, or
- a finance lease.

This is significant to which party bears or assumes the risks and benefits of ownership. In general terms, an Operating Lease is like a rental agreement; whereas a Finance Lease is like a loan; but either can apply to the acquisition of assets.

In a procurement process, some buyers want to test the optimum value for the solution by inviting both buy and lease options in the request for tender. This introduces a very complex and potential inconsistencies in the procurement as the conditions for each are significantly different. It is an ‘apples with oranges’ comparison. As well, unless a lease option/model is well defined, it is difficult to fairly and consistently compare one lease type and characteristics with another without well developed financial and accounting skills. The life cost implications in lease or buy become significant considerations.

The lease or buy option must be explored and defined in the planning for procurement. It is unwise to include the options in a Request for tender.

In the absence of reliable information for the comparison of lease v buy, a staged procurement should be undertaken.

Any lease based procurement should be clear on whether it is an operating or finance lease.

The procurement planning should identify whether a lease option is to be considered, and the type of lease. Any decision to lease must be based on the Net Present Value, and the cost/benefit assessment of any lease based tender. If insufficient information is available to decide the lease or buy option, then a staged procurement should be undertaken, which involves indicative costs of the options, and the assistance of financial specialists in the evaluation. Acquisition strategies may include the ‘Own Operate and Transfer’, or “operate and Transfer”, or some variation.

The probity service provider to any form of lease procurement must ensure that there is full transparency and accountability in these activities, as well as ethical behaviour, acting in good faith, and fair dealing.

a. Lease-out assets

In the different lease scenarios, a public organisation (e.g. Department, Agency or Local Authority) may consider leasing-out assets (e.g. public assets) rather than sale of the asset. In this case, the procurement is either of a Lessee, or for a specialist service to manage the acquisition of a lessee. In either case, the asset ownership is retained, and the lessee’s liabilities to maintain as well as operate the asset can become quite complex, particularly as they are public assets. Issues such as:

maintenance standards, responsibility for utilities and services, and meeting public expectation of social and sustainability, can become so complex as to negate the commercial value of the lease. If public assets, they always will be subject to public accountability and scrutiny, with a focus on the lessee as well as the government.

b. Resource development leases

Leases for resource development activities (mining, gas, and petroleum) are particularly sensitive due to the high value of the commercial interest, the social and environmental implications, and the related commercial sensitivities of royalties. They have been the subject of prosecution for corrupt activity by both developers and public officials. Probity service providers to these activities need solid skills and experience, and also strong resolve and tenacity.

c. Licence to Occupy

In a variation of leasing-out assets, particularly constructed facilities where an Agency or government entity ‘owns’ the asset, the outsource procurement of a private service provider or NGO to provide a service from, and operate the facility will likely also involve a Licence to Occupy type of lease arrangement. The terms and respective responsibilities of the parties are defined in the Licence to Occupy, as well as any related lease costs and operating costs. It is essential that the procurement of an outsourced service involving a Licence to Occupy includes the draft terms of the Licence as well as being definitive as to the parties division of responsibilities, liabilities, and costs to ensure equity of information, and fair dealing in the procurement and contracting processes.

6.4 Clothing Textiles and Footwear

Legacy of the Government endorsed Code of Practice for the Textile, Clothing and Footwear (TCF) industry still may exist in some jurisdictions¹⁷². Underlying the focus on this type of procurement is the attempt to control unacceptable and illegal trading and industrial practices in some TCF industries. The sensitive public issues are:

- Protection of the rights of Outworkers,
- industrial workplace requirements,
- control of illegal imports such as ‘knock-offs’ and ‘parallel importing’¹⁷³, and
- the protection of ‘brand’ intellectual property and their accredited suppliers.

Despite the change in policy, the principles of compliance with Fair Work legislation still prevail, and Probity Practitioners should observe that related procurement ensures the legislated compliance, including legislated provisions specific to employment in the TCF industry.

A Code of Practice on employment and outworker obligations for textile clothing and footwear suppliers may still be mandated in some jurisdictions.

It attempts to control improper work practices in the industry, as well as protection of brands from parallel imports.

¹⁷² The Australian Government repealed the related Code of Practice on 1 June 2014. Some State government may have residual policies. The Code of Practice is now managed by Ethical Clothing Australia under joint industry/Union arrangements, and is voluntary.

¹⁷³ ‘Knock-offs are pirate branded products infringing intellectual property, while parallel imports are imported products by unlicensed importers or sellers.

6.5 Integrated Planning

Projects and their associated procurement activities which involve the development of land, in any way, whether it is development planning or physical works, is most likely to be affected by integrated planning legislation, whether in the public or private sectors.

These projects expose the requirements for consultation, approvals, and submissions to several state and local government bodies and agencies. A consequential probity effect is that information which can be commercially sensitive to a commercial proposal may be disclosed to several parties involved in the integrated planning submission and approvals processes which are ancillary to any procurement activity.

As well, the interests of the particular agencies and local government bodies may unduly influence the processes, and may induce inappropriate transparency. It is an area where lobbyists often operate, and are sensitive areas for probity and integrity. It also is an area where individuals can benefit personally from improper use of privileged information and/or improper disclosure or breach of confidentiality.

6.6 Environment and Sustainability

Both government and private sector corporations have environmental and sustainability responsibilities, along with obligations under related standards and policies; and more robustly in the public sector. These are in response to legislative and moral responsibility for environmental protection and sustainability, much of which integrates ‘sustainability’ into a balance of economic, social, and environmental considerations¹⁷⁴. Naturally the balance of these three components will vary between and across public sector and private sector entities. The term ‘sustainability’ is often loosely expressed, very broad and difficult to agreeably situate, quantify, qualify, or define.

HINT:

Where related to a procurement or other acquisition or grants process, a probity services practitioner should ensure that relativity in application and expectation of sustainability is reasonably clear in related documentation, and evaluation.

State legislation on environmental protection applies to both the public and private sectors, and all procurement must take into consideration the impacts of the environmental protection legislation.

Commonwealth government legislation may have superior effect to the state legislation, particularly in respect of conservation and biodiversity¹⁷⁵. Environmental matters which arise in projects and procurement relating to land development and construction are particularly exposed in requirements for a project’s Environmental Impact Statement (EIS). The procurement and contracting of project construction contractors must address compliance with these statutory requirements. It is not uncommon for EIS approvals to be protracted and multi-level; hence timelines in these projects need to be significantly indicative.

These projects carry significant legal as well as probity requirements. The probity services should ensure that the integrity of the procurement processes includes reasonable consideration of the environmental and sustainability statutory requirements; however the

¹⁷⁴ Sometimes referred to as the ‘triple bottom line’.

¹⁷⁵ The *Environmental Protection and Biodiversity Conservation Act 1999* has had significant effect on several development projects in Australia

probity service provider should not be responsible for the statutory compliance, or to read and understand the statutory requirements.

In addition, the conduct of procurement and projects relating to commercial or quasi-commercial activities in conservation areas is most likely to come under legislation relating to nature and conservation, rather than procurement policy¹⁷⁶.

6.7 Cultural Heritage and Indigenous Land Use

Legislation on Native Title and Aboriginal Cultural Heritage is in effect in all jurisdictions and the Commonwealth¹⁷⁷. These complex statutory requirements have important implications for projects and related procurement, leases, and a diverse range of land and marine activities. They are particularly sensitive to public and secular interests, and media focus.

A procurement, grant, sponsorship, or similar activity associated with this legislation or legislation related to Aboriginal and Torres Strait Islander culture and interests should check the relevant legislation (State and Commonwealth) for any procedural implications as well as ‘representative requirements’, i.e. the condition which govern the legal representation of interests in the related matters; as well as any process conditions, restraints, or procedures. It is the role or responsibility of the Agency to determine and meet the related accountability requirements. Good documentation is essential.

NOTE: *The probity service practitioner should not be responsible for the related statutory compliance, and should not be required to understand and interpret the legislation; only that the Agency has appropriately considered its accountability requirements. These are matters for the legal advisers in compliance and risk, and specialised cultural area advisors.*

6.8 Medical/ Clinical

The nature and characteristics of the medical and health services industry present many complexities for probity service providers. The apparent rationale for decisions affecting procurement of health products and services and their related logistics can vary from what otherwise might be clear and defensible value for money procurement practices. The reasons are sensitively complex and will not be explored in this handbook. However, procurement within this sector is exposed to the optics of public scrutiny, politics, policy, vigorous commercial interests, industrial influence, professional positioning, and other dynamics. Procurement is often influenced by self interest, be it commercial and/or political, power, public interest, or passion. Securing value for money within these dynamics can be challenging within the spectrum of integrity and objectivity.

Local and international cases of inappropriate dealings in procurement of health products, services, technologies, and construction can be found in courts cases, political debate, investigations, inquiries, audits, and commissions. The industry is affected by significantly expensive processes and certification of products, equipment, and services which are frequently not internationally consistent. All of this is a fertile area for practices which test practice and parameters of probity and integrity reasonableness and risks, and litigation

¹⁷⁶ For example, the *Nature and Conservation Act 2006* (Qld) defines the processes for procurement activities conducted in or affecting the areas affected by the Act and Regulation.

¹⁷⁷ For example the *Native Title Act 1993* (Cth), and the related legislation of each jurisdiction; and the *Aboriginal heritage Act 1972* (WA) where similar legislation on indigenous culture and heritage exists in other jurisdictions.

caselaw is not reflective of the influences on the procurement environment. No particular case study for this handbook might be indicative of the probity spectrum that surrounds this nature of procurement.

It is an area where relationships between buyer (a broad spectrum of influences) and supplier (often multi-level), and user (research lab, clinician, medical facility, public interest, etc) are particularly virulent. There is a strong potential for bias, influence, and real and perceived conflicts of interest in this sector, more so than most others. Buyers and suppliers in this industry are more strongly connected than most other industry sectors. There are strong and generally narrow technical and professional links academically and in practice. Probity service providers in this area must be appropriately experienced to understand the industry dynamics, the influences (some of which can be obfuscated), and to be capable of determining what is fair and reasonable in procurement decisions and **managing the procurement risks**. An expressed probity opinion may well be unreasonably debated or marginalised. There is temptation for the probity practitioner to provide the answer more agreeable than most appropriately probative.

6.9 Aviation

This is a highly regulated industry, and in many cases, the related procurement is likely to be affected by strict regulatory or safety standards. It is an industry sector in which there are limited markets for certified products and standards; where engineering and trades are specialised; and where limited numbers of technical ‘expert’ consultants and advisers exist.

Compliance is critically important to the Aviation industry. As a consequence, the supply market is strongly influenced by relationships or by monopolies and oligopolies. Procurement usually is high value and risk. Objectivity and independence can be challenging.

Similar to the health and medical industry sector, there have been significant court cases of unfair or corrupt dealings, as well as high level investigations and inquiries. A probity service provider in this area should have a good appreciation of the industry characteristics and embedded relationships in order to understand the related accountabilities in being capable of determining accountability, and what is fair and reasonable.

6.10 Transport equipment and machinery

Many parts of the transport equipment and machinery industries and related supply requirements are significantly affected by regulatory control and/or standards. This is largely for safety reasons; yet it is an area which can attract illegal or corrupt practices. It also is an area which is likely to require tests and trials in proving suitability and acceptability, including the potential for new technology and innovation.

An area sometimes missed in this sector is the requirement for suitable documentation, handbooks, and training. These are areas which might attract significant input costs to a procurement, to be marginalised and added-in later. If not reasonably addressed in the requirements and specifications, it can result in additional requirements being introduced which might invalidate the process, or introduce inconsistency and unfair dealing. It also can result in contract disputes, additional unplanned costs, and significant contract variations.

The probity service provider in procurement for this sector should be experienced and adequately understand the requirements, cause, and effect of the procurement requirements, although the person does not need to be technically qualified in the industry to competently provide the services.

6.11 Disposals

The probity issues with disposals are predominantly within accountability and transparency. Public sector policy on disposals can be forgotten or ignored in the process of an acquisition, particularly where technology is an important driver. The key considerations are:

- Replaced items are still likely to be Public assets and need rational and defensible consideration, e.g. for residual value, physical accounting, and environmental impacts;
- Environmental legislation and regulations may apply;
- When the new acquisition involves replacement of existing ‘items’, e.g. disposal of old items must comply with any related disposals policies¹⁷⁸;
- Eventual disposal should be considered with the Whole-of-life cost in Value for Money, and is a necessary factor in procurement planning;
- Public Assets, including real property, can be transferred by Deed and within legal conditions of transfer;
- Disposal of Commonwealth assets (other than Real Property) are accountable under ‘proper use of resources provisions’ of legislation and procurement rules;
- Gifting of assets is a characteristic of an Australian Aid Program

Example: an Agency replaced 1500 electronic devices with a later technology device. The tender required the Contractor to remove and dispose of the old devices with related costs in the tender pricing. The contractor sold the old model devices internationally for as much as the cost of the new devices. No benefit was returned to the Agency.

6.12 Other Specialised areas

There are other specialised procurement which are addressed elsewhere in this Handbook:

- Public Private Partnerships – see [9];
- Collaborative/ Relational procurement and contracting – see [10]; and
- Building and Construction – see [8].

7. Probity Management

7.1 Probity advisers and probity auditors

For most procurement activities, appropriately trained and experienced agency procurement teams should manage probity issues effectively. Where the activity may be complex, high value, sensitive, or prescribed by policy, supplier grievances are more likely. In these cases it may be beneficial to engage an independent probity service provider, or it may be mandated in policy to do so.

Probity service providers (probity advisers and auditors) are expected to be probity specialists who provide their clients with probity assurance¹⁷⁹.

¹⁷⁸ Commonwealth Disposals Policy applies only to real property

¹⁷⁹ Op.cit. AS 8000, HB 325, [s3.1].

To support good governance, an organisation should routinely ensure it has personnel with the appropriate skills in probity risk assessment and management; and have the processes in place to ensure good procurement practice, so that probity advisers and auditors are used by exception rather than as a rule¹⁸⁰ unless prescribed by policy.

A differentiation between the functions of Probity Auditors and Probity Advisers is found in the procurement guidelines for the Commonwealth and several jurisdictions¹⁸¹. The table below, **Table 2** summarises and contrasts the differences. Likewise in AS8000 HB325¹⁸².

Adviser	Auditor
Forward looking	Backward looking
Advice contemporaneous	Audit opinion on compliance
Involvement (questionable independence) ¹⁸³	Highly independent
Anticipates and prevents lapses in probity to provide assurance	Traditional assurances services
Participation required	Audit methodology
Prepares plan	Verifies compliance with plan
Reports to Steering Committee with an escalation path	Reports to a Delegate or Sponsor

Table 2. Contrasting Probity Advisers and Probity Auditors

In order to preserve the **independence** of the role, probity advisers and probity auditors (probity service providers) should be independent of the Agency and preferably be external to Government. Their services should probity-specific and **not** be seen as:

- ☒ a substitute for expert procurement officers managing a well-planned process;
- ☒ a procurement adviser;
- ☒ a legal adviser¹⁸⁴;
- ☒ a technical adviser; or
- ☒ a business analyst.

However, when the use of external probity auditors or probity advisers is contemplated, this commitment should be made at an early stage in the procurement process. Getting it right should start at the beginning of the procurement, and not after problems are uncovered. The

¹⁸⁰ For example, see Australian Government Department of Finance, *Buying for the Australian Government guidance, procurement/procurement-policy-and-guidance/buying/accountability-and-transparency/ethics-and-probity*, July 2014

¹⁸¹ Op. cit., *Ethics, Probity and Accountability in Procurement*, (pp17, 18, 19). Similarly ICAC and the VGPB equivalent guides have mostly identical information.

¹⁸² Ibid, AS 8000, HB 325, [3.1.1].

¹⁸³ Australian National Audit Office Report 2016 on Airservices Australia OneSKY tender management.

¹⁸⁴ Op. cit. Box and Forde, [7.9]

potential for engagement of a probity advisor should also be considered in high risk procurements¹⁸⁵. See the diagram at *Figure 15* which shows how the determination of the use of probity advisers and auditors traditionally occurs.

“If you can hear the hooves, it’s likely to be a stampede”

Quoted from several sources, originator unknown.

A probity service provider needs to have a robust understanding of procurement frameworks and processes, including relevant policies, standards, and statutes. In addition, the probity service provider should have a realistic and rational understanding of business practices and government frameworks. Good knowledge of supply chains and commercial reality are a distinct advantage if not essential to effective appreciation of probity risks.

Without a reasonable understanding of human nature and ethical behaviour of both individuals and organisations, the probity service provider may fail to appreciate the dynamics ‘at play’ in trading processes and what is reasonable integrity of the processes¹⁸⁶.

The probity practitioner should not become a road-block to the procurement, but rather to identify to the client the probity risks, and options for dealing with them or avoiding them, keeping in mind that ownership of a decision and course of action remains always with the client. A probity practitioner who mostly thinks and advises negatively is often no benefit to the procurement.

Note:

Probity Practitioners need to naturally have superior judgement skills and ability.

They need to think ‘Reflectively’, and think ‘outside the box’

There is no ‘one size fits all’ approach due to the variables in:

- *The client*
- *The task & objectives*
- *The issues*
- *The behaviour & skills of people involved*
- *The related compliance*
- *Etc.*

What is the ‘right level’ of probity service is a matter of judgement, knowledge & skills

¹⁸⁵ *Ethics, Probity and Accountability in Procurement*, Op. cit. (p. 17).

¹⁸⁶ Box & Forde, Op. cit. (Ch5).

