



# Commercial notes

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## Managing probity and process issues in procurement

Probity and process issues are integral considerations for agencies in ensuring the defensibility and overall success of government procurement processes.

In the context of a government tender or procurement process, probity is often used in a general sense to mean a defensible process which is able to withstand internal and external scrutiny – one which achieves both accountability and transparency and provides tenderers with fair and equitable treatment.

Public awareness and scrutiny of government's management of probity and process related issues is significant and increasing. There are a number of reasons for this, including:

- increased concern with ethics and accountability in public life
- greater media scrutiny
- more time and resources now required from bidders in formulating and submitting bids, leading to demands for increased accountability and transparency in procurement processes.

Failing to conduct a procurement process with due regard to probity and fair dealing may potentially leave it open to challenge. Defending challenges is time consuming, costly, can undermine public confidence, affect reputations and act as a distraction from government's core functions.

Outcomes of any challenge (whether or not ultimately successful) are negative and involve consequences for government, senior management and, potentially, for staff and advisers generally.

This note firstly examines some of the issues which we find most often arise in the context of government procurement. It next deals with the roles of probity/process advisers and probity auditors. Finally we consider the circumstances in which probity services are needed, and the type of probity role which agencies may require.

## Common issues in procurement processes

### *Disconnect between Request for Tender (RFT) and evaluation plan*

The decision in the *Hughes* case<sup>1</sup> established that a process contract may arise from procurement processes. When the procuring entity is a government agency, it may be appropriate to imply in the process contract a duty to act fairly. One aspect of this duty involves the requirement to



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evaluate bids according to the priorities and methodology specified in the RFT. In this context it is now common practice for government agencies to prepare and obtain internal sign off on a formal evaluation plan before bids are opened. Properly drafted and implemented evaluation plans enable agencies to demonstrate that they have objectively evaluated bids in accordance with the RFT and without conscious or subconscious bias towards an initially preferred bidder.

The *Commonwealth Procurement Guidelines* stress the need for 'logical, clearly articulated, comprehensive and relevant conditions for participation and evaluation criteria' to enable an accurate and fair assessment of all potential bidders.<sup>2</sup>

However, in practice there is often a lack of consistency between evaluation plans and the requirements specified in the applicable RFTs. To avoid this problem, the RFT and the evaluation plan should be drafted together to enable 'side by side' review to ensure that the evaluation methodology proposed in the plan is consistent with the draft RFT. For example, if the plan proposes threshold or mandatory requirements, these should be clearly brought to the attention of bidders in the RFT. In addition, all steps in the evaluation process described in the RFT should be mirrored in the evaluation plan.

#### ***Disconnect between evaluation criteria and requested information from bidders***

In order to ensure a fair evaluation process, bidders must be considered on the basis of the bids submitted. This process is enhanced in circumstances where agencies give careful consideration to ensure that enough information is sought from bidders to enable full evaluation against each evaluation criterion, and to ensure that additional information is not inadvertently sought to the cost of bidders.

It is therefore necessary for agencies to ensure that the RFT requires bidders to provide information by direct reference to the evaluation criteria. In addition, prior to requesting information from bidders, agencies should consider the relevance to the evaluation of each piece of information requested. Finally, agencies should ensure that the evaluation methodology is sufficiently broad to permit all relevant information submitted by the bidder to be taken into account.

#### ***Communication with bidders***

It is important for agencies to ensure that identical information is available to all potential bidders during the procurement process. In order for this to occur, procedures need to be established to govern communication with bidders.

Such procedures should stipulate that only authorised personnel are to provide information to potential bidders. In particular, agency employees should not express any personal opinions on the procurement process publicly, privately or on the email system, particularly in relation to preferred potential bidders or prices, unless specifically authorised to do so. They should also refrain from making any comments or giving information to the media regarding the procurement process.

If potential bidder briefings are conducted, all material information provided at the briefing and during the procurement process should be documented and sent to all interested parties. 'Interested parties' can be

*Ensure the RFT requires bidders to provide information by direct reference to the evaluation criteria.*

taken to include all people who have collected, been sent or downloaded from the agency's website, copies of the documentation relating to the relevant request for submissions.

However, agencies should advise potential bidders that information will not be copied to other interested parties to the extent that it relates to information unique to the submission, or potential submission, of the potential bidder making the query.

It is also important for agencies to ensure that submissions and assessment data gathered during the evaluation phase are not communicated outside the evaluation team.