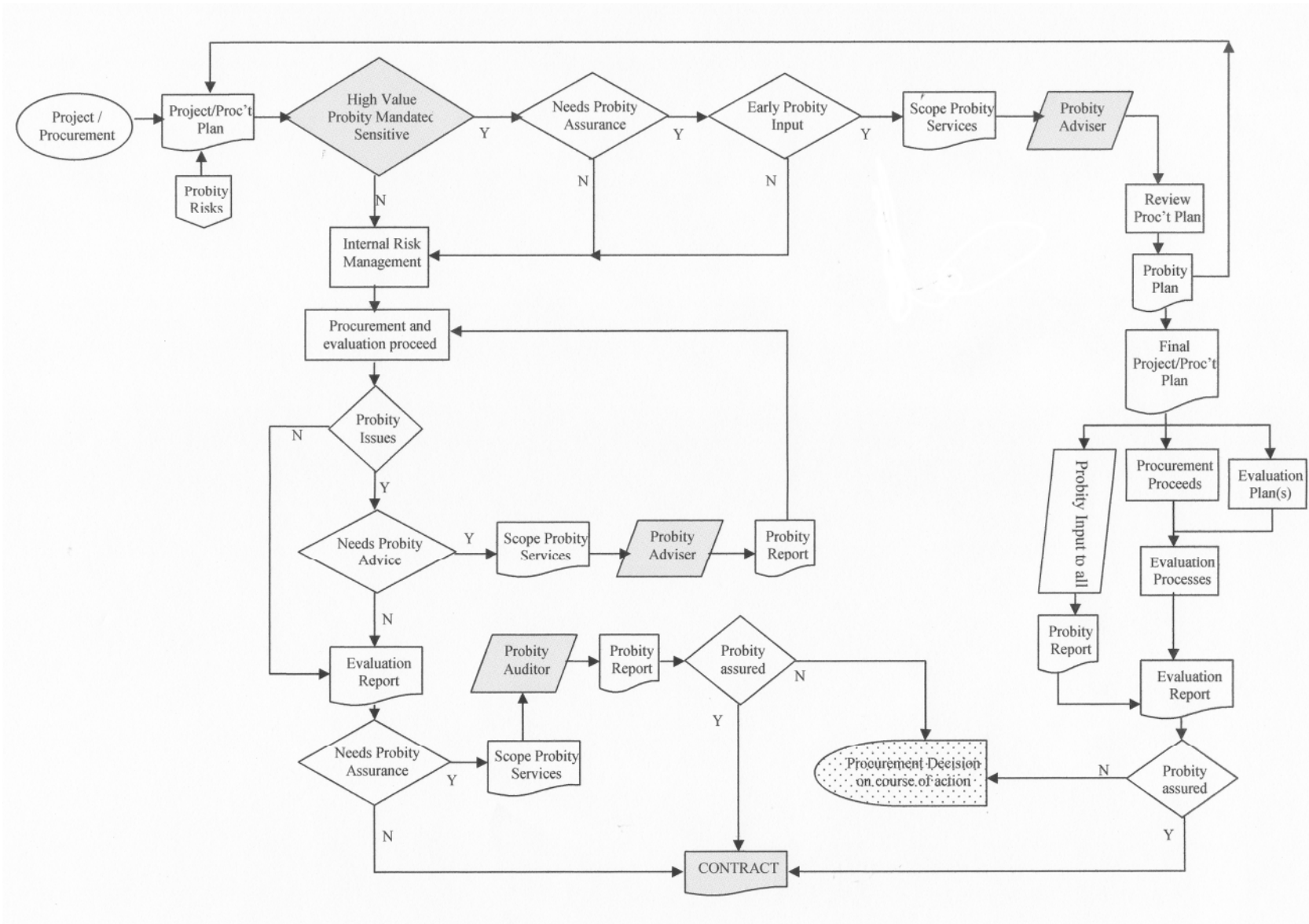


Figure 15 Diagram of traditional involvement of probity practitioners

7.2 The Probity requirement

It is important that the probity service provider has a good understanding of their client and the objectives of the procurement. Often this information can be found in the Procurement Plan or Project Plan, the Evaluation Plan, and/ or the tender documents. The probity assignment should be described in a Terms of Reference, or Scope of Work, which includes the reporting requirements and channels, and preferably an issues elevation pathway.

Some clients may define the scope of the probity services in a formal RFP/RFO, but many do not. In the latter case, the probity service provider should establish an agreed scope of the requirements at the outset. In the former case, where matters of probity risk might be missing from the scope, the probity practitioner should inform the client of the potential for probity risks, and if still excluded from the scope, these may subsequently become a constraint to the provision of the services, and be identified as a Constraint to the Services in a Probity Report. While this is uncommon, it may reflect that a Client wishes to limit the probity service inputs for whatever reason.

While an experienced probity service provider/practitioner may be able to provide a reasonable estimate of the time and resources required against a scope or work, and while these should be reasonable estimates, they should be subject to an agreed caveat that they are subject to the unforeseen probity issues that might arise. Probity service providers should avoid ‘capped hours’ arrangements unless the potential probity issues and probity risks are reasonably identifiable.

7.3 Technical experience

It is essential that a probity service provider in procurement has a good understanding of procurement. Procurement is an administrative process which itself is not a technical profession; but is not something that *colloquially* “anyone can do because everyone buys things”. Professional procurement requires layers of complex understanding of policies, accountabilities, processes, authorisations, delegations, related laws, and sometimes unpredictable supplier and buyer behaviour¹⁸⁷. It also requires training, and high standards of ethical behaviour. While a probity service provider may not necessarily need to be trained or experienced in procurement, they need to be capable of managing the associated probity responsibilities reliably and efficiently, and without having to ‘learn’ about the procurement characteristics in order to do the job.

Probity service providers should take care that they do not provide technical, legal, or financial advice, and should confine the services matters of probity, accountability, transparency, and integrity, otherwise there is a risk that the probity service provider loses their independence.

Similarly, to ensure independence, probity service providers also should take care that they provide advice and comments on procurement documents and that they do not become the author or ‘owner’ of the documents.

Where the procurement is the acquisition of technical requirements, as in specialised procurement, the probity service provider does not need the related technical qualifications to do the assignment; but should have a reasonable appreciation of the operating environment for the technical requirement, e.g. to appreciate and confirm that codes,

¹⁸⁷ Op. cit. Box and Forde, [5]

standards, or regulations might apply. It is also important to appreciate the nature and characteristics of the particular supply markets and supply chains.

Sometimes these skills can be obtained by experience or by being mentored; but the client should not be disadvantaged or prejudiced because the probity service provider needs to learn about the nature and characteristics of the procurement before the service can be efficiently provided. There is no room for ‘guessing’, ignorance, or obfuscation.

Case Study - Conformance:

An organisation was about to purchase a portable electronic device for a specialised application. Only a few suppliers were likely to exist. The organisation went to the market with an expression of interest, and received 5 bids. The requirements said that the device had to be rugged and resilient. The EOI included some testing, and four devices were selected for trials, which included a ‘waterproof test’.

One of the four device suppliers stated their device was water resistant, but not waterproof, so it could not be tested for water emersion, and subsequently was not selected for the tender stage.

The tender specifications included that the device ‘must be waterproof’. The probity adviser reviewed the tender documents and evaluation plan, and asked whether there was any standard or benchmark for ‘waterproof’. On investigation it was found that there were international standards for electrical and electronic devices to define ‘waterproof’. It clearly differentiated water resistance from waterproof and levels of water protection. The buyer determined the waterproof standard necessary for the application and use, and then specified it in the tender.

Only one tendered device was certified to meet the standard. This enabled the buyer to be confident of the technical integrity of the device, but also it avoided complaint that any other device selected might not be ‘waterproof’ as per the standards.

7.4 Probity cost benefit

Clients often see probity services as simply a cost to the procurement of demonstrating accountability and integrity, with that as its only benefit. A skilled, experienced, and capable probity service provider should demonstrate the ability to confirm or otherwise in a procurement:

- Integrity
- Accountability
- Transparency
- Ethical behaviour.

The probity service provider should have the ability to provide timely & sound judgement; and have the ability to add-value:

- through well-reasoned activities and reporting,
- through well-structured advice where appropriate.
- with innovative or alternative processes,
- to enunciate clear understanding of available alternatives or options, and associated risks,
- through transfer of probity management skills, and
- through contributing to building the probity culture in the organisation.

It is not always possible to pre-empt issues; but the probity service provider should have reasonable confidence that his/her presence or role is meaningful.

7.5 Probity Plans

Probity practitioners should consider the following issues with Probity Plans:

- a. What is the purpose of the probity plan? Is it:
 - to guide probity of the procurement; or
 - to tick off on a compliance checklist; or
 - to tell the procurement and project staff something they already should know, and if they do not, then is the probity plan the panacea; or
 - to be some form of quasi-legal defence for the procurement?
- b. Will it be timely to be useful in the procurement planning and implementation, or too late to be effectively applied and integrated?
- c. Is it to define the probity procedures for a procurement?
- d. Will it:
 - guide the accountability, transparency, integrity and ethical behaviour of the procurement;
 - identify and analyse the probity risks;
 - propose the strategies to manage the risks; and
 - assign responsibility for the management of probity issues and risks?

It is a reasonable thesis that the probity in procurement processes and decision making should be integrated seamlessly in the processes and not be an add-on¹⁸⁸. It should not attempt to replicate procedures or guidelines in other reference material; as attempting to do so runs the risk of creating inconsistencies which might legally prejudice the procurement if challenged. Probity planning should draw on reference material for its principles, but address the probity issues relating to the particular procurement in the context of risks in the related procurement. It should be timely to be included in the procurement planning and the procurement risks. It should not be seen as a different or separate set of risks or procedures.

Therefore from all of the above, the rationale and timing of a probity plan should be as expressed in point [d.] above – a probity plan, where the probity risks are complementary to and integrated into the procurement risks.

Some probity risks will be common issues, e.g. confidentiality, fair dealing, consistency, equitable information, security of information, managing conflicts of interest, managing undue influence, impartiality, accountability and transparency, and an evaluation plan that can effectively differentiate the offers with defensible reasoning. However circumstances in a particular procurement in which probity breaches might arise, and the strategies for addressing them will be specific to the procurement and its probity risks.

A comprehensive probity plan will evidence at least the following:

- a. General probity considerations including the probity environment;*
- b. The requirements for the probity services – a Probity Adviser, a Probity Auditor, or both, including the reasoning;*
- c. The probity objectives;*
- d. The probity principles;*
- e. Identification and description of the probity risks; and*
- f. Probity risk analysis and strategies, including assignment of responsibility.*

The ownership of the plan is **not** with the probity adviser, but with the client, and particularly the project/ procurement sponsor. In that context, there is no room for logos or

¹⁸⁸ AS8000 HB325, Op. cit. (s1)

brands of the Probity Service Provider’s business entity. This is essential as the probity management must be ‘top-down’ under the authority of the client organisation.

A checklist¹⁸⁹ could be used to prepare or support a probity plan. For high value or complex procurement activities, best practice would see the development of a suitable probity plan well prior to the commencement of the approach to the supply market.

HINT: The Probity Plan must clearly be ‘owned’ by the Client, not by the probity service provider.

Refer to *Appendix 9 – Probity Plans* for examples of both a detailed probity plan, and also a more simplified plan. The detailed Plan extensively relates issues, risk and responsibility. Both example Probity Plans should be used only as a guide.

7.6 Probity guides and checklists

Satisfying probity and accountability demands may not be easy given the scope of procurement activities. In addition to complying with legislation and other directives, each stage of a procurement must meet the overall objectives of impartiality, accountability and transparency while maintaining confidentiality and security. To cover every probity aspect for each of the process steps is beyond the scope of this handbook. The Appendices to this handbook go some way to cover the common areas of need for probity guidance.

Organisations also can use checklists in evaluating their “probity readiness”. For private sector corporations doing international business, such checklists can be valuable in demonstrating that acceptable procedures are implemented to mitigate against corruption¹⁹⁰.

Checklists and Probity Guides should outline the various probity checkpoints and related documentation across the various stages of:

- procurement planning,
- preparing a tender,
- the invitation to offer/tender,
- evaluation of offers/responses,
- verification and validation,
- selection / recommendation / execution,
- contracting, and
- debriefing.

Guides provide the pointers to the probity issues in a procurement process, including the probity protocols, and probity risks. The extent of the use or need for guides might depend on whether a probity plan has been developed and authorised for the project at an appropriate time for effect¹⁹¹. Probity guides also provide a physical demonstration of the awareness of the probity risks, and the probity management for specific stages in the process.

A most useful guide or checklist is that which is developed for probity briefing a procurement development team. See *Appendix 11 – Probity Briefing Guide*.

¹⁸⁹ For example, Op. Cit. *Ethics, Probity and Accountability in Procurement*, (pp. 21-24).

¹⁹⁰ For example, the *US Foreign Corrupt Practices Act*, and the *UK Bribery Act* require evidence of anti-corruption processes in any defence against claims of corruption.

¹⁹¹ Ibid, for example, where a corporation is claimed to have acted corruptly, the court is likely to seek out a Probity Plan for the project.

The types of checklists and guides useful for probity services include:

- ❑ *Probity Plan Checklist (Appendix 9);*
- ❑ *Probity Process Checklists for:*
 - *Procurement stages, or*
 - *Evaluation stages;*
- ❑ *Guide for probity briefings, e.g. to procurement teams or evaluation teams (Appendix 10),*
- ❑ *Probity guide to supplier interviews, demonstrations, workshops, and site visits (Appendix 4);*
- ❑ *Probity guide to supplier referee and reference site checks (Appendix 7);*
- ❑ *Probity guide to supplier debriefing (Appendix 3);*
- ❑ *Probity guide to industry briefings (Appendix 6);*
- ❑ *Probity guide to vendor viability checks (Appendix 5).*

7.7 Managing probity issues

During a procurement activity, matters are likely arise which have not been anticipated for procedural action within agency guidelines, plans, policies or procedures. When this occurs, the personnel involved should immediately bring it to the attention of an appropriate officer for advice and resolution. An understanding of how to recognise and cope with an ethical dilemma (Getting it right 3.12) is thus essential. If a Probity Adviser is engaged at that point, the adviser should be appropriately integrated in the procurement, and be alerted to the matter, in order to provide timely, responsive, and constructive advice.

Generally, any probity concern should be referred in the first instance to a supervisor and/or the head of the procurement team. Unless the initial concern is found to be groundless, the employee(s) or persons involved should document the issue, record who was consulted, and how the matter was resolved. Where a Probity Adviser is engaged, and provides advice on the matter, the adviser **must** clearly document the advice and its related matter for transparency and accountability.

Having documented probity policies and procedures is no assurance that all the organisation's employees and other personnel involved in procurement activities will understand or embrace them.

Awareness and commitment will come from the active promotion of probity and ethics principles, in such a way that they become an integral part of day-to-day operations and decision-making.

A Probity Adviser can enhance the probity culture by not only providing advice and reports, but also provide information and guidance which transfers probity skills and awareness to others.

7.8 Promoting a probity-orientated culture

7.8.1 Guidance & Reference Material

The development of clearly worded guidance and reference documents, the issue of supplier guidelines, and education through suitable development programs can help to achieve awareness of procurement risks and the adoption of best practices in a probity orientated culture.

Under Australian Standard AS8000, Governance, organisations should have a Code of Conduct which establishes not only a probity culture, but also a governance framework

which ensure the ‘tone at the top’ reflects the ethical behaviour and standards for the organisation¹⁹².

In the public sector, the governments at all levels in Australia provide a range of relevant resource materials, guides, and factsheets on procurement processes for probity guidance. As well, crime prevention and monitoring bodies at a state and commonwealth level offer misconduct and corruption prevention advice [3.103.103.10].

7.8.2 Culture of integrity

Best value procurement will come from an integrity-based culture that:

- supports the public sector or corporation’s Code of Conduct,
- consistently applies the organisation’s ethical principles,
- recognises the potential risks in procurement,
- applies due process and procedural fairness,
- effectively manages any probity issues,
- uses appropriate skills and resources, and
- includes ongoing education and assessment of probity principles¹⁹³.

Competent probity service providers have a key role to play in realising and promoting these outcomes.

8. Building and construction

8.1 Scope

Tenders for building and construction are usually related to one or more projects and involve physical works and/or services relating to physical works. It may include one or more of:

- physical buildings,
- design,
- engineering (several disciplines),
- earth works,
- construction trade works and services,
- architecture,
- land preparation,
- physical survey and spatial services,
- utilities (energy, water, waste),
- Quantity Survey, and/or
- Works consulting services (project management, superintendence).

Some or several of these can be consolidated, and the conduct of the project and related procurement may be in one or more stages. The project and its procurement can include or otherwise ancillary requirements (e.g. supply of fitout of a building, or supply of pumps for a pipeline).

¹⁹² Ibid, these are also requirements under the US and UK legislation to demonstrate top-down commitment to anti-corruption and ethical behaviour.

¹⁹³ Some corporations conduct initial and periodic ethics testing or training of staff. A relevant ethics questionnaire for individuals and organisations is difficult to find. One is provided by Leading Edge Management Products – lemp@ccspl.com.au

Procurement and probity services to construction require some experience and understanding of the industry, its nature and characteristics, and the specialised methods of tendering and contracting.

The industry operations are underpinned by a significant number of applicable codes, standards, regulation, policy and statutory provisions, of which the probity service provider needs to be aware. Requirements for professional and trade qualifications, registration, and certification are included. Certain government industrial policies also impact on this industry's operations and the conduct of related procurement. These industry governance requirements are significant and can be complex; and are areas where there exists potential for failure in compliance, corrupt, deceptive, or misleading behaviour, or broadly a failure in a project's procurement, and contracting. Significant dollars are at stake in this industry and its procurement, and it is highly competitive, and with other party influences and obfuscation.

In Australia and internationally, construction projects and related procurement are a significant area of disputation and litigation, the extent of which can be moderated with the engagement of competent probity services. For that reason, in the public sector, the engagement of probity services is often mandated according to established project value thresholds. Probity Plans and/or Probity Deeds can be complex with interrelated probity and legal requirements.

8.2 Documentation

The project and procurement documentation in construction can include (not exhaustive):

- Project Plan,
- Business case,
- Project approval and staged approval(s),
- Risk analysis,
- Probity Plan,
- Prequalification submission,
- Scope of work,
- Specifications with or without design drawings,
- Design Brief with or without design drawings,
- Request for Tender (or tender)
- Confidentiality Deed(s),
- Probity Deed,
- Environmental Impact Statement (EIS),
- Indigenous Land Use Agreements, and
- Contract(s).

There are several Conditions of tender (contract conditions) and building standards and codes which have been developed as Australian Standards¹⁹⁴. In some public sector jurisdictions the standards might be modified to local conditions of the respective public sector. The relevant standards and codes are usually mandated.

The application, selection, and use of the relevant standard forms of tender and contract are most likely to involve legal council, and the use of legal advisers experienced in construction tenders and contracts is well advised.

¹⁹⁴ Note that these standards change from time to time so they are not listed in this Handbook

8.3 Policies, Legislation and Codes

Within the public sector, each jurisdiction and the Commonwealth has its own legislation and policies for public works. For public and private works, all jurisdictions have agreed to a national code of tendering for building and construction, a embedded or separate related code of ethics, and a national code of practice including implementation guidelines¹⁹⁵. The national building codes also govern the application of technical standards for construction design, engineering, and works in both the public and private sectors.

8.4 Construction models

The traditional construction project requires the contractor to build the requirement, but care should be taken with the expression ‘traditional’ as it has connotations of designating the delivery model of construction contract, potentially the Design and Construct (D&C) model; whereas other models include Managing Contractor, Construct Only, or a combination of these for components of the works in major construction. Others may have other objectives such as Build and Own (BO); Build, Own, and Operate (BOO); and Build, Own, Operate, and Transfer (BOOT).

9. Public Private Partnerships

9.1 National Policy

The Public Private Partnership (PPP) is an option employed by the public sector in the privatisation and/or commercialisation in the provision and/or management of facilities or services that otherwise might be public assets or public services. All Australian jurisdictions including the Commonwealth have agreed to a National Policy¹⁹⁶ and implementation guidelines to apply to procurement of PPPs.

9.2 Probity in PPPs

The policy requires a competitive process, and due to the variables introduced through the interests in commercial options and outcomes, a high level of probity is required.

The probity issues in a PPP are found in:

- *ownership and protection of intellectual property (IP),*
- *strict confidentiality,*
- *fairness in communications,*
- *the commercial interests,*
- *related parties,*
- *potential for undue influence and interference,*
- *conflicts of interests (both real and perceived), and*
- *involvement of lobbyists.*

As described in the National Policy, PPP processes are staged, and include the requirements for the appointment of a ‘probity practitioner’, a probity plan, and probity documentation including a Conflict of Interest and Confidentiality Deed¹⁹⁷, and a Probity and Process

¹⁹⁵ The titles, contents, application, etc of these are amended from time to time.

¹⁹⁶ See the suite of documents under Infrastructure Australia, *National Public Private Partnership Policy and Guidelines*

¹⁹⁷ Ibid, Vol 2, Practitioner’s Guide, Appendix C

Deed¹⁹⁸. See [11.6] for discussion on the probity deed. The National PPP policy framework includes well developed practitioner guidelines.

9.3 Post-contract accountability

Once a PPP contract is entered into the public accountability for the asset or service usually ceases unless otherwise deemed in the contract. Usually, accountability under a PPP is under private sector governance and the apposite legislation¹⁹⁹.

10. Collaborative Procurement

Collaborative procurement²⁰⁰ has also been termed Relational Procurement in this handbook and its context should not be interpreted as procurement arrangements with supply panels or related parties, as sometimes it is referred to in offshore jurisdictions. It is the conduct of procurement and contracting using specific models which lead to a collaborative relationship between the buyer and successful supplier under contract forms and objectives other than the traditional forms of ‘hard’ contract.

10.1 Collaborative contracts²⁰¹

These are a special types of procurement models and consequential contracts, usually associated with infrastructure, construction, and/or works tenders. The models can include:

- an ‘Alliance’,
- an ‘Early Contractor Involvement’ (ECI),
- an Early Tender Involvement (ETI), or
- a Spiral Development arrangement.

These models and types of contracts require special attention to the development of the requirements and specifications, and have the potential to provide accelerated development, cost savings and other benefits to a project including minimising contract disputes.

10.2 Alliance contract procurement

Alliance contracts include a high degree of openness on all matters between the parties in order to effectively resolve issues and save time and cost while delivering quality outcomes. Alliance contracts present complex issues for both the engineering and technologies in the projects, and also for the legal relationships between the parties.

An Alliance Contract model in a project’s procurement is likely to test both subjective and objective issues, in both the statement of requirements and the offer evaluation. There may well be decisions based on judgement of the evaluators and even the probity adviser. A probity adviser associated with these projects is expected to be experienced in the types of projects and the nature of the related contracts.

Alliance contracts rely on achieving optimum value and risk sharing based on openness and transparency, including open book accounting. As well as optimum value and cost effectiveness, an objective is ‘no blame and no dispute’. The alliance should be fully

¹⁹⁸ Ibid, at [4.5] and Appendix C

¹⁹⁹ In particular, the *Corporations Act 2001*, and *Competition and Consumer Act 2010*

²⁰⁰ See suite of documents by Infrastructure Australia *National Alliance Contracting Policy and Guidelines, Guidance Note 6*

²⁰¹ Ibid; also for example of policy guidance, see Qld Government Procurement Guide, *Relational Procurement*, July 2008.

integrated, including the alliance of the contractor, the supply partners, and alliance with the buyer. Joint governance occurs with Alliance Contracts

Probity issues which arise in the procurement process are similar to those with PPPs. See discussion at [9.2]. The National Alliance Contracting Policy and Guidelines²⁰² includes substantive probity guidance.

10.3 ECI contract procurement

The Early Contractor Involvement (ECI) procurement method²⁰³ is not based on one particular model, but rather it is a procurement process. It is staged procurement which starts usually with a Request for Prequalification, leading to a shortlist of a tenderers to stage 2, a request for tender(RFT). The Stage one Prequalification deals with commercial/ financial information and capability, and usually involves articulation of demonstrated experience and financial capacity, and identification of any consortium or joint venture partners.

The RFT stage is about the tendered solution and what risks the tender is prepared to offer in their solution. From the RFT, one or a limited number of bidders are invited to enter into a contract with the Principal to develop the project costs and risks, leading to a tendered Risk Adjusted Price (RAP) by the ECI contractor(s). The ECI contractor(s) selected from the RFT is paid a fee under an ECI Contract to negotiate and workshop the detailed design and the development of the RAP. The successful ECI contractor becomes the Contractor for the project; and the governance and transparency of the project is similar to an alliance contract.

The RFT will include a pricing model which will become the basis of the negotiations and workshopping of the RAP if an RFT respondent is selected as the ECI. The pricing in the RFT may or may not use the two envelope system (credentials in one and financials in the other). In either case, the evaluation should look objectively at the RFT bidder capability and capacity, and their project risk assessment, without being influenced by the bid pricing. The evaluation should address the relationship between the bidder's risk assessment and their pricing.

The Probity issues in an ECI procurement are substantially those in a PPP; see discussion at [9.2]. The probity issues are compounded where more than one bidder is selected for the ECI contract stage and parallel or sequential negotiations are undertaken in the RAP development. With robust probity management, an ECI contract approach should realise optimum project outcomes in delivery and cost.

10.4 ETI procurement

The Early Tender Involvement (ETI) is similar to the ECI model; but does not involve the contracted negotiation of a RAP. Instead, it selects one or more of the Stage 2 tenders to negotiate a Tender Adjusted Price (TAP) based of a more defined risk apportioned structure. It appears to be more of a traditional contracting approach; but the contract relationship is more open in managing the known and emerging risks, and sharing innovation and benefits.

10.5 Market-led Proposals (MLPs) – Unsolicited Proposals

The Private Sector may directly approach Government with a commercial proposal to supply:

²⁰² Op. Cit. Infrastructure Australia, *National Alliance Contracting Policy and Guidelines*

²⁰³ Ibid at Guidance 6 *Early Contractor Involvement and Other Methods*

- an innovative product, solution, or service; or
 - infrastructure,
- to meet a real or perceived community need. These are unsolicited by Government and are market-led by a supplier or supplier collaborative in the approach to government. There is usually some commercial exclusivity embedded in the proposal.

Government will usually have a policy or guideline on managing MLP as, if successful, an MLP will result in direct sourcing and contracting. The commercial arrangements will usually include the establishment of a Process Deed (or a Probity and Process Deed) and a Project Board. Government may seek alternative arrangements following competitive procurement guidelines. There are likely to be real or perceived intellectual property implications in MLPs or Unsolicited Proposals

10.6 Spiral Development

This is a procurement model which seeks to establish a relationship between Principal and supplier to jointly develop an innovative solution and/or new technology. It usually will be a staged procurement where stage one prequalification is similar to other collaborative / relational models. The stage two form will depend significantly on the objectives and approach to solutions; and importantly the evolving intellectual property (IP). The IP is a significant matter in Spiral Development procurement models, and therefore must involve specialist legal and commercial inputs to the processes.

Case Study – Developing IP:

A Corporation determined that a high risk and high cost business process would be more profitable if it was automated. There was no other similar automation technology solution worldwide; so it would require a supplier with expertise to progressively develop the solution in commercial partnership with the corporation.

The Corporation was not in the business of developing and owning IP; but the strategic profitability of the solution necessitated that it be constrained to use by the corporation and its related commercial interests; and not available to the Corporation's competitors.

A Spiral Development approach was selected where a high degree of protection of commercial information was a focus from the outset established by legal non-disclosure agreements with every potential participant. These agreements were reinforced and consolidated as the procurement progressed.

The IP use and management was paramount and involved complex legal negotiation.

The role of the Probity Practitioner was similar to that in a PPP; where acting in good faith and fair dealing was important; and a Probity Deed with each participant was critical to the entire procurement.

11. Contracts

11.1 The Process Contract

An implied term in a procurement is the unwritten or implied process contract that has the potential for reasonable complaint if not litigation. The Process Contract has been referred to previously [5.3.7.d]. In basic terms, the buyer is reasonably expected to:

- follow the process and information published in the tender and process documentation – sometimes referred to as the ‘contractual element’ of the process contract, and
- act in good faith, and
- act fairly and consistently²⁰⁴ likewise referred to as the ‘implied terms’ of the process contract.

A complaint or action in this respect might arise during the procurement process or after the contract has been awarded. Therefore consistency between the procurement, contract award, and contract management processes is important. Most Probity Auditors and Advisers do not get to observe whether the contract and contract management truly reflect consistency unless an audit is called on after the award of the contract. In these cases, the probity auditor should examine the Process Contract issues as well as issues of accountability, ethics, fair dealing, confidentiality, and conflicts of interest.

11.2 Technology related contracts

Procurement and contracting for technology broadly can be particularly difficult to ensure consistency due to the complexity of comparative technologies and their alignment with a specification. As well, issues such as software versions and upgrades in ICT tenders[6.1] can not only be inconsistent with a procurement, but also be difficult to rationalise; e.g. whether the software version and solution that was offered is a different ‘product’ to what is supplied due to the extent of change to the design and source code. Likewise, the model of a device that is offered, evaluated, and selected should be the model that is supplied unless clearly provided for in the tender conditions, or through a transparent evaluation outcome. Even then, a replacement model might be significantly different to what was specified.

In these circumstances, the probity service provider should not act as a technical adviser or ‘expert’ in the related technology, and while the probity service provider might identify the possibility for inconsistency, they might also advise to recommend an expert opinion on the issues before drawing any conclusions.

Problems can arise in transitioning between suppliers and/or technologies. Transitioning-out and transitioning-in are important issues that should be considered and addressed in procurement planning; but are often forgotten. Probity Practitioners are unable to advise on transitioning, but are able to observe and comment on whether the considerations have been undertaken and are transparent.

***Transitioning in and out need to be considered
and transparent in procurement planning***

²⁰⁴ The expectation are found for example in *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1

11.3 Disputes

Contract terms would normally include provision for dispute resolution, which apply to the contracting parties. However a party to a tender who is not a party to a contract might take other action if aggrieved. Most organisations which take responsibility for statutory compliance and for quality management will have a Complaints Handling and Management process²⁰⁵. Government entities at all levels are required to have an effective Complaints

Early and appropriate involvement of a Probity Service Practitioner in significant or sensitive procurement can contribute significantly to dispute prevention

Management (or Handling) Policy and process that conforms to the Australian Standard.

Government tenders are usually subject to Freedom of Information or Right to Information legislation which makes provision for complainants to obtain information which might substantiate or otherwise the disputed issues or complaint. Whether or not an aggrieved party follows a Complaints Handling process, it may choose to take a social or political approach, (to the Media or a Minister), or litigation seeking redress or remedy.

It should be noted that Purchase Orders are contracts; but often fail to contain appropriate Conditions. In these cases, an aggrieved party might have limited recourse to seek remedy, to take action to redress, or to successfully litigate.

Whether in the Public or Private Sectors, the provisions for redress or remedy, or handling and settling complaints or disputes that might follow from any procurement or contracting process, are well founded in both legal and administrative processes and Contract Law.

Some individuals are inappropriately motivated to deal expediently with complaints or disenchantment by conveying whatever information to the complainant that they request. This expediency is high risk for breach of confidentiality or unfair dealing. It is important that due process is followed in the complaints handling processes.

11.4 Liquidated Damages

These are legal, not Probity matters. ‘Liquidated damages’ basically is damages which are fixed or can be calculated. Un-liquidated damages are damages which require estimation.

Case Study – Understanding Performance Indicators:

A request for tender included the terms and conditions. The conditions of contract included a reference to “Liquidated Damages” and stated “Clause intentionally deleted”. The specification included requirements for key performance indicators and service levels which included that the contractor was required to meet a performance target in 85% of events.

Failure to meet the performance levels would be reason to be in dispute with the contractor. With no stated damages, the only punitive recourse if the contractor continued to fail the performance levels might be termination.

If the organisation suffered damage as a consequence of the failure of the contractor to perform there was no provision for a claim to be pursued. If the contract had to be terminated, the organisation would suffer costs in re-establishing a new supply arrangement.

If the performance level failure(s) were inconsequential then the requirement for the 85% level may have been overstated, and other contractor performance indicators may be more useful.

²⁰⁵ Australian Standard, ISO 10002:2004, *Complaints Handling*

This is a complex area of commercial law and not an area for unqualified probity advice. However it is not unusual to find that ‘boilerplate’ template Conditions of Contract are used in a tender, and the conditions relating to liquidated damages may be unreasonable or unrealistic, or may in fact be ‘Un-liquidated’ in its application, or be a penalty rather than damages. They also may unreasonably discourage participation of small to medium enterprises (SME). Therefore it is prudent to ensure that the buyer obtains legal advice on the reasonableness and realism of these types of conditions as it might apply to the tender specifications and contract requirements.

11.5 Contract variations

A procurement process should take great care that the outcome is not based on the award of any contract variation(s) or terms not provided for in the tender, otherwise it has potential to introduce inconsistency, and potentially be inequitable. Variations usually are seen to have an impact on the tender pricing, and are a method used by some suppliers to disguise their real tender solutions, costs, and delivery.

Even derogations or departures by an offer to the tender conditions of contract are contract variations which may or may not have an impact on a tender price; and have the potential to induce an inconsistency or inequity in a tender.

Where a panel of suppliers is established, care must be taken to ensure that fair competitive pricing and price escalation provisions are provided within the panel arrangements, and that particular suppliers do not use uncommon variations to corrupt the equity across the panel.

Where a tender provides for offers to submit any proposed derogations to the tender conditions of submission or contract, great care must be taken to assess fully the cost and non-cost implications in order to preserve the equity of an evaluation and selection, and the integrity of the procurement and contracting processes.

11.6 Probity Deeds

Probity Deeds are most commonly used in construction tender processes, and in particular in PPPs, Alliances, ECIs, and other collaborative or relational contract procurement. The deed also can be referred to as a “Probity and Process Deed”; and can be used in any complex procurement where the Principal wishes to bind a respondent to the tender to a set of probity requirements.

While input to the development of a probity deed should involve the probity service provider (or probity practitioner), this is a legal document which should be developed importantly by the project lawyer(s). The probity service provider should endorse the deed prior to use. As well as the information below, see *Appendix 10 – Probity (and Process) Deed Guide* for an indicative list of contents.

Example contents of a probity deed:

- *Probity (e.g. Fair dealing, anti-competitive behaviour, Code of Conduct, accountability, transparency);*
- *Confidentiality of information (principles, protocols, disclosure control, Freedom of Information, Public Interest disclosure, Commercial information protection, communication protocols, need-to-know principles, Intellectual Property protection);*
- *Conflicts of Interest (real and apprehended bias, what might constitute a conflict in specific circumstances, disclosure requirements, avoidance requirements, management of conflicts, related parties interests and disclosure);*
- *Related Parties (requirements for 'Chinese walls', Holding company disclosures, Governance and board structures, 'sister' and related companies, disclosure requirements, identification of persons/parties, authority for undertakings, right to disqualify a related party);*
- *Disclosure requirements (including at procurement stages, disclosure of risks);*
- *Security (Physical, electronic, information, stages of particular requirements).*

12. Other Arrangements

12.1 Grants and Funding Agreements²⁰⁶

The definition of these is in the Glossary. Grants are most commonly identified with Public Sector processes where the public sector engages a commercial entity or not-for-profit supplier or Non-Government Organisation (NGO) to provide services which are often beyond the resources of the public sector to deliver. Grants also can be used by the public sector to stimulate an outcome in the community.

Grant policies vary across jurisdictions and levels of government and can be more or less prescriptive. Policies may set both rules and guidelines; but because public money is involved, there is a requirement for a high degree of accountability and transparency. Value for money remains as the key principle; supported by the requirement for reasonable auditability of the processes and outcomes.

Grants can occur also across levels of government to provide the financial resources to the most appropriate level of public sector. These are usually in a form of partnership agreement; but the demands for probity should not be ameliorated by the partnership arrangement. The management of grants in jurisdictions may be centralised, partially centralised, or wholly or partially devolved.

Grant processes may be invited competitively, or awarded directly in the public interest or to achieve administrative objectives.

Probity Practitioners must have a full understanding of the applicable policies, as the ethics may be common across jurisdictions, but the accountability and transparency rules and guidelines often vary. They also should be familiar with jurisdictional guidelines issued by local integrity or anti-corruption authorities.

²⁰⁶ Also see [3.10] for grant management in some jurisdictions

12.2 Sponsorships

Sponsorships occur in both the public and private sectors; but this handbook will comment primarily on the public sector since the probity and accountability relates to public money, resources, and assets. Sponsorships in the public sector can arise in many different circumstances and for many different reasons²⁰⁷. They can be with or without consideration/payment. The fundamental consideration therefore is whether the rationale for a sponsorship is robust and defensible, is in the public interest, and the accountability is supported by reasonable transparency to support auditability.

Sponsorships are sometimes sought by the community and commercial interests. Otherwise they are initiated by the public sector to cost-shift from the public to the private sector. In these environments are latent self-interest and partiality. Probity Practitioners need to be both commercially aware and inquisitive to appropriately manage the probity services which might arise, whether in an advisory or audit capacity²⁰⁸.

The public accountability for sponsorship arrangements is found in related policy and guidelines which vary across jurisdictions. Integrity and anti-corruption bodies in the public sector often issue guidelines for the probity and accountability of sponsorships. Probity Practitioners will need a good understanding of the applicable policies, rules and guidelines.

²⁰⁷ For example, Op. Cit. Commonwealth Dept. of Finance *Accepting Sponsorship Guide*

²⁰⁸ Also see Gifts, Benefits and Hospitality [4.10]

Additional useful references

- Box and Forde, *Probity and Managing Procurement: how to avoid corrupting the process*, Lexis Nexis Butterworth, November 2007
- Box J, *Evaluation Methods Guide*, July 2013, <http://www.roomtorun.com.au/Publications.aspx>
- <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/>, Australian Government procurement Policy, guidance, and rules
- <http://www.finance.gov.au/agict/> , Australian Government ICT
- <http://www.finance.gov.au/resource-management/grants/> , Australian Government Grants rules and guidelines
- <https://www.apsc.gov.au/aps-values-and-code-conduct-practice>, APS Values and Code of Conduct
- <https://www.apsc.gov.au/ethics-advisory-service> , APS Ethics Advisory Service
- Australian Government, *Selling to the Australian Government, A Guide for Business*, https://www.finance.gov.au/sites/default/files/A_guide_for_business_15.pdf
- UN Convention on Contracts for the international Sale of Goods, 2010
<https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>
- <https://www.accc.gov.au/business/anti-competitive-behaviour/cartels> , ACCC *Cartel Conduct*
- *Privacy Act* 1988, Australian Privacy Principles, <https://www.oaic.gov.au/privacy-law/privacy-act/>
- OECD Convention on Combating Bribery of Foreign Public Officials, <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>
- OECD guidelines for member countries – Public Procurement
<http://www.oecd.org/gov/public-procurement/>

Glossary

Accountability

Accountability is the obligation to account for the way particular duties or processes have been performed or activities conducted in compliance with all statutory requirements, policies, directives, codes, standards, and other governance and performance statements of requirement.