Through the adoption of comprehensive procedures governing communication during the procurement process, an agency will play an important role in ensuring that all bidders compete on a level playing field.

### ***Bid repair versus bid clarification***

A bidder may be requested to clarify its bid where there is a conflicting statement or an ambiguity in that bid. However, it is important to consider all requests for clarification, and the answers provided to these requests carefully. In some cases, the answer given by a bidder may change its bid and therefore amount to 'bid repair', rather than 'bid clarification'. In addition, before asking for further information from bidders, agencies should carefully consider whether their proposed questions are in fact seeking clarification of bid ambiguities, and not correction of mistakes or additions of omitted material.

Agencies must also consider whether they may be affording an advantage or disadvantage to the other bidders by inviting additional information or clarification from one bidder and not the others. To ensure procedural fairness, it may be necessary to allow all bidders the opportunity to provide additional information.<sup>3</sup>

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### ***Management of conflicts of interest***

The *Commonwealth Procurement Guidelines* emphasise that procurement processes must be conducted in an ethical manner to avoid conflicts of interest and the misuse of power.<sup>4</sup> Conflicts of interest will arise where a member of a procurement team or an adviser to a procurement team have an affiliation or interest which prejudices – or might be seen to prejudice – their impartiality.

All members of the procurement team, and their advisers, must declare all conflicts of interest before the beginning of the bidding process. In addition, 'conflicts of interest' should be the first agenda item at all meetings of relevant teams, committees and panels.

The response to conflicts and potential conflicts of interest will vary depending on the nature of those conflicts. Where a serious conflict or potential conflict of interest is identified, the officer or adviser concerned should be removed from the procurement process. If a less serious conflict or potential conflict of interest is identified, some ring fencing or quarantining of the individual/sensitive information may be sufficient to deal with the problem.

## How can a probity adviser/probity auditor/legal process adviser assist?

### *Role of the probity adviser*

A probity adviser may be appointed under a probity plan to monitor and report on compliance with the plan. A probity adviser is usually an adviser who is external to and independent of the process, who will scrutinise (by way of observing and reviewing) the tender and evaluation process, provide advice on probity issues which may arise before and during the tender process, and advise whether the process is equitable and conducted with integrity.

The role of the probity adviser is usually to monitor the tender, evaluation and selection processes in order to advise whether they are defensible and conducted in a fair and unbiased manner. The probity adviser does not undertake the evaluation and is not responsible for advising on the legal issues that arise from the conduct of the tender process. However, the probity adviser will provide advice on the conduct of the tender process (including the tender evaluation procedures), advise whether the tender rules and procedures are followed, and whether the tender process has been conducted fairly and the tenders received are assessed in accordance with the stated evaluation criteria.

In the period following the release of the RFT, for example, the probity adviser can advise on issues such as bidder communications and bid receipt, including the treatment of late bids.

In respect of the evaluation phase, the probity adviser can advise on matters such as the establishment of an evaluation team, assessment of risk and score adjustment, and the assessment of value for money. The probity adviser can also conduct, or arrange for a third party to conduct, various types of probity and security investigations on a particular company and/or its directors and secretaries.

The probity adviser will normally advise and report to the project steering group, and may attend and monitor meetings of other tender committees. Often the probity adviser will also provide all tender evaluation team members with a probity briefing before the actual commencement of tender evaluation.

At the conclusion of the tender process, the probity adviser usually provides confirmation (or sign off) that the process has met all probity and process requirements. This would normally involve the provision of a sign off which confirms that the process followed applicable government policies and the agreed probity plan, and that the tender evaluation was conducted in accordance with the process as set out in the tender evaluation plan.

### *How does the role of a probity adviser differ from the role of a legal process adviser?*

While the concept of a process (or legal process) adviser and probity adviser has been used synonymously, significant differences have emerged with the roles.

A probity adviser solely considers probity issues and is primarily concerned with defensibility in the event of a challenge. A legal process adviser considers both probity issues and project management techniques in government procurement.

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The legal process adviser assists the project in developing and drafting the procurement strategy, and the process documents used to govern the process, including conditions of tender and evaluation plan. In other words, while the probity adviser would normally be required to review and comment on these documents as developed by the project, the legal process adviser would be actively engaged in the development and preparation of the documents.

Accordingly, while the legal process adviser would also usually be external to the process, they would be less independent of the process than a traditional probity adviser and more likely to form part of the integrated project team. In this regard, the legal process adviser performs a complementary role to the project legal adviser, with the legal process adviser generally responsible for advising on, drafting and monitoring