Agency

Refers to a unit of government. In each jurisdiction the description on an Agency is in the relevant Public Sector statute defining the public sector.

Agreement

Means the documented acknowledgement of obligations, duties, rights, and expectations when two or more people or entities reach an understanding about a particular matter. An Agreement has the force of a contract with broader understandings that might not be normally expressed in a contract; however an Agreement is usually legally binding unless the parties agree otherwise, or as otherwise determined by a judicial process.

Bid-rigging (see also Collusion and Price Fixing)

Is unethical and illegal collaboration between suppliers to corrupt market competition. It is where one or more bidders agree not to submit an offer, or two or more bidders agree to submit prearranged offers, to avoid price competition or contrive the outcome.

Bid Shopping

Also called ‘**Price Shopping**’, is the practice of trading-off one bidder’s price against another to obtain lower prices. It also can be forcing down prices by disclosing offer prices. Also see Reverse Auctions. These practices can present procurement and probity risks.

Bid Peddling

It is the practice of an unsuccessful supplier to coerce the buyer to replace the successful bidder with the unsuccessful supplier by reducing his price to below that of the selected supplier.

Bracket Creep

Also can be equated to Order Splitting. This is the practice of awarding repetitive orders to the same supplier for the same or related requirements, often uncontested; and often to avoid a value threshold requiring a competitive market approach. This is not only anticompetitive but also breaches accountability rules of delegations.

Contract Management

Ensuring that the contracted Goods and/or Services are delivered in accordance with the Specifications and the terms of the Contract, ensuring that all associated risks are identified and managed, and managing the effectiveness of communication between all parties; and payments made are consistent with performance and the contract terms.

Contractor

Contractor means a person, corporation or other entity and includes its officers, employees and sub-contractors (and their officers and employees) of the Contractor, who has entered into a Contract or Agreement with the buying entity.

Corruption

Means the abuse of a power of function to acquire a personal benefit either directly or indirectly, not necessarily a financial benefit; or to improperly or unduly influence a process through partiality or bias. More recently the term has extended to include a breach of accountability or transparency, and has become synonymous with Probity and Integrity.

Debriefing

Means providing feedback to an unsuccessful Respondent on why their offer was unsuccessful. The feedback should address the strengths and weakness of the response against the evaluation criteria.

Dutch Auction

Is the practice of the buyer proactively driving down the tender price usually by disclosure of the best bid price, seeking an offer of a cheaper price. There may or may not be a reserve or floor price which is the target price. This is similar to Price/Bid Shopping except that the Buyer is the entity driving down the price as opposed to the market.

Ethics

Ethics are the moral principles or behavioural values that guide individuals in all aspects of personal and work behaviour. Ethical behaviour encompasses the concepts of honesty, integrity, probity, diligence, fairness, trust and respect. Ethical behaviour includes avoiding conflicts of interest, and not making improper use of an individual's position. In contemporary terms, ethics is a component of Probity but not entirely.

Evaluation (Also known as Assessment)

It is the process that leads to selection of the most appropriate Response based on the comparative merits of each response against defined evaluation/selection criteria.

Evaluation is the process of assessing best value for money..

Evaluation Criteria (also called Selection Criteria or Assessment Criteria)

This means the predetermined criteria used to differentiate the nature and characteristics of the Responses; and a basis for assessing the responses or measuring value for money.

Expressions of Interest (EOI) (Also see Request for Information)

An invitation to prospective Respondents typically used to develop a shortlist of qualified Respondents who might then be eligible to receive a subsequent request for tender. Requests for Expressions of Interest are generally conducted where the requirements or options for solutions may not be fully defined; or where the market for supply might be uncertain; or to prequalify suppliers for a subsequent stage of procurement.

Fraud

This is intentional false representation with an intention to deceive. This includes the intentional falsification of documents or provision of false, misrepresentative, or misleading information intending to deceive.

Grants

A Grant is a generic term for forms of funding arrangements, both in the public and private sectors. Grants, subsidies, and funding arrangements are made in various circumstances by governments to support community activities which achieve goals and objectives consistent with government policy. Grants may be discretionary, or participatory, and may be covered by legislation or regulation, or be subject to Cabinet, ministerial or administrative discretion.

They range from highly structured arrangements to relatively informal. Grants are the use and application of public money and must to meet financial accountability.

Integrity

Means unbroken completeness or totality with nothing wanting, the state of being unimpaired; soundness, uprightness, honesty, and sincerity

Invitation to treat

This means an invitation by one party (the buyer) to one or more other parties to submit a response to the invitation. An invitation to treat is not intending that the buyer is bound to or proceed with any particular response. While this does not form a binding commercial arrangement with any party, it carries an implied 'Process Contract' to act fairly and in good faith.

Joint Venture

This is an arrangement between two or more legal entities or individuals which is created for a specific purpose or time. It may initially be a partnering arrangement; but if it progresses to a stage requiring a legally binding commitment of the joint venture, it would be necessarily a partnership. A contract should not be entered into with a non-legal joint venture.

Negotiation

This means, in a general context, a bargaining process between two or more parties. In the procurement or grants context, it is the process of discussion between the buyer and one or more suppliers, arriving at an agreement on the scope of the supply requirement and the conditions of a contract.

Offer (also referred to as Tender, Bid and Response)

This means a submission by a Respondent (or tenderer or bidder) in response to an Invitation, including any subsequent modification if the invitation.

Offeror (also referred to as Respondent, Tenderer or Bidder)

This is a person, business, corporation or other entity, and where the context so requires includes its officers and employees, who submits a response to an invitation to treat. An Offeror may also make an unsolicited offer.

Order Splitting (also see Bracket Creep)

This is the practice of unbundling requirements or limiting the procurement value to that which is below a delegation of procurement process threshold. Contracts are usually awarded to one supplier repetitively without seeking competitive bids. This is a prohibited practice; but one which is often used in procurement for expediency.

Partnering

This usually is a non-binding arrangements between two or more individuals or entities to create synergistic solutions in mutual benefit. It would not normally create a legal entity.

Partnership

This usually has a legal connotation of some binding arrangement between two or more parties. It normally would create a legal entity or arrangement. It is often misused in a non-binding relationship.

Price Fixing (also see Collusion and Bid Rigging)

This is an agreement among competing Respondents to sell at the same price, or an agreed price, or otherwise manipulation of the market.

Probity

This is the evidence of ethical behaviour in a particular process. The term probity means integrity, uprightness and honesty. For public sector employees and agencies, maintaining probity involves more than simply avoiding corrupt or dishonest conduct. It involves applying public sector values such as impartiality, accountability and transparency. Ensuring probity in public sector activities is part of every public official's duty to adopt processes, practices and behaviour that enhance and promote public sector values and interests.

Probity Service

This means the services relating to probity audits, probity advice, and probity opinions. The provider of professional probity services is also referred to as a probity practitioner.

Procurement

It is the entire process by which all classes of resources (human, material, facilities and services) are obtained generally, or for a specific project or requirement. This generally includes the functions of: planning, market analysis, design, accountability compliance, specifications, invitation for interest/ quote/ proposal/ tender/prequalification, supplier evaluation and selection, financing, negotiation, contract administration, contract management, disposals and other related functions.

Procurement Policy or Framework

This means the policy or instructions or directives which apply to all procurement relating to goods, services, or construction.

Proposal

In the context of procurement of goods and services or construction, a proposal is the response to a Request for Proposal. The proposal is not a fixed or firm offer, and subject to negotiation or refinement. A response is a proposal, and is less likely to be binding than a tender or offer. In procurement, the outcome of a Request for Proposal would normally require a subsequent action to establish a binding response on which to contract.

Redress

Refers to a range of responses re actions that might be provided to a complainant in a dispute where the complainant claims to have been adversely affected by a decision or action within the procurement process. The redress response is addressed within the complaints handling process, or the disputes resolution process, or under common or administrative laws.

Request for Information

A request issued to the marketplace to gather information as to what might be available in relation to an buyer's requirements. It is often a stage one of a multi-stage procurement process. Also see 'Expressions of Interest'.

Request for Offer (RFO)

Also referred to as Invitation to Offer (ITO) or Request for Tender (RFT). It is an invitation to suppliers in which the terms, conditions, and specifications are described.

Request For Proposal (RFP) (also see Proposal)

An invitation to prospective suppliers in which the detailed requirements of supply may not

be stated at the time and responses are therefore non-binding. An RFP may or may not include a second stage of procurement or a Best and Final Offer process; but an RFP at some stage of progressed must lead to a binding response.

Reverse Auction

Similar to Bid Shopping or Price Shopping but conducted on the internet, where the buyer posts an invitation to bid, and suppliers post their price against the stated requirement. Bidders see the lowest price and may offer a lower price. It can occur iteratively until the time to bid expires. The lowest bid will usually win, unless they fail to contract on the stated requirements. In some jurisdictions this may be illegal or constrained to value limits or parameters. It is more suited for defined performance manufactured items than for construction. Reverse Auctions can present many procurement and probity risks if not managed prudently.

Specification

This is the detailed statement of needs. It defines what the buyer wishes to purchase and, consequently, what the Contractor is intended to provide.

Sponsorship

The scope of sponsorship arrangements is broad – they may range from event support, to supply of goods or services often with gratuitous intent and without payment of consideration to organisations. It also may include the receipt by an organisation of funding provided by the sponsor to support activities, such as: research, training, promotion, and compliance processes; i.e. the Sponsor buys the sponsorship in payment of money or in kind to an organisation.

Supplier

This is the term has a definition in law. Also see '*Vendor*'.

Tender

Includes the bid, offer, response or submission in respect of an invitation to supply products, equipment or and/services.

Terms and Conditions

This is generally applied to the rules under which all responses in a procurement process must be submitted. It also can refer to the rules applying in a Contract.

Transparency

This is the evidence and auditability of accountability. It provides the defensibility for actions and decisions which led to an outcome.

Value for Money

The holistic consideration of all things relevant to whole of life costs whether directly or indirectly related to the monetary consideration of procurement.

Vendor (also referred to as Supplier)

A Vendor is a supplier or a product or service and may or may not be a Respondent to a procurement.

Appendix 1 – Probity Protocols for Industry Functions, Conferences, & Seminars

Before a Corporate representative or Public Officer attends an industry function, conference, or seminar where they may be exposed to influence of suppliers or contractors, they should consider probity and confidentiality issues to which they may be exposed.

This is more likely where the corporate representative or Public Officer is either a decision-maker or has some influence in the selection of a product, service or technology from the related industry.

Industry individuals in marketing and sales have well-developed skills in both soliciting intelligence from corporate representatives or Public Officers, and in influencing those individuals towards a vendor, product, service, or technology.

Corporate representatives or Public Officers attending industry functions, seminars, or conferences usually do so for professional development, for commercial intelligence collection, and for commercial relationship building related to professional or corporate interests.

Confidentiality Principles:

To observe requirements for safeguarding the confidentiality of commercially sensitive information, staff should:-

- Never reveal or discuss any aspects of any nature of a procurement or contracting activity with any supplier; or
- Never speak in comparative terms of any one supplier against another or others;
- Never informally indicate to a supplier that an offer is likely to be accepted or rejected, either on the basis of what is demonstrated or presented, or on any technology principles, or
- Never provide any opportunity for a supplier to see privileged information of any kind.

Remember that all commercial information other than what is in the public domain is likely to be Confidential.

Probity Protocols:

- The Individual should **act objectively and impartially.**
- The Individual should always **act in the best fiduciary interests of the organisation.**
- Ensure you are fully aware of your organisation's **Code of Conduct.**

- **Protect commercial information** including any proposals, investigations, intentions, and processes that are not ‘public’ information and which may be relevant to their organisation’s operations or interests.
- Where hospitality is provided, **avoid the potential for being influenced by alcohol.**
- Use the environment to **obtain information rather than provide it.**
- **Do not disclose information** on the stage of any requirement development, procurement or evaluation or contract; or on any organisational strategy.
- **Avoid being isolated individually** by a vendor.
- **Avoid the potential for lack of corroboration** of actions, information, or findings. (i.e. try to have a reliable ‘witness’)
- **Avoid being exposed to vendor pressure** or questioning.
- **Revisit your conflicts of interest.** Understand your organisation’s Conflict of Interest Policy, and what constitutes a real, potential or perceived conflict of interest. Ensure you preserve your ability to act impartially and objectively.
- **Refrain from any interest in the shares or shareholding,** trust or other form benefit from the commercial activities of a supplier that is or could be a supplier to your organisation.
- **Avoid accepting gifts or benefits.** If unavoidable, the receipt must be consistent with the organisation’s Code of Conduct.
- Ensure there is **reasonable disclosure of the event,** who attended, and what was provided.
- Any hospitality should be within the formal arrangements for the event, and **no exceptional hospitality treatment** provided.
- Always **deal objectively and impartially towards competing suppliers** with industry hospitality and events.
- **Advise suppliers that solicitations or offers of influence may prejudice their relationships** with your organisation. Refer to the Code of Conduct.
- **Do not respond to any overtures or solicitations,** but document and disclose them.
- **Report any ‘offer of employment’.**

Appendix 2 – Probity & Confidentiality Guide for Communications with Vendors

The Agency and the Government have a responsibility to be fully informed on the nature and characteristics of the products and vendors it may need to meet its potential objectives. To achieve that, it is necessary to communicate with vendors.

A public officer or representative should consider probity and confidentiality issues to which he or she may be exposed in the process of communicating with vendors. Where the public officer/representative is either a decision-maker or has some influence in the selection of a product, service, or technology, the risk of a probity breach is heightened.

While dealing with the development of a procurement, or evaluation of offers, through their daily responsibilities, a person also might have exposure to a vendor which also is or may be a bidder. Then once a procurement is underway, strict communications channels need to be established to control the fairness and equity in the information flow.

Public officers/representatives need to be aware that:

Industry individuals in marketing and sales have well-developed skills in both soliciting intelligence from public officers/representatives, and influencing them towards a particular product, service, or technology.

The probity in dealing with vendors becomes more acute when the public officer is involved in, or potentially involved in a procurement development, process, or decision. However all public officers/representatives have a responsibility to protect confidential information.

*The key principle is to **always act objectively, ethically, and equitably.***

Confidentiality Principles:

- Public officers/representatives should:-
 - **Never** provide any prospective vendor with timelines of a planned procurement activity unless that is publicly provided to all prospective vendors; or
 - **Never** speak in comparative terms of any one vendor against another or others; or
 - **Never** indicate to a vendor that any offer/ product/ solution is more or less likely to be accepted or rejected or preferred, or
 - **Never** provide a vendor with, or provide any opportunity to obtain, privileged information of any kind, or
 - **Never** accept gifts, benefits, or solicitations of any kind; and
 - **Always** act ethically, objectively and impartially.
- Note that all procurement information other than what is in the public domain is Confidential.
- Have one person or a strictly limited number designated to communicate with vendors when the procurement is underway (the Contact Officer).

Probity Protocols:

- A Public Officer or Contractor acting for the Crown must **act objectively and impartially**.
- The Public Officer must **be in control** of the flow of information.
- Information must be **provided equitably** across vendors.
- **Protect the confidential information** including any proposals, investigations, intentions, and processes that are not in the public domain and which may be relevant to the Agency's operations or interests.
- When seeking information, **act to obtain information rather than to provide it**. The process should be 'one-way', with the vendor supplying information on their product or service or technology.
- **Do not disclose any information** on the stage(s) of any requirement development, procurement or evaluation, or procurement decision or contract.
- **Avoid being isolated individually** by a vendor.
- **Avoid the potential for lack of corroboration** of actions, information, or findings. (i.e. try to have a reliable 'witness')
- **Avoid being exposed to vendor pressure, influence, or questioning**.
- **Avoid any conflicts of interest**. Understand what constitutes a real, potential or perceived conflict of interest.
- **Refrain from any interest in the shares or shareholding**, trust or other form benefit from the commercial activities of a vendor that is or could be a supplier to your agency, and which may impact on the impartiality or objectivity of your responsibilities.
- **No gifts or benefits of any kind** can be accepted. If unavoidable, the declare it under the Agency Gifts policy and Code of Conduct.
- **Avoid allowing a vendor to provide individual hospitality**. Avoid any situation where a vendor might pay for your hospitality, accommodation, meals, or travel. Informal hospitality (lunch, etc) can and or should be avoided. Otherwise, record and disclose the circumstances to the Agency Management. Always act objectively and impartially towards competing vendors.
- **Advise Vendors that solicitations or offers may prejudice their relationships with the Agency**. Refer to the Agency's Code of Conduct and Gifts Policy, and Government guidelines on Ethics and Probity in Procurement (irrespective of whether you are a public officer or a contractor).
- **Do not respond to any overture or solicitation**, but document it and disclose it to Agency senior management.
- **Do not respond to any 'bonus' offers** from a vendor but document it and disclose it to Agency management.
- **Report any 'offer of employment'** to the Agency management. Your rights to employment aren't restricted, but you have fiduciary responsibilities to your employer.
- During the procurement, **only the authorised Contact Officer(s) should communicate with the vendors** with information approved for communication.

In presentations/ demonstrations/ interviews/ site visits, **plan for a structured process** to manage the probity risks (see *Appendix 1*).

Appendix 3 – Probity Guide to Debriefing Suppliers

The conduct of feedback or debrief to unsuccessful offers in a procurement process can prejudice integrity of the procurement if not managed with care and attention to probity.

Most public companies and government organisations provide feedback to a vendor, whether successful or unsuccessful; but mostly it is the unsuccessful vendor which seeks or can benefit from feedback. It is in the buyer's interest to encourage competition and act in good faith with the suppliers, which have gone to some time, trouble, and expense to tender.

Protocols:

The protocols of Post-tender debrief are:

- Maintain **confidentiality** of the procurement processes and competing tender's information;
- Advise vendors on the **strengths and weaknesses** of their offer and performance;
- Tell them the **name of the successful tender(s)** if it is not already public information;
- **Never speak in comparative terms**; and
- Debrief is **only for vendors who submit a tender**, whether complying, timely or otherwise.

Principles:

1. The conduct of vendor debriefs is to assist vendors to:
 - improve their competitiveness;
 - better understand the organisation's procurement processes; and
 - be transparent about the 'winner', but
 - **not to defend 'why' or 'how'**.
2. Debriefs support the principles of transparency and accountability.
3. It is **not** a forum to defend why the procurement was conducted the way it was; nor to defend the procurement content, requirements, conditions, or formats.
4. The Vendor can ask questions, but you may decline to answer the question(s)
5. You should not defend the processes or outcomes, and you must never breach the above protocols.
6. Keep a file record – minutes and copies of documents used in debrief.
7. A Vendor's right to any other information of the buyer's organisation is vested only in common law rights; or with Government, the relevant freedom of information legislation.
8. Avoid written debriefs as it may be misused against the interests of the corporation.

Guidelines:

To support these protocols and principles:

- The **Buyer must be in control** of all aspects.
- **At the start, explain the purpose of the debrief** (Principles 1 to 5 above).
- The Buyer **may decline to answer any question** and refer the vendor to the organisation's Complaints Management processes.
- The vendor entitled to attend debrief is **that which submits an offer**, including a consortium, but not attended by sub-contractors or supply chain parties to the vendor.
- Have **prepared notes only on the vendor's offer and evaluation** prepared for the interview.
- **Do not provide comparative information where a vendor rated** against other vendors.
- **Do not have information on any other vendor**, such as the evaluation report or worksheets, able to be seen by the recipient of the debrief.
- **Do not go through a vendor's offer in detail**. Restrict information to strengths and weaknesses.
- **Not all vendors are satisfied**; but attempt to leave the vendor feeling that debrief had some benefit.
- **It is not necessary to have a Probity Adviser/auditor or your legal adviser present** unless the situation is sensitive or you have concerns over the vendor's reaction.

Appendix 4 – Probity Guide for Interviews, Presentations, and Demonstrations

During a tender process, before the commencement of supplier demonstrations, presentations or interviews, the Principal's personnel should consider probity and confidentiality issues which should apply or may arise.

Confidentiality Principles:

To observe requirements for safeguarding the confidentiality of commercially sensitive information:-

- **Never** reveal or discuss any aspects of any nature of one Supplier's tender with any other supplier; or
- **Never** speak in comparative terms of any one supplier against another or others;
- **Never** informally indicate to a supplier that its tender is likely to be accepted or rejected, either on the basis of what is demonstrated or presented, or on any preceding elements of evaluation, or
- **Never** provide any opportunity for a supplier to see evaluation sheets of any kind.

Remember that all tendered documentation and evaluation information is Confidential.

Probity Protocols:

The principles of presentations and demonstrations are to:

- **Confirm** or validate information provided in the Supplier's tender and any successive Clarification questions;
- **Clarify** the functional, technical, process, and management issues in a tender as it relates to the specification in the Request for tender (RFT) documents; and
- **Establish** the Supplier's functional, technical, process, and management performance relative to the RFT.

To achieve these outcomes:

- **The Principal must be in control** of all aspects, and **Chair the process**.
- **Conduct an equitable process by a structured approach**. Develop and apply a pre-planned structure to the presentations and/ or demonstrations.
- **Clarification, amplification, and confirmation will differ** from supplier to supplier in respect of a response, but should not result in the supplier changing the substance of the response.
- **Avoid gathering any new information outside of scope** of what was requested in the invitation documents. The time to canvas new information was before the Invitation was issued, not during evaluation.
- **If additional information is essential to differentiate submissions, seek it from all Tenders** at interview and make it part of their response. This must be managed with great care to avoid inequity and to preserve integrity of the total procurement process.
- **Set aside new information** which emerges and is **not part of the clarification** or confirmation process. There are issues of equity, confidentiality, and any intellectual property associated with the new information if it becomes used. New Information should only be used to differentiate between closely competing submissions.

- **Ensure the supplier understands your expectations and intentions from the ‘meeting’.** Advise each Supplier in writing of the purpose and limitations of the presentation or Interview; e.g. the purpose may be only to ask questions; or to allow the Supplier to present their solution; or to both present and interview; or to present only a designated part of their Offer.
- If more than one Supplier is invited to present/ interview, **ensure the selection order is impartial, and that the notice given allows equal advance time** to each affected supplier.
- Aim to ensure that **all suppliers have the same opportunity** to address the requirements of the ‘meeting’. This usually requires equal reasonable time allocated to each Supplier to present the required information.
- **Suppliers should be evaluated under the same criteria**, although the nature of clarifications may vary.
- **Questions to the Supplier should be tailored to the clarification required.** There is no equity or requirement for fair dealing to ask all Suppliers the same question(s) unless the question applies to all.
- **Confine suppliers to the stated objectives**, and stick to the developed agenda.
- **Confine suppliers** to the time allotted.
- Structure questions to suppliers for fairness - **act impartially**.
- Structure the process to **collect information, not to convey information**. The process should be have the supplier supplying the information on their Offer, and Principal’s staff seeking information without providing new information.
- Principal’s representatives should **avoid being isolated individually** by a supplier, and **avoid the potential for lack of corroboration** of actions, information, or findings; and also to avoid exposing an individual to supplier pressure or questioning.
- **Revisit the conflicts of interest disclosures of all the Principal’s representatives participating.** Refrain from any material interest with the Supplier, or other form benefit from the commercial activities of a supplier.
- **No gifts, benefits, favours, or inducements** should be accepted.
- **Never allow the supplier to provide any hospitality.** Any necessary catering is to be provided by the Principal, should be kept to a basic level, and be equitable if more than one supplier is demonstrating.
- At the outset, **advise Suppliers that solicitations or inducements may prejudice their submission.** Refer to the relevant tender Conditions if they exist.
- **Do not respond to any overtures or solicitations**, but document them and report them as possible impropriety.
- **Do not respond to any ‘bonus’ deals** from suppliers but document them and report them as possible impropriety.
- **Protect the confidentiality and security** of the evaluation and assessment documentation and your notes.
- **Information the Supplier provides should become part of their submission.**
- **Restrict Suppliers to the details of their submission and the scope** during any closing address/ summation.
- **Take minutes of the meeting** as official records of the proceedings.
- **If the proceedings are to be recorded, it must apply to all Suppliers.** Ensure the Supplier and all parties present understand that it will be recorded and become part of the official records. If there is any objection to the recording, then either the recording cannot proceed or the objecting party(ies) cannot participate.

Appendix 5 – Vendor Due Diligence Information

1. Essential Due Diligence

- a. Is the Vendor is an entity **controlled from an offshore jurisdiction**?
- b. Are there any identifiable **prospects of merger or acquisition** (takeover) by or of the Vendor?
- c. Have any of the Directors , key partners, or Key Officials:
 - i. Been **bankrupt**, or accused or convicted of **business related offences**?
 - ii. Are known to have been subject of any **non-compliance with Corporations law or Consumer laws** in the last 5 years or pending?
 - iii. Have been subject to **any offences/charges** whether or not prosecuted successfully under the Criminal Code?
- d. Is the Vendor's **safety record** incident free, if not what are the circumstances?
- e. Is the Vendor's **industrial relations** record without incident, if not what are the circumstances?
- f. Provide details of all **industrial issues** that has been lodged with or investigated by any industrial commission, workplace regulator, or anti-discrimination regulatory body involving the entity, its parent, trust, or subsidiary.
- g. Which of the **key staff** of the Vendor are critical to the contract; and what is the level of surety of continuity of those staff?
- h. What **training and professional development** framework does the vendor have to ensure training, certification, and qualifications of the key personnel to current professional standards and technologies?
- i. What **supply chain** vendors of the Vendor are critical to the solution and hence the success of the contract? Provide details of what related contractual arrangements are in place with these supply chain partners.
- j. Does the Vendor have **Compliance and Risk Management** Policies in place which comply to the AS/NZS standards for both Compliance and Risk Management? Provide details of the systems, procedures and processes used to comply with legislative requirements, including trade practices, privacy and environmental legislation. (*Evidence of their processes comply*)
- k. Are there any identifiable contracts with the Vendor with the last 5 years which have had **early termination**?
- l. Is the Vendor in **any current contract dispute**? Provide details of any contract disputes involving the company which have been unresolved to date, or if resolved, was as a result of a court order, arbitration, or alternative dispute resolution process, irrespective of the determination.
- m. Are there any **insurance claims** against the company?
- n. Can the vendor provide **the last 3 Company Annual Financial Reports**? (*An appropriately skilled person needs to analyse these returns*).
- o. Does the Vendor have an **internal audit** unit, and to whom does it report?
- p. What is the Vendor's projected **financial position and forecast growth** for the next 5 years?
- q. Is a **Dun & Bradstreet Company Report** obtained and analysed for business risk?
- r. Are you aware of **any conflicts of interest** which may result from entering into a contract with you?
- s. Does the Vendor apply **Modern Slavery principles** and comply with any legislation?
- t. Does the Vendor have reasonable **environmental management and sustainability policies** in place and in practice?
- u. What **level of debt** (Financial Charges) are held against the Vendor or a parent company underwriting the financing?
- v. Is the vendor likely to be **more than 40% financially dependent on this contract** for its financial viability?
- w. Is the vendor **more than 40% dependent on any one customer** or other contract?

2. Company Profiling

- a. Obtain a complete profile of the vendor - specifically provide evidence under each of the following headings: *(some of the information may already be in tender response schedules)*
- ⇒ full name and ABN of the vendor (Vendor) company; *(the offering legal entity)*
 - ⇒ strengths and experience in this industry; *(only of the offering entity, not the parent or subsidiaries. Also see comments below in b. on other contracts.)*
 - ⇒ financial risk and stability; *(This can be a subjective point).*
 - *(The financial stability should be assessed by someone with the appropriate skills.*
 - *Use the analysis of more than one recent financial report of **the Vendor's business** (not a related entity), which should come from the tender responses, or otherwise obtained from the ASIC for Australian reporting companies.*
 - *If the Vendor is a proprietary company, it may not have lodged their financials with ASIC. Despite harmonised international financial reporting standards on companies, it requires a professional assessment of the financial reports to ensure that the reports are directly relevant to the offering entity, that entity is not exposed to financial impacts of a parent, trust, or subsidiary.*
 - *The financials of a non-Australian entity need to be comparatively and equitably assessed against local entities.)*
 - ⇒ dependency on overseas related companies; *(there may be legal risk or continuity risk if controlled by an offshore corporation)*
 - ⇒ company strategic direction locally and, where relevant, overseas; *(could be found in a company annual report, otherwise does the vendor have a corporate plan or Quality manual)*
 - ⇒ key partners; *(Directors and key personnel of the offering entity)*
 - ⇒ depth of local base in terms of resources, skills, etc, and whether the staff numbers have increased or decreased over the last 3 years. *(relative to capacity to provide support)*
 - ⇒ support resources and/or arrangements, *(either internal or within the vendor's supply chain)*
 - ⇒ details of any recognised awards; *(of the offering entity)* and
 - ⇒ local and international organisation structure and size. *(if not already answered)*
- b. Obtain any clauses of the draft Contract/ Agreement that the Vendor is likely to find unacceptable or seeks departures/ derogation, and the nature of commercial or technical risk of any changes, and any induced inequity in the tender process. *(If subject to Information Technology Conditions, this should be dealt with in the government IT form of contract if public sector IT, and you should have asked in the Request for Tender for any proposed departures from that contract form. You and your legal and technical advisers will need to understand the implications of each variation, including careful consideration for cost and equity.)*
- c. Seek answers to the questions in 1 above: *(mandatory questions)*
- d. You may ask for information on some of the above questions about the entity from the referees nominated by the Vendor. However that does not prevent you from doing your own investigations of the clients of the offering entity, particularly those not nominated as referees, and those using the vendor in contracts of a similar size and nature to yours. *(Do not be put off of doing this as it is sound commercial 'caveat emptor' if you can obtain objective responses. It requires skill to educate and assess the responses, but the information can be very valuable. Therefore you may consider asking the entity for a list of all clients of the entity over say the last 3 years and the indicative nature and value of the contracts with those companies.)*

Appendix 6 – Probity Issues for Industry Briefings

The Agency has a public responsibility to be fully informed on the nature and characteristics of the products and vendors it may need to meet its potential objectives. To achieve that, it is necessary to communicate with vendors.

Industry individuals in marketing and sales have well-developed skills in both soliciting intelligence from government representatives, and influencing those persons towards a particular product, service, or technology.

The probity in dealing with vendors becomes more acute when the public officer is involved in, or potentially involved in a procurement process, including Industry Briefings.

The key principle is to **always act objectively, ethically, and equitably.**

Protocols:

The Protocols for this sort of industry briefing are:

- It is wise to have one person as **Chair to control and conduct** the session.
- Remember to cover the **Administrative/safety issues** (evacuation, restrooms, any refreshments & timings, etc).
- All Industry Attendees should register on an **attendance registration sheet** with name, role, and organisation. You should have a registration sheet at the forum.
- At the outset, all attendees are reminded that they should **register their attendance.**
- The list of **attendees is NOT circulated**, i.e. if any attendee wants the list of who else attended, it is NOT provided. This is for Privacy Act reasons.
- Attendees can be told that Offerors of a compliant offer may seek **the names of the successful offer(s)** as part of debriefing. The list of who tenders or obtains the tender document is not available.
- The presentation of information (or rather the information itself) should be **consistent with the Request for Tender (RFT)** specifications.
- The Presentation can cover either or both the **technical specification and/or the process.** Cover what you want to emphasize.
- Normally the presentation, **is posted onto e-Tender as an addendum** (so take care with what you put on slides).
- Questions from the attendees and related answers (**Q&A**) **are recorded as a meeting record.** You may record it electronically but if you intend to do so, for Privacy reasons, you should determine that no attendee objects. Normally you have someone who records the Q&As. The question time can be left to the end (normal) or questions taken during the process. Decide which, & tell attendees at the start.
- The **identity of any person asking a question is not a requirement.**
- **You may decline to answer any question;** but rather advise that the answer will be posted on eTender.

- While answers may be provided in the forum, you should advise that **the official answer will be circulated** on eTender or notified to all who obtain the tender.
- The **originator of any question will not be identified** when the answer is circulated, either at the forum or subsequently.
- If an **attendee asks a question other than during the open forum**, they should be advised to put the question in writing as per the clarification instructions. Don't give an answer to the question.
- **Avoid being isolated** by any prospective vendor before or after the briefing.
- **You may (but don't have to) identify your organisation's attendees present and their roles**, but you should emphasise in any case that during the tender open period, **clarification and communication must only be in accordance with the RFT Conditions and the contact named in the RFT**. Any other contact may prejudice the Offeror for reasons of the necessity to maintain public confidence in the integrity of the tender process.
- If in attendance, it is **prudent to identify the Probity Adviser** and the rights of an Offeror to contact the probity adviser on any concerns about probity and fairness.
- You should **comment on the evaluation process; but only on what is already in the RFT**. Any questions about the evaluation process are answered by saying that you can only comment on what is in the RFT.
- You should **emphasise the importance of compliance with lodgement, place, and time** as per the RFT. Emphasise not to be late.
- You should **emphasize the need for offers to comply with mandatory requirements**, and ensure completeness. Non-complying or late offers may not be considered when complying timely offers are received.
- Note that any alternative offer must meet the outcomes as per the specifications, and be complete and conforming. **Alternative offers might not be considered where there are other suitable compliant offers received**.
- Emphasize that **Offers are to be submitted in accordance with the requirements of the RFT**, otherwise they are may not be considered.

Appendix 7 – Probity Guide for Referee Checks & Reference Site Visits

The conduct of reference/referee checks and/ or reference site visits conducted as part of a tender evaluation process, if not managed with care and attention to probity, can prejudice integrity of a procurement process.

Protocols:

The principles of reference and/ or reference site checks are to:

- Establish the **independence** of the reference;
- Maintain **confidentiality**;
- Ensure **relevance and relativity**; and
- **Obtain information**, not provide it.

Principles:

9. Referee checks and reference site visits require good planning to ensure probity and effective processes. The conduct of these activities is to:
 - collect information relevant to the evaluation of an offer and the requirement;
 - verify a vendor's claims; and
 - verify the integrity of a vendor through the opinions a third party.
10. Confidentiality is a sensitive issue in these processes.
11. The information sought and obtained must be fully relevant to the requirement being evaluated; otherwise the information collected will be potentially invalid.
12. Referee checks would not normally attract a significant value or weighting in an evaluation scoring methodology, but may be used to moderate scores or values determined through other evaluation methods, provided the information is objective.

Guidelines:

To support these protocols:

- The **Principal's representative must be in control** of all aspects.
- Establish that the Referee **will cooperate** with the process.
- Establish that the Referee **is appropriately independent**, i.e. they are not a subsidiary or aligned partner of the subject vendor.
- Establish the nature of the **product environment** with the Referee to ensure its relevance to the requirement and environment. Do not proceed if the Referee is not relevant.
- Have a **structured questionnaire** prepared for the interview.
- **Do not discuss your requirements unless it is necessary** to establish relativity to the referee.
- **Do not discuss specific comparison with your other tenders** under evaluation; but you can pursue Referee's opinions on broad comparison with competitor products.
- **Do not allow the Referee to question** your process or progress.
- **Do not disclose the relative positioning** of any tender in the evaluation process.
- Always **record responses** in writing.
- It is important to question the **positive and negative features** of the product/service.

Appendix 8 – Conflicts of Interest Concise Guide

1. **Conflicts of Interest** relate to the circumstances where person is, or is perceived to be, unable to act objectively, fairly, and impartially in respect of the interests and/or activities of the entity they have a legal obligation represent, e.g. their employer or under a contractual relationship. It includes individual (or group) interests that are not in the best fiduciary interests of that entity.
2. All Conflicts of Interest require **disclosure**.
3. The **determination** of whether a conflict of interest exists **does not rest with the individual** ; but the objective test of a conflict of interest is the opinion of a reasonable independent third party reasonably informed of the available facts.
4. Either **pecuniary or non-pecuniary interests** can manifest a conflict. The conflicted person could be the individual, a relative, close associate, or an active social relationship.
5. Conflicts have three possibilities:
 - A **real Conflict of Interest** exists where the person, irrespective of personal benefit from the particular interest, has personal interests which are inconsistent with their role and responsibilities. It extends also to a relative or close associate of the person, where the person should be reasonably aware of the conflict.
 - A **perceived Conflict of Interest** can exist where another party or parties reasonably perceive, or would have the potential to perceive the objectivity of a person, or their relationships, or an association conflicts with the persons roles or responsibilities. Perceived conflicts of interest can be pervasive.
 - A **potential Conflict of Interest** exists where, from the conduct of a person’s role or responsibilities, they may consequentially or subsequently be exposed to a real or perceived conflicted interest.
6. Some examples are:
 - Bias, i.e. applying subjective opinion based on preference or prejudice to unduly influence an outcome more favorable to the individual or influenced by the person’s associations. The reasonable ‘apprehension of bias’ is an apprehension of a conflict of interest.
 - Offering or accepting gifts or benefits or an influential relationship from a supplier or prospective supplier.
 - Undue Influence, i.e. acting to advance the interests of a supplier (or other party), e.g. skewing an evaluation.
 - Self-dealing, i.e. using an official position to secure a preferential arrangement in which the person (or relative or associate) has a pecuniary or other material interest.
 - Nepotism, i.e. contracts which are designed to benefit a relative or close friend, or an associate.
 - Secret commissions, i.e. accepting or offering any undisclosed payment in any form with intent to influence a particular outcome, e.g. development approvals, permits, or contracts. This could be by direct association, or through associated parties.
 - Misusing an organisation’s assets or information - using confidential ‘inside’ information for advancement of personal interests or motivations.
 - Moonlighting or other conflicting secondary employment, e.g. setting up a business, providing commercial services, or taking another job that has conflicting commitments, or which may have related business dealings.
 - Post-separation employment, e.g. misusing the person’s role to seek employment with a supplier; or to misuse acquired information in a competing business.
 - Commercial relationships – such as sitting on a panel for product selection while also providing technical or commercial services to a participating supplier.
 - Equity interests – holding a significant interest (equity, e.g. investments) in any company bidding for a contract in which the individual has a role in the evaluation or selection process.
7. A Conflict of Interest may or may not be manageable, depending on:
 - the individual’s ability to act impartially and objectively,
 - the ability to mitigate, remove or ameliorate the conflict of interest, or
 - the organisation’s ability to maintain integrity or credibility of the outcome.
8. Even an interest which is manageable may not meet the Objective Test in the public interest: ***“What would an independent fair-minded person reasonably conclude?”***

Appendix 9 – Probity Plans

Below are two forms of example Probity Plans: a detailed Probity Risk Assessment and Plan, and a simplified generic Probity Plan. Both are indicative formats only and will vary according to the procurement, its complexity, and its probity risks.

Probity Risk Assessment and Plan

Introduction

The Project has appointed an External Probity Adviser to:

- Overview the probity of the processes;
- Identify the probity risks associated with the project;
- Advise on management of probity and accountability risks;
- Advise on management of real or perceived probity issues as they arise during the related processes;
- Report on the probity and equity of the processes; and
- Address any issues of probity and accountability that might arise or as considered by the project Steering Committee.

This document identifies the probity and accountability risks and the related strategies and actions to manage them.

The project will progress in (number if applicable) principal stages: (list stages)

The requirements for the procurement are detailed in (*Procurement Plan*). This has led to a decision to undertake a (public/restricted) competitive procurement process.

Probity Risk Identification

In understanding this plan, Section 2 is the identification of the probity risks; and Section 3 takes the individual risks from section 2. The substance of the plan is in Section 3. Despite these identified risks and strategies, the potential always exists for unprecedented probity risks or alternate strategies emerging. Therefore this plan may be dynamic, and is not necessarily conclusive or definitive.

The probity risks (PR) associated with the project and related procurement are:

Probity Risk	Identified Risk
PR1	Communicate with the supply market in an open and equitable manner in the development of the requirement;
PR2	Ensure a sound basis for the selection of the procurement process through an adequate knowledge of the supply market competitiveness and capacity;
PR3	Ensure the requirement specification is structured to obtain competition from the supply base;
PR4	The scope of the requirements in the ITO must be able to be effectively evaluated with a methodology that is equitable and can differentiate between the offers and the offered components; and with an evaluation team that has the appropriate numbers, and is credible, skilled and experienced.
PR5	Ensure a high level of consistency between the tender, the evaluation plan, and the evaluation, and consistency in dealing with vendors and processes ;
PR6	Without effective communications , probity can be prejudiced , particularly: <ul style="list-style-type: none"> • breach of confidentiality either accidental or intentional; • untimely release of information; • unauthorised release of information; • breach of security of commercial-in-confidence documents; or • incorrect, incomplete, inconsistent, or misleading information released.
PR7	Local ‘Politics’ may destabilise the integrity of the process.
PR8	Influence on the project or procurement might be applied by individuals and/ or vendors.

PR9	Interests exist or emerge with associated parties which conflict or influence their impartiality and objectivity or equity of the process and outcomes.
PR10	Due Diligence conducted on the preferred supplier should ensure commercial risks are considered.
PR11	The contract negotiated is inconsistent with the ITO statement of requirements, the market response, or the preferred vendor's response, reflecting unethical dealings with vendors within in the stated intention, and in the resulting services.
PR12	The provision for contract variations in the conditions of contract do not preserve value for money or are unable to be equitable evaluated.
PR13	The stated vendor performance indicators are unrealistic.
PR14	Accountability and transparency of the ITO and evaluation processes are inadequate.
PR15	Other Party/other Agency interests unduly influence the project or its implementation.
PR16	Competence of a third party Contractor/ consultant and/ or subcontractor services, including assessments, or reports which are flawed.
PR17	Policy Parameters are not fully tested.
PR18	Confidentiality of sensitive information is breached.
PR19	Community and/ or technical consultation/ engagement is incomplete.

Risk Analysis and Strategies

PR1 – Communications with the Market.

Care should be taken to consider probity and confidentiality issues in the process of communicating with vendors. The risks are more significant when incumbent supplier(s) have a real or perceived advantage through their dealings with the Agency, or their natural understanding of the inherent requirements. Where the buyer's representative is either a decision-maker or has some influence in the selection of a product, service, or technology, the risk of a probity breach is heightened. While dealing with the development of a procurement, or evaluation of offers, through their daily responsibilities, a person also might have exposure to a vendor which also is or may be a bidder, whether or not they are an incumbent supplier. The probity in dealing with vendors becomes more acute when the person is involved in, or potentially involved in a procurement development, process, or decision. However all persons have a responsibility to protect confidential information, and also to preserve the equity and fairness of information provided to suppliers.

Persons communicating with prospective vendors in the market should apply the related strategies.

Related Strategies:

Never provide any prospective vendor with timelines of a planned procurement activity.

Never speak in comparative terms of any one vendor against another or others.

Never indicate to a vendor that any offer/ product/ solution is more or less likely to be accepted or rejected or preferred.

Never provide a vendor with, or provide any opportunity to obtain, privileged information of any kind.

Never accept gifts, benefits, or solicitations of any kind,

Always act ethically, objectively and impartially

All procurement information other than what is in the public domain is Confidential.

Ensure that there is no reasonable claim that an incumbent supplier has more or better information relevant to a competitive process.

Action: *Persons engaged in market information collection; Project Manager; any Consultant advisers, specification writers.*

PR 2 – Selection of the tender approach.

Information from the 'market scan' and the assessment of the corporate objectives in the procurement will lead to consideration of how the supply market is approached, e.g. Request for Quote, Expressions of Interest, Request for Proposal, single stage or multiple stages, sole supplier, restricted supplier list, or open tender. The wrong selection or an indefensible selection will have probity consequences and may jeopardise the success of the procurement.

Related Strategies:

A Procurement Plan will document the market analysis, market approach options and implications, and form the justification for the tender approach.

Use procurement expertise in the assessment of the tender approach options.

Ensure any decision for Sole Source or Restricted List has robust justification.

Ensure there is full and comprehensive appreciation of the specifications and the competitive nature of the supply market in deciding a single stage tender, otherwise consider multiple stages.

Decide early whether you want 'proposals' or 'offers/tenders' as it will effect what flexibility you may have to negotiate with suppliers.

Action: *Project Manager, Project Sponsor, Procurement manager, and Probity Adviser.*

PR 3 – Competitive specifications. It is rare that requirements cannot be developed to achieve a competitive procurement process. Even when a sole source is selected, requirements should be structured to ensure value for money is the best outcome. Specifications should be written to encourage competitive offers and to enhance the ability to differentiate between suppliers in evaluation of the tenders.

Related Strategies:

Ensure specifications avoid excessive 'mandatory' requirements unless essential for regulatory, safety, or environmental reasons, or as a 'cost control' measure.

Avoid heavily loaded technical performance specifications which might skew the offers uncompetitively.

Do not use the specifications or technical descriptions of any particular supplier, but ensure they are generic.

Wherever possible, develop functionally worded specifications.

The number and nature of 'mandatory' requirements should be kept to a minimum, with most being rated as 'important', 'highly desirable' or 'desirable'.

Have justification for every 'mandatory' requirement and ensure these are consistent with market capability.

Ensure KPIs and service level requirements are realistically achievable by several suppliers.

Wherever possible, ensure small and medium enterprises (SME) can bid competitively against larger suppliers.

Avoid specifications that attract monopolies or oligopolies unless that is justified in the Procurement Plan.

In developing requirements consider and avoid the potential for collusive tendering, third line forcing, or exclusive dealing.

Consider and avoid the potential for any supplier to exercise anti-competitive behaviour or misuse of market power.

Action: *Project Manager, Specification writers, Project Sponsor, probity Adviser.*

PR 4 - Effective Evaluation. It will be important to ensure that all elements of the specification and terms of the requirement are able to be evaluated by either quantitative or reasonable qualitative methods.

Related Strategies:

An Evaluation Plan should be developed concurrently with the tender requirements to ensure a quantitative or qualitative evaluation methodology is defined, and which considers every meaningful functional, technical or commercial aspect in the context of the Selection Criteria, Sub-criteria, or other element within the specification, and on basis of its priority/significance.

The nominated Evaluation Team must be suitably structured, have an appropriate number of evaluators, be credible, and be skilled and experienced; as well as being accountable, impartial and objective.

The evaluation methods should be able to fairly differentiate between the responses.

Weightings which represent the associated significance and/ or priority should be established against the quantitative Selection Criteria and Sub-Criteria;

Qualitative or subjective criteria should not be weighted;

The Evaluation Plan is approved preferably prior to release of the ITO to the market. Guidelines for scoring and interpretation of the respective criteria/ sub-criteria are developed and included in the Evaluation Plan.

The evaluation includes an iterative process of staged evaluation, quantitative scoring, shortlisting, moderation of scores, and qualitative assessments.

'Value for money' should be the overall outcome all things being considered, and not be exclusive to offer 'price';

A probity briefing should be provided to all evaluators prior to commencement of the evaluation.

The Evaluation Plan should specify the 'who and how' in responsibility for security of documents. As well, all evaluators should be made aware that:

- Documents in their possession are their responsibility for security;
- They should not discuss any information outside the evaluation team;
- They should not discuss any aspect of a vendor or their response or evaluation where it can be overheard by others unauthorised to have the information;
- No unauthorised copies are to be taken;
- All documents are to be accounted for;
- Electronic documents should not be sent to an insecure printer or to an insecure print server;
- Electronic documents should be held only on password controlled computer systems;
- Care should be taken with documents emailed or copied to CD/DVD that the security can be preserved; and
- Documents not required after the evaluation should be disposed of in accordance with related government and agency policies.

Action: *Project Manager. Confirmed by the Probity Adviser. Evaluators are to be informed of the evaluation process and probity requirements*

PR 5 – Consistency. Inconsistencies in documents lead to inaccuracies, confusion, lack of definition, and potentially failure or disputes within contracts. There are two principal areas for consistency:

- The requirements, references, specifications, priorities, expression, processes, and information generally; and
- Dealings with the Offerors throughout the processes.

The first establishes an overall integrity and resilience across the procurement processes. The second is an aspect of fairness, equity and reasonableness in dealings with vendors or comparative consideration of offers. Collectively it should lead to clear and reliable contract documents.

Related Strategies:

Ensure consistency between the Procurement Plan, the tender invitation, and the evaluation plan documents through a planned 'consistency check'.

Brief all document writers and checkers on the need to ensure consistency.

Ensure all references to legislation, regulations, standards, codes, and policies are referencing the correct and current versions.

The evaluation methodology should be structured for consistency, and minimum flexibility.

Brief all evaluators to ensure evaluations are done to the approved methodology; and that the evaluation criteria are applied consistently across all suppliers.

Contract negotiations should be conducted against the stated requirements and the supplier's response without potential to contract for what was not required.

Action: *Project Manager, Project Sponsor, Document writers, Procurement Advisers, Probity Adviser, contract negotiators.*

PR 6 - Communications, Confidentiality, & Security. By establishing protocols for communicating with vendors before, during and after the issue of the ITO, and during

evaluation and contracting processes, the risks are controlled or minimised. It is essential to ensure that those persons exposed to communications with vendors are aware of the protocols, as it relates to their responsibilities within the procurement process, and under statutes relating to the conduct of persons acting within the administrative processes of government.

As well, the secure handling and storage of commercially sensitive information (vendor submissions and evaluation documents) is essential to preserve the confidentiality of information.

Related Strategies:

The Communications Protocols are:

- i. All external communication is to be minuted and archived to create a defensible audit trail of meetings by identified individuals, discussions, information exchanged and agreements that are reached over the course of the project.
- ii. Prior to the release of the ITO, and in the process of collecting information on vendor interest and capabilities, the persons authorised to undertake these activities may explore all avenues of information provided that no commitments are made or intentions expressed as to the final content of the ITO, the associated timeframes, or the prospects for success of any vendor. Records of all industry and vendor contacts are to be maintained and auditable.
- iii. Communications should proceed only with prospective vendors or the related industry by persons authorised by the Project Manager.
- iv. No public statements will be made unless approved by the Chair of the Steering Committee.
- v. Information on the timing of release of the ITO is to be controlled under the authority of the Steering Committee.
- vi. Once the ITO is released, one person is appointed and authorised to communicate with prospective vendors on all matters related to the procurement. All communications, whether they are clarifications, amendments to the ITO, seeking information, establishing arrangements/ appointments/ meetings, will be through the appointed person. The appointee may change, but only on the authority of the Steering Committee.
- vii. Communications with vendors or referees during stages of evaluation and negotiation (e.g. reference checks, presentations, contracting or contract negotiations) will be controlled through structured processes developed specifically for those activities.
- viii. Where during their normal course of work responsibilities, staff or employees are required to communicate with the shortlisted vendors or other vendors related to the requirements, they must not discuss or convey any information about the ITO or the progress of the project to any vendor.

Consistent with these protocols, all persons exposed to contact with the related vendors are to be made aware of the communication protocols, and should acknowledge their understanding of their associated responsibilities.

Action: *Project Team with endorsement of the Steering Committee. All persons associated with relevant communications and information should be formally notified as per () above and an acknowledgement sought.*

PR 7 - Local Politics. Other agencies, local government, or community interests may have ideas and opinions which may be inconsistent with the project directions and/ or the ITO; and act independently or contrary to the interests of the project. They also may feel disenfranchised in the consultation and/or process.

Related Strategies:

Ensure the interests and opinions are fairly consulted prior to the release of the ITO.
Ensure reasonable representation of interest in the procurement stages while maintaining a manageable number of persons involved.

Ensure persons involved are not only representative of the respective interests but also can make a competent and meaningful contribution to the procurement stages. Provide communication opportunities for discussion of divergent views so these can be channelled into meaningful forums that allow such concerns to be properly managed. Where appropriate, address progress and concerns through communication to the agencies and related business units, providing non-confidential information which keeps them engaged and informed.

In all cases, in the interests of transparency, the Project Team will process any such communication:

- It will firstly clarify the understanding of the information, and then provide a written response to the originator of how the project accommodates the interests, or information.
- It will confer within the project governance structure, or otherwise as necessary, in formulating a response.
- An originator has the right to propose that an issue be elevated upwards through the project governance, provided that the Project Team has the right to include any information related to the issue.
- Any direct approach to the Steering Committee or Evaluation Team will be referred to the Project Team.
- The Project Team will respond to the originator in writing with its views and any related actions.

Action: *Project Manager and the Project Sponsor.*

PR 8 – Influence. Influence of individuals or vendors may attempt to bias the equity of the process.

Related Strategies:

The communications protocols in 6.1 should be effective in controlling and managing any attempt to influence the equity of the procurement, evaluation, or contracting processes. All meetings should be minuted.

Action: *Project Manager, and as for 6. Above*

PR 9 - Interests. Interests which may conflict or be perceived to conflict with the public interest or breach fiduciary responsibilities may exist or emerge with any person associated with:

- the Steering Committee,
- the evaluators,
- the senior management,
- individuals participating in the development of the ITO or evaluation requirements,
- external consultants or specialists associated with the Agency and/or the project,
- Community ‘stakeholders or interest groups’,
- Industry Associations,
- Individuals affected by the project or related policy, or
- the vendors.

The Conflict of Interest may be either real or perceived; and may result from any direct or indirect benefit to these associated persons, or a relative or associate of these persons. A breach of fiduciary responsibilities can occur where an individual accountable to the Agency acts against the interests of the Agency. A Conflict of Interest or fiduciary breach can not only be damaging to the integrity of the procurement, but also if not disclosed or managed, may damage the reputation of the Agency. Most conflicts of interest can be managed without detriment to the project provided the person(s) with the interest can continue to act impartially. Fiduciary breaches may be difficult to prove or manage and may have legal implications.

The apprehension of bias with evaluators who might influence the process and/or decision-makers in the selection and approval process has the same effect as a perceived conflict of interest.

Related Strategies:

All persons involved with the construction of the ITO, or the evaluation plan, and all evaluators including those involved in presentations, reference site visits, or referee checks should complete a form of acknowledgement and declaration of obligations to disclose conflicts of interest and preserve confidentiality.

Any person who declines to make the form of disclosure should be advised specifically of their obligations, asked for any disclosure, and the details recorded to the project file.

The ITO should contain a vendor conflict of interest disclosure statement.

The Communications Protocols above also should assist to manage the potential of this risk. Prior to commencing any evaluation, all evaluators and decision-makers should be briefed or made aware of their obligations for objectivity and impartiality; and to:

disclose any conflicts of interest with any vendor which exists,

disclose in the event that an interest emerges during the evaluation, and

disclose any possible apprehended bias.

It would be prudent to refer any disclosure to the Probity Adviser for advice on the management of the interest.

Action: *Project Manager, project related individuals, and Probity Adviser.*

PR 10 – Due Diligence. The commercial integrity of the preferred offer(s) should be established by a vendor viability check which is conducted timely in the evaluation process.

Referee checks can be useful to both validate vendor claims and obtain information on vendor performance. Referee information may be subjective and or hearsay, and should not be relied on significantly unless able to be substantiated. Referee information is often only indicative in its value to the evaluation.

Related Strategies:

A Due Diligence or Vendor Viability check should be sought from independent sources, e.g. Dun & Bradstreet and ASIC.

The related checks should cover all aspects of the commercial integrity of a preferred vendor including any parties in the vendor's offer which are key to the success of the project.

A structures referee check should be based on validation of vendor claims, and obtaining indicative information on vendor performance.

Action: *Project Manager and Steering Committee.*

PR 11 – Consistency of the Contract. The contract negotiation process is a likely environment where a preferred vendor may seek to redirect the requirement or their offer to their favoured commercial position. This may be inconsistent with the ITO requirements, and/ or unfair against other Offerors. Alternatively the preferred vendor negotiations may so significantly change the essentials of the requirement to prejudice the integrity of the competitive process.

Related Strategies:

The draft form of contract should be included in the ITO documentation, including a form for seeking any derogation from the stated terms and conditions.

Require offers to lodge any proposed departures/ derogations from the form of contract as part of their offer, and the implications of those departures become a component of evaluation of cost and risk.

Ensure the scope for contract variations are identified in the ITO Conditions and.

Ensure disciplined and well informed negotiators represent the Agency in any negotiations.

Consider involving the future contract manager in the negotiating team.

Identify your Most Preferred Outcome, you Least Acceptable Outcome, Best alternative to a Negotiated Agreement, and Worst Alternative to a Negotiated Agreement.

Should it emerge that the essentials of the requirement could change significantly, it should be then examined as to whether the changes might invalidate the invitation and offer process. Probity advice should be sought in these circumstances.
Ensure no Conflicts of Interest exist with supplier and what risks there might be of the emergence of conflicts of interest.
Plan and structure the contract negotiations.
Record the negotiations and have co-signed minutes.
Revisit conflicts of interest with participants, especially the Contract manager.

Action: *Project Manager, Contract Manager, and possibly Probity Adviser.*

PR 12 – Contract variations. The ITO permits contract variations in the pricing offer, and those variations:

- when applied under the contract, are likely to distort the original pricing assessment so that expectations of value for money are corrupted; or
- cannot be compared competitively across the offers, thereby introducing inequity or inconsistency in evaluation

Related Strategies:

The project team should determine clearly the requirements for pricing variations and state those unambiguously in the ITO.
The evaluation should ensure effective commercial assessment of the structure and effect of pricing indices proposed for variation to ensure they are realistically and reasonably applied in the contract.

Action: *Project Manager and Steering Committee.*

PR 13 – Vendor Performance Indicators. The expectations of vendor performance of the selected vendor/supplier for the project are ineffective or unrealistic or not managed effectively.

Related Strategies:

The project team should develop realistic performance indicators in concert with the nominated contract manager, and these be established contractually at contract negotiations.

Action: *Project Manager and Steering Committee.*

PR 14 – Accountability and Transparency. The conduct of the procurement must comply with State Procurement Policy, and potentially other Information policies and statutes of the Queensland Government. The State Procurement Policy (SPP) is supported by Practice Guides and guideline formats. While there is some flexibility in the application of guidance material to the procurement and evaluation processes, the compliance with government statutes is likely to be mandatory, and compliance with other related policies may also be mandatory. As well, there is an expectation and requirement that the ITO and evaluation processes are conducted in accordance with the approved related documents.

Vendors in the related market are influential in government relationships.

Other than compliance accountability, other areas of accountability and transparency and the related strategies are covered above.

Related Strategies:

Ensure the ITO is conducted and evaluated in accordance with the approved documents. Any departures should be referred for probity and possibly legal advice.
The Probity Adviser will review all ITO and requirements documents to ensure accountability with the related policies and statutes, and advise on the application of the practice guides and format guidelines where necessary.
All applicable policies, statutes and guides will be identified in the ITO development process along with the related compliance requirements.

The Probity Adviser will observe and advise on the conduct of the ITO process at all stages, including all stages of evaluation and selection.

The ITO and requirements documents, and the related evaluation and selection will give full consideration to the related accountability requirements, and will document reasons if the related guides or forms are not used or otherwise modified

Action: *Project Manager, Probity Adviser, and corporate legal advisers where necessary.*

PR 15 – Other Agency Interests. The procurement or project may include the interests of other agencies having interest and/ or responsibilities (e.g. Housing, Transport, Education, Environment, Emergency Services, Main Roads, Energy, Police, Communities, Industry). It will be important the inter-agency consultation, engagement, and cooperation are maintained. All interests and issues should be identified, together with cooperative strategies for management and resolution.

Related Strategies:

Structured and regular inter-agency consultative committee meetings are held and minuted. An Issues and Actions schedule is maintained and progressed throughout the project. Inter-agency committee meeting representatives should be at a level where issues are identified and strategies for resolution are effectively managed.

Action: *Addressed where appropriate by the Steering Committee.*

PR 16 – Competence of a Contractor & Contractor’s Team. The integrity of the outcomes can be damaged or flawed if the competence of a Contractor appointed to the Panel, and/or the contractor’s team is unsound or a contractor fails to meet reasonable business standards. While the Offer selection process will be based on selecting the best contractor(s), the Steering Committee will need to include, in the governance of the project, a process to ensure:

Related Strategies:

The Scope of Works should have technical integrity in the planning, services, assessments, and any related options; and

Any assumptions in the Scope of Works are valid, and not flawed.

The Steering Committee should monitor the technical integrity of the Project process, and consider what validation may need to be applied.

There should be contractual requirements for meeting currency with standards and regulatory requirements.

The ITO should examine the Offeror’s processes for ensuring continuous improvement.

All Offerors appointed to the panel should have a Quality Management System in place and be demonstrable.

Action: *The Steering Committee, Contract manager.*

PR 17 – Policy Parameters to be fully tested. The Project must ensure that there is no area of policy that impacts on the Project which, if further tested, might alter the options or outcomes.

Related Strategies:

The Steering Committee should ensure through Interdepartmental consultation that the policy parameters are identified fully, and the parameters of the related policies are identified and explored within the Project.

Action: *Project Sponsor and the Steering Committee.*

PR 18 – Confidentiality breach. Sensitive information which may be:

- Process,
- Political,
- Commercial, or

- Intellectual property, may be purposely or inadvertently disclosed.

Related Strategies:

- The Communications protocols advised earlier should be applied.
- The requirements for document security, both hard copy and electronic, should be applied.
- Confidential information should be clearly identified to all users.
- Acknowledgment of obligations to preserve confidentiality should be executed or enunciated by all parties with access to any confidential information.
- Any detected real or possible breach should be referred to the Project Manager and where necessary the Probity Adviser to determine an appropriate response.

Action: *Project Manager, Probity Adviser.*

PR19 – Community Engagement. The extent of community engagement and consultation may be determined by the scope of community views and interests in the project and/or related policy development. Any consultation and the ‘Communication Protocols’ should be developed to ensure the respective community interests are inclusive rather than exclusive to ensure equity as well as the management of the related interests

Related Strategies:

(relevant strategies to ensure reasonable transparency).

In conjunction with the Consultant, the Steering Committee will monitor the transparency of the Project process, and effectiveness of any consultation with interest groups.

Action: *Project manager and Steering Committee*

Summary

It will be the primary responsibility of the Project Manager to be familiar with the probity risks and strategies identified in this plan. The Probity Adviser can act proactively to advise on and act on the risks and strategies to manage the probity of the processes; but only with effective communications with the project team.

Simplified/Generic Probity Plan

Organisation

Probity Plan

Procurement of

ITO No:

1. **Background**

.... Statements of what leads to the procurement

2. **Procurement Objectives**

..... Statement of the procurement objectives

3. **Proposed Timelines**

Table of the proposed/indicative timelines

4. **Probity Framework**

4.1 The acquisition of is expected to stimulate interest from the industry. The suppliers in that industry are expected to act in a highly competitive way which may present some risks for probity, fairness, and equity. With international trade agreements, a competitive local supply market and other third party and public interests, it is necessary to ensure the procurement is conducted accountably and with demonstrable integrity.

- 4.2 The acquisition process and timings will need to avoid acts or perceptions of inequity and fair dealing.
- 4.3 A probity risk register will be maintained (*either separately or included in the procurement risk register*). It will record at least the risk, to whom management is assigned, the severity, and its progress.
- 4.4 The Probity Plan strategy is to:
- a) communicate with the supply market in an open, fair and equitable manner in the development of the requirement;
 - b) ensure a sound basis for the selection of the procurement process through an adequate knowledge of the supply market competitiveness and capacity;
 - c) ensure the requirement specification is structured to obtain competition from the supply base;
 - d) ensure fairness and equity in communications and the flow of information to suppliers both prior to and throughout the acquisition process;
 - e) ensure that the specification and its evaluation criteria are able to accountably differentiate the supply capability as well as ensuring competition;
 - f) ensure a high level of consistency between the tender, the evaluation plan, and the evaluation;
 - g) ensure the processing of all offers is fair, objective and impartial;
 - h) invite, encourage and manage all conflicts of interests and conflicting interests with all associated parties,
 - i) ensure the identification, accountability, and management of all confidential information both internal and external to the procurement processes, and
 - j) ensure all decisions and evaluation outcomes are defensible

5. Probity Auditor/ Adviser

- 5.1 An independent external Probity **Auditor/ Adviser** is appointed to this acquisition. This is necessary to manage the risks associated with the probity strategy independent of the process.
- 5.2 The Probity **Auditor/ Adviser** will report to the Chair of the Offer Evaluation Committee/ Project Manager, and provide advice as necessary and appropriate to the Offer Evaluation Committee and to senior management where appropriate.
- 5.3 Offerors may be made aware of the appointment of the Probity **Auditor/ Adviser**. Any member of the Offer Evaluation Committee may contact the **Auditor/ Adviser** directly on any probity or accountability associated matter. Any supplier who has concerns for the probity of the tender process should first be advised by the Procurement Contact person, or otherwise be advised to contact the Probity **Auditor/ Adviser**.

6. Probity Objectives

6.1 Accountability and transparency

This procurement process should be conducted in a manner which is fully compliant with all relative laws, policies, standards codes and instructions; is defensible with well reasoned documentation; and encourages participation by suppliers with the relevant appropriate capability and who will have confidence in the integrity of the procurement, its processes and outcomes. Documentation should be able to withstand any public scrutiny, audit, or legal review. Offers are to be evaluated against consistent evaluation criteria with transparency and against a well-reasoned Evaluation Plan.

6.2 Fairness, objectivity and impartiality

Offerors and prospective tenderers are to be treated fairly and should be provided with equal opportunity to access relevant information and advice. Fair dealing practices both actual and implied will apply, and all parties involved in the conduct of the procurement will be required to act objectively and impartially.

6.3 Confidentiality and security of information

All information and communications relating to this procurement and its processes are to be managed within a structured framework for confidentiality and security, with *(a designated position)* to oversee the effectiveness of the processes. All process and information whether oral or written are to consider the confidentiality and security of the material. In addition, the information generated in this procurement and received during the procurement process may be intellectual property.

6.4 Managing conflicts of interest

It is critical to the integrity of this procurement and its processes that all conflicts of interest whether actual, perceived or potential are disclosed and managed consistent with accountability and integrity. All parties involved in the development of information and material related to this procurement including its evaluation of offers and decision-makers are to declare any conflict of interest. All declarations are to be reviewed and updated through the maturity of the procurement to finalisation of the contracting process. All conflicts of interest and disclosures are to reviewed and managed by a person independent of the discloser.

7. Obligations of Evaluators, Decision Makers, and suppliers

7.1 All persons involved in preparation of the invitation documents, the evaluation, or the selection, whether:

- a) on a panel or committee,
- b) providing advice of any kind to the procurement process, or
- c) seconded to the Procurement process whether as a contractor, employee, or an officer of the organisation,

are to act with integrity, and act fairly, objectively, and impartially. They must maintain the confidentiality of vendor, tender, or evaluation information; and that confidentiality survives the process.

7.2 All persons involved at any level of 7.1 above will be required to declare any perceived or actual conflicts of interest at the commencement of evaluation, and also declare any conflict of interest which may emerge during the evaluation process.

7.3 All persons in 7.1 and 7.2 will be required to acknowledge their obligations in a Declaration and Acknowledgment of Obligations form, or a similar Deed of Confidentiality and declaration of Interests, on appointment or secondment, and before the commencement of their role in the process.

7.4 All suppliers submitting a tender (or form of response to an invitation) should be invited to disclose in their response any conflicts of interests or employment/engagement of any person associated with the procurement processes.

8. Evaluation Plan

8.1 An Evaluation Plan will be finalised prior to the registration of Offers received at closing time/ date and before any Offer is examined, but preferably prior to the release of the tender to the market.

8.2 There will be no variation to the Evaluation Plan, in particular the scoring methodology, once Offers are registered and opened, unless approved by the *(Project Manager)* with endorsement of the *(Probity Auditor/Adviser)*.

8.3 The Evaluation and selection processes will conform strictly to the final Evaluation Plan. The procurement process establishes a 'Process Contract' in law with the market. You must do what you say you will do.

9. Evaluation

9.1 Only conforming offers will be evaluated. Incomplete or non-conforming offers will be set aside and not considered further unless no conforming offer is found acceptable.

9.2 The Evaluation Panel will evaluate and score offers in accordance with the Evaluation Plan. When a consensus in evaluation scoring cannot be reached, the majority decision will prevail, and the details of the dissenter(s) and their reasons, reported to the Evaluation Panel Chair. All

decisions and justification for individual criteria and sub-criteria scores are to be documented in the Evaluation Report.

9.3 Scores will be moderated as Offers progress through evaluation to short listing, and beyond to selection of the preferred offer(s). All reasoning at moderation is to be documented.

9.4 The *(Probity Adviser/Auditor)* will review and advise on the defensibility and equity of the short listing and scoring processes.

10. Minutes of Meetings

10.1 All meetings and decisions associated with the evaluation processes will be minuted and signed by the meeting chairperson and provided to *(the Project manager)*. These minutes will be held in the project acquisition file.

11. Security and Confidentiality of Documentation

11.1 At all times while opened offers are in the evaluation process they are to be held securely; and all evaluation records are to be securely filed with controlled access only by persons authorised by the Project Manager.

11.2 The (Project Manager) or appointed delegate will maintain an access register of all persons with authorised access to or copies of the secure and confidential information.

11.3 All copies of offer documents are to be registered, and no unauthorised copies of any associated offer or evaluation record documents are to be taken except with the authority of the *(Project Manager)*.

11.4 Documents at any time in the personal possession of individuals are to be handled confidentially with access only to persons authorised by the *(Project Manager)*.

11.5 No information on individual offers is to be passed outside the Evaluation Committee membership except by authority of the *(Project Manager)*. No information on the short-listing processes or progress is to be passed outside the Evaluation Panel except as authorised by the *(Evaluation Panel Chair)* on advice of the *(Probity Adviser/Auditor)*.

11.6 At the conclusion of the acquisition, all related documents, file records, tapes, disks, communication records, Offer documents and copies, and any other associated records are to be assembled and filed as determined by the *(Project Manager)* in accordance with related Departmental and Government policies.

12. Presentations, demonstrations, interviews, site visits

12.1 During market assessment prior to the issue of an Invitation to Offer (ITO), a high degree of flexibility is available to the project in information collection. However once the ITO is issued, and during the evaluation of Offers, it is essential that the a structured approach is applied to presentations, demonstrations, interviews or site visits to ensure:

- a) the specification requirements are adhered to,
- b) solutions are assessed competitively, fairly and equitably against the requirements and according to the Evaluation Plan, and
- c) all offers are provided equal opportunity to demonstrate capability and capacity to meet the specification.

12.2 Interview questions and presentation/demonstration and site visit schedules are to be structured to ensure equity and fair dealing between and across short listed Offerors, preferably by way of a 'checklist'.

12.3 The *(Probity Adviser/Auditor)* should be consulted in respect of the related formats to support and endorse the integrity of the processes. Related activity/outcomes reports are to be fully documented against the structured criteria for all participating offerors.

- 12.4 Reference site or product examinations also may be conducted as part of evaluation. It is important to ensure that reference site reviews are:
- examined against the principles of the specification, in particular can reference the essential criteria;
 - reflective of the specification requirements; and
 - conducted independent of influence from the respective Offer, i.e. the Offeror does not participate in the reference site examination.

The (*Probity Adviser/Auditor*) is expected to provide guidance for the conduct of any site visits.

13. Evaluation Summary and Report

13.1 Evaluation scoresheets and the Evaluation Summaries are to record the findings from individual and consensus evaluation respectively in accordance with the specification and the Evaluation Plan. Comments must be able to demonstrate defensible reasoning for actions taken and outcomes.

13.2 The Evaluation Report should consistently reflect the evaluation compliance and outcomes. Recommendations must be rationally and defensibly supported by the evaluation findings unless an alternative defensible case is reported, in which case, the defensibility should be supported by the Report from (*the Probity Adviser/Auditor*).

13.3 The (*Probity Adviser/Auditor*) will report on the acquisition processes as appropriate to substantiate the accountability, probity, fairness and equity of the processes, and the related defensibility or alternatively endorse the Evaluation Report for probity and conformance.

14. Due Diligence

14.1 Reasonable due diligence verification of corporate reliability and integrity will be conducted on at least the preferred selected supplier from the evaluation processes or if necessary of a shortlisted supplier selection. Due diligence reports are to be fully documented.

Results of checks of vendor corporate records and financial reports are to be fully documented. Advice from (*the appropriate financial advisor(s)*) should be sought where any question arises on the financial performance of an Offer, and/ or for issues of finance hedging or exchange rate effects.

15. Post Offer Negotiations

15.1 (*Options for both Post Offer Negotiations or Best and Final Offer (BaFO) may exist in this ITO.*) Should a BaFO be entered into, it will be by authority of the Accountable Officer on recommendation from the Evaluation Panel Chair.

15.2 Post-Offer Negotiations are expected to be conducted to finalise contractual terms. The authority of Accountable Officer to enter into Post-Offer Negotiations will be required in order to establish contract terms with a preferred supplier following the results of the evaluation process. The Accountable Officer may establish any negotiable parameters for agreement or otherwise.

15.3 It will be essential to ensure that negotiations establish contractual arrangements without significant deviation from the specification, including matters resolved from clarifications, interviews, presentations, etc, in particular ensuring that all mandatory requirements are embedded in the contract.

16. Unsuccessful Offers

16.1 Offers set aside during the evaluation process may become generally aware of their status. Formal advice to unsuccessful offers is usually, but not necessarily withheld until contracting is concluded. However, it will be at the discretion of (*the Evaluation Panel Chair/Project Manager*) to determine when it is appropriate to advise offers set aside during the process that their offers have been set aside and will not be considered further pending the progress of evaluation of other offers. The (*Probity Advisor/Auditor*) should be consulted prior to the issue of any such advice whether orally or in writing.

16.2 Debriefing/feedback opportunities for unsuccessful offers will be available in accordance with the ITO. It is not necessary to advise unsuccessful offers that they may seek feedback/debrief unless stated in the ITO Conditions.

Prepared by:
Project Manager

(date)

Endorsed By:
Probity Adviser/Auditor

(date)

EXAMPLE

Appendix 10 – Probity (and Process) Deed Guide

General matters Include:

1. Parties to the Deed Poll
2. Definitions & Interpretation.
3. Disclaimer & Exclusion of Liability.
 - a. Disclosed information
 - b. Principal not liable
4. Respondent Warranties.
5. Respondent to Inform Itself.
 - a. Bona fides
 - b. Respondent accepts conditions of tender.
6. Principal's Rights.
 - a. Amend or vary.
 - b. Determine the procurement & processes
 - c. No Advertising
 - d. Withdrawal of a tender
 - e. Unintentional Error
 - f. Change of Respondent entity, JV, or consortium
 - g. Respondent Sponsors
7. Other General Matters:
 - a. Entire agreement
 - b. Variation or precedence
 - c. Waiver
 - d. Validity
 - e. Assurances
 - f. Time for acts
 - g. Governing Law & jurisdiction
 - h. Severance
 - i. Merger/ no merger
 - j. Relationship of the parties
 - k. Expenses of the parties
 - l. Notices

Probity matters include:

8. Probity:
 - a. Requirement to act in good faith
 - b. Avoiding collusive and anti-competitive activity
 - c. Code of conduct
 - d. Code of practice
9. Confidentiality:
 - a. General disclosure of project matters
 - b. Public interest disclosure
 - c. FOI obligations
 - d. Need to know (including personal & organisational)
 - e. Need to have adequate information for the role
 - f. Commercial information
 - g. Inappropriate transmission or passing of information
 - h. Intellectual Property (identify what is IP, ownership, & handling)
10. Conflicts of Interest:
 - a. What is a Conflict of Interest (real, perceived & potential)

- b. Disclosure
 - c. Avoidance
 - d. Who is affected
 - e. Management
 - f. Related Parties
11. Related Parties & Associates:
 - a. Holding Company & Boards
 - b. Parties in other bids
 - c. 'Sister' companies in an organisation
 - d. Require disclosure of all related parties
 - e. No 'person' can be in 2 parties.
 - f. No information conveyed unless related parties & persons are disclosed
 - g. Security of information & material in all parties
 - h. A Deed undertaken by all parties before information provided
 - i. Right to disqualify for breach without compensation.
 12. Disclosure:
 - a. By Bidding Parties and Related Parties
 - b. Involvement and interests of:
 - i. Bidding parties in other projects
 - ii. Related parties in other concurrent projects
 - c. All affiliated interests of all related parties
 - d. All personal affiliations of all persons with probity risk exposure in related parties
 - e. Revisit at stages of project as risks increase.
 13. Security:
 - a. Physical security for material, & information
 - b. Access security
 - c. Electronic security
 - d. Information security
 - e. Increases during stages
 14. Supplier behaviour.
 - a. Inducements
 - b. Collusion
 - c. Improper acts
 - d. Dealings with or use of Principal's personnel
 - e. Canvassing
 - f. Undue influence
 - g. Use or publishing of tender or related documents
 - h. Private information
 - i. Right to Information
 - j. Right to disclosure
 15. Evaluation
 - a. Process
 - b. Fairness and objectivity
 16. Accesses
 - a. To premises
 - b. To sites
 - c. To information
 - d. To Principal's employees or representatives
 17. Tender Costs
 18. Tender Acceptance
 19. Assignment and Novation
 20. Exclusion for Breach
 21. Warranty of Capacity
 22. Power of Attorney
 23. Compliance with Codes and Standards Policies & Regulations

Appendix 11 – Probity Briefing Guide

Overall Strategy:

- To pass the 'media test'
- To ensure accountability and transparency,
- To ensure fairness and integrity,
- To maintain objectivity and impartiality,
- To preserve competitiveness,
- To maintain confidentiality and security,
- To ensure decisions and outcomes are defensible and auditable.

Invitation/ Tender Documents:

- Seek Competitive offers and not over-specified.
- Developed knowing how it can be fairly evaluated.
- Asks for what will be evaluated & considered.
- Includes any mandatory compliance.
- Minimise Mandatory requirements (Mandatory is yes/no, pass/fail, go/no-go).
- Prioritise functionality/ variables.
- Set weightings for evaluation criteria & sub criteria according to significance & rationality.
- Include a response format that can be easily comparatively evaluated.
- Has adequate time for response.
- Has appropriate Conditions that apply equitably.
- Has a single point of contact.
- Has clear lodgement details.
- Recognise that it is the core of a subsequent contract.
- Be clear/ unambiguous on terminology & definitions.
- Determine the need for a Probity Plan

Conflicts of Interest:

- All bound by the Code of Conduct
- Conflicts of interest can extend to gifts, gratuities, benefits, etc and can be complex.
- Real, potential, or perceived are all important.
- All persons involved in the procurement process should sign a Disclosure form or Deed. The purpose is to preserve impartiality and heighten awareness of responsibilities.
- Most can be managed without detriment to the project or procurement.
- They may not be obvious at the start of the procurement process.
- Gifts & benefits, etc policies apply.
- All persons must have a fiduciary duty to act in the Principal's best interests.

Confidentiality:

- Protection of the Commercial Confidentiality of Offerors' information is critical.
- All evaluation information is Confidential
- Single point of contact designated to contact Offerors. Other panel members avoid contact.
- Do not discuss information outside the team and avoid being overheard.
- Potential risks are associated with site visits and other contact with Offerors.
- The Confidentiality survives the procurement.
- Do not leave any information unsecured in your workplace.
- Public places & home are not secure work environments
- Any documentation provided becomes the responsibility of the individual.
- Particular care with electronic documents.

Security & Storage:

- All offer and evaluation documents are to be held securely when not being worked on.
- Receipt of any document issued is to be acknowledged by the recipient.

- No copies to be taken without written authority of the Project Manager.
- All copies to be registered.
- All copies to be recovered and accounted for at end of evaluation process.
- No information on progress or shortlisting to be passed outside the Evaluation Team without authority of the Project Manager.
- Secure working environment arranged where documentation is not easily viewed, conversation not easily overheard, and the room can be secured.
- Security of Information standards apply.

Evaluation Plan:

- High level of consistency between invitation and the evaluation.
- Selection criteria should clearly differentiate between offers, and will lead to the best result for the Principal.
- Weightings should be a true reflection of the demands and priorities of the Principal.
- Evaluation plan complete before offers are opened (as a minimum).

Evaluation:

- Must be conducted in accordance with the Evaluation Plan.
- Evaluation Panel must be credible
- Evaluators to be appropriately qualified and experienced for the task.
- Must not change the weightings once the offers are opened.
- Don't bring bias for or against any Offeror.
- Use a consistent set of comprehensive forms for scoring and recording.
- Evaluate each offer point by point solely against the criteria.
- Make comprehensive notes and comments to justify scores, particularly high or low ones.
- Can bring personal knowledge to the forum if not capricious or arbitrary.
- Be prepared to test the veracity of supplier claims.
- Individual scoring records are accountable documents.
- Clarification questions through single point of contact.
- Take care with Referee checks & Due Diligence & use information for moderation of scores.
- The final score must be reflective of the individual and consensus scores.
- Individual evaluators have the right to dissent from the group score.
- If no consensus, record the details.
- Outcomes must be defensible from the evaluation process.
- If in doubt or difficulty, consult the Probity Adviser.

Meetings:

- Take essential minutes of all meetings – time, place, attendees, purpose, outcomes..

Supplier Demonstrations or Presentations:

- Plan for fair process with reasonable equity.
- The process is to collect or confirm information, not to convey information.
- Reject any overtures or solicitations, but document and report to the Project Manager.
- Reject any 'bonus' offers but document and report to the Project Manager.
- Restrict the Offerors to the details of their offer at closing.
- All questions to the vendor to be structured for equity.

BaFO and/ or Post Offer Negotiations:

- May be conducted whether or not stated in ITO/ RFO.
- BaFO and Post Offer Negotiations may be different stages, but not necessarily.
- BaFO/ Post Offer Negotiations can be iterative, but take care with overall equity, and consistency with both Invitation & the Offer. Avoid change to the substance of an offer.
- Should be conducted only with suppliers selected from the assessment/ evaluation process and approved by Steering Committee/ Project Board.

Unsuccessful Offers:

- Advise at earliest but preferably debrief at end.
- Only advise strengths and weakness of Offer.
- Don't compare with others in any measure.
- Can disclose how many offers, but not who.
- Avoid written debrief, Oral debrief only.

Probity Adviser:

- Role is to observe, advise, and report on the probity and accountability.
- Probity Adviser reports to the Project Manager.
- Offerors should be/ have been made aware of the Probity Adviser.
- Any person (or vendor) might contact the Probity Adviser at any time, but the Probity Advisor has responsibilities for confidentiality.

Appendix 12 – Paired Analysis

Paired Analysis is a structured and logic-based method for comparative assessment or of establishing weightings in any scenario.

There are two levels/options of application of the Paired Analysis method of establishing weightings:

- (a) Paired Analysis; and
- (b) Paired Analysis with Qualitative Differentiation.

Option (a) is a basic application, while option (b) is a higher level of rationale because it applies a level of importance in the paired comparison.

Use for weightings

The weighting is established as a percentage (%) based on comparing each evaluation criteria against each other, in a table.

Paired Analysis (Example 1) is conducted by:

- (a) The Evaluation Criteria are tabled and paired;
 - Each pair is compared with each other. Each is considered as more important or not, i.e. One is more important than the other.
 - Total the number of occasions where each is more important.
 - Each criterion is converted to a % of total to give its **WEIGHTING**

Paired Analysis (Quantitative Differentiation) (Example 2) is an extension of the Paired Analysis method, but additionally applies significance to the differentiation of each pair:

- (b) The Evaluation Criteria are tabled and paired;
- (c) Each pair is compared with each other;
 - Each is considered as more important or not, i.e. One is more important than the other; then
 - The Degree of more importance is rated, e.g.:
 - 1= marginally more important
 - 2= moderately more important
 - 3= significantly more important
 - Total the number of occasions where each is more important by degree of significance

Examples:

1. Paired Analysis:

Criteria		A	B	C	D	E	F
EC1	A						
EC2	B	A					
EC3	C	C	C				
EC4	D	D	B	C			
EC5	E	A	E	E	D		
EC6	F	A	B	C	D	E	
Total for each		3	2	4	3	3	1
		3/16	2/16	4/16	3/16	3/16	1/16
% Weighting for each		19%	13%	25%	19%	19%	6%

Note that E did not rate more significant than any other and therefore rates only 1. It cannot get '0'.

2. Paired Analysis with Quantitative Differentiation:

Criteria		A	B	C	D	E	F
EC1	A						
EC2	B	A1					
EC3	C	C2	C3				
EC4	D	D1	B2	C2			
EC5	E	A1	E3	E1	D1		
EC6	F	A3	B3	C3	D3	E3	
Total for each		5	5	10	5	7	1
		5/33	5/33	10/33	5/33	7/33	1/33
% Weighting for each		15%	15%	30%	15%	22%	3%

Paired Analysis Scoring - Simple Paired Analysis

- Example for one criterion, each criterion has its own table:

Paired Analysis for One Criterion

Tender		A	B	C	D	E
Red Company	A					
Yellow Company	B	B				
Blue Company	C	A	B			
Green Company	D	A	B	C		
Gold Company	E	E	E	E	E	
Capability Criterion Total		2	3	1	0	4
%		20	30	10	0	40

Paired Analysis for scoring (with Qualitative Differentiation)

- ❖ The offers are tabled and paired
- ❖ Each pair is compared with each other
 - Better or not, i.e. One is better than the other, and by degree:
 - 1= marginally better or more important
 - 2= moderately better or more important
 - 3= significantly better or more important
 - Total the number of occasions where each is better:
 - Each score is converted to a % of total to give its rating

Example:

Paired Analysis with Qualitative Differentiation for One Criterion

Tender		A	B	C	D	E
Red Company	A					
Yellow Company	B	B3				
Blue Company	C	A1	B1			
Green Company	D	A3	B1	D1		
Gold Company	E	E2	E3	C2	E1	
Capability Criterion Total		4	5	2	1	6
%		22.2	27.8	11.1	5.6	33.3

Appendix 13 – Evaluation Plan Content Guide

Effective evaluation planning should address the requirements for accountability, transparency, consistency objectivity, and fair dealing during the evaluation and selection.

An Evaluation must always be consistent with what is stated in the related invitation to tender (or similar); and the Evaluation Plan should always be a written plan which should address at least the following matters:

- Authorisations, endorsements, and approvals.
- The Objective of the evaluation:
 - Reference to associated key documents, in particular:
 - Procurement Plan,
 - Probity Plan (if applicable), and
 - Request for tender document(s),
 - The expected outcome, e.g.:
 - Single or multiple contracts, or
 - A supplier panel, or
 - Other supply delivery arrangement; and
 - Actions if the outcome cannot be achieved.
 - the rationale or analysis,
 - any related procurement or projects, and
 - any special terminology.
- The Governance, e.g.:
 - Steering/selection committee,
 - The Evaluation Panel, and if relevant the structure of the evaluation panel, and
 - Any advisory panel.
- The Roles, e.g. roles of:
 - high level committee appointments,
 - evaluation panel members, and any evaluation sub-group members, and
 - Advisors.
- Evaluation timetable/schedule:
 - By Milestone descriptor and date.
- Late tender/submission requirements and process.
- Evaluation Criteria:
 - Each criterion, and
 - A brief explanation of what each means.
- The Evaluation Process:
 - Evaluation stages,
 - Evaluation method(s) including the method to be applied to each Evaluation Criterion,
 - Scoring or rating method(s) and any related table or matrix related to each or all Evaluation Criteria, including assessment moderation and group rating;
 - Any applicable weightings,
 - Qualitative or subjective components and assessment,
 - Any iteration of evaluation and/or stages.
- Completeness and conformance checking:

- Completeness of submissions,
- Compliance with Terms and conditions including departures,
- Mandatory requirements checking, and
- Responsibilities and Management of these processes (procurement and legal).
- Communications:
 - Designated contact person and arrangements,
 - Clarification of information processes,
 - Fair handling of ‘new’ information, and
 - Communications protocols and flow.
- Documentation:
 - Forms to be used,
 - Evaluation records – individual and group records,
 - Justification/defensibility statements,
 - Evaluation Reports, and
 - Meeting records.
- Process/es for ranking and shortlisting.
- Interviews, demonstrations, tests, and/or site visits.
- References:
 - Referee checks,
 - Reference site processes where applicable.
- Vendor viability/due diligence checking.
- Selection and recommendation:
 - Stages if applicable,
 - Negotiation planning, and
 - Compliance verification.
 - Any Contract matters including contract management responsibilities.
- Probity requirements:
 - Probity risks in the evaluation, selection, and negotiation,
 - Probity briefings,
 - Conflicts of interest disclosures,
 - Security of information and access control, and
 - Confidentiality applicability, requirements and awareness.

Appendix 14 – Probity Report Content Checklist

Executive Summary (if necessary)

1. Introduction

- Project/procurement scenario
- Summary of what occurred

2. Appointment

- When, to whom, what terms
- Indemnity statement

3. Assumptions

- State only valid assumptions and basis of assumption

4. Constraints

- State any constraints, e.g. what stages the services & report covers
- State any limitations placed on the services, e.g. access to information, access to parties, etc

5. Documents Reviewed/ considered

- Summarise the key documents on which the services relied.

6. Key Policies, Legislation, Standards considered

- List the policies, legislation, standards, codes, etc relevant to accountability, and on which the services relied
- Statement of ‘process contract’ consideration

7. Observations

- Accountability and compliance
- Market
 - Characteristics & Analysis,
 - type of approach, Open date & closed date, any extensions
 - Supplier response, competition
- Conformity
 - Conformance with Conditions and mandated requirements
 - Completeness,
 - Timeliness/ Late offers
- Evaluation Committee - Credibility/ numbers/ advisers
- Evaluation Planning
- Evaluation conduct:
 - Process
 - Method
 - Documentation/ records/ defensibility
- Confidentiality and Security of information – communications, processes and awareness; and security of information controls
- Conflicts of interest – disclosures, management, awareness
- Due Diligence
- Contract issues – any legacy issues for the contract

8. Conclusions

9. Recommendations (if necessary)

Appendix 15 – Probity Guide to Validating Information

Seeking clarification of information is part of the processes of verification, validation, and understanding of an offer; and occurs normally during the evaluation and selection stages of the procurement. Validation of information in an Offer would normally occur in the following:

- Clarification questions
- Interviews
- Presentations, Demonstrations
- Proof of ‘Concept’
- Tests and Trials
- Reference sites
- Referees

This Probity Guide deals with the circumstances requiring questions of clarification. Other Probity Guides in this series address the other approaches to validation.

1. Clarification Protocols

A question of Clarification must be specific to a piece of information:

- provided by an Offer; or otherwise
- to verify the deficiency of information which should have been provided by an offer.

This can arise from:

- a) a conforming Offer which requires clarification of information provided; or
- b) an Offer presenting uncertainty of its conformance; or
- c) an Offer which is non-conforming or non-compliant which the Principal wishes to confirm the Offeror’s understanding of the stated requirements for conformance or compliance. Usually the purpose of such a question is a ‘reality check’ to the Offeror that they have failed to meet a conformance/ compliance requirement, or misunderstood the requirement.

In both a) and b) the question of clarification should:

- State the specific reference to the information in either the Offer, or the Conditions;
- State the nature of the Clarification required;
- State that the information requested is not an opportunity to provide information:
 - which should have been provided in the substance of the Offer, or
 - additional information other than that which is required in the Clarification Question;but rather to clarify or verify the information in the Offer; and
- Request a response in a given timeframe.

If the information requested or provided changes the substance of the Offer as it was expected at Closing time, then the information is likely to be new information and probably unacceptable after Closing for reasons of ‘late information’, or unfairness in dealings with other Offers which reasonably provided the expected information.

The timeframe needs to be fair to allow an appropriate clarification response, but not excessive or unreasonably generous to provide unfair advantage one offer over another. The timeframe will sometimes depend on the complexity of the answer; but note the sensitivity in fair dealing with Offers which have provided the required information clearly and without clarification.

It can arise where the Principal notes that the issue of clarification applies to all Offers, usually due to some weakness or characteristic of the Request for Offer. In this case, it may necessitate a question of clarification:

- to all Offers who submitted a Response;
- to only the shortlisted Offers from the evaluation processes; or
- if the deficiency in the required information is fundamental to the Request for Offer, it may necessitate a recall if the RFO.

In respect of c) above, an Offeror may claim ambiguity in the stated requirement or conformance statement. In this case, you need to determine whether:

- the Offer and its deficiency is by exception, and other Offers understood clearly the requirement;
- the Offeror or another Offeror sought a Clarification Question & Answer during the Open stage;
- the Offer has made an assumption stated in their Offer on the specific point/ issue; or
- there is potential for making a reasonable assumption based on the information provided in the Offer.

Note that care should be taken in dealing with assumptions as ultimately a Court might determine the reasonableness of any assumption.

2. Inadvertent Error or Omission

In most cases, only the Offeror would know for certain whether an error or omission is inadvertent. Care should be taken by the Principal not to assume the inadvertency of an error or omission.

Inviting or accepting information to rectify an error or omission in an Offer can introduce unfair dealing with other Offers which were complete, and offer favour or advantage to the Offer with the deficiency.

Observing a omission or error during the evaluation or consideration of an offer should not give rise to an opportunity for the Offer to correct the error or deficiency if the rectification will change the substance of what was expected to be in the Offer at Closing.

It may be appropriate to seek a clarification that the Offeror understands that they have omitted information or that the information provided is in error; but whether the clarification question provides the opportunity to rectify the deficiency is subject to the sensitivity test of fair dealing to all or other Offers.

Take care that any related clarification question does not to state or imply that the deficiency or error is 'inadvertent' as that may be an unreasonable assumption.

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Practitioner
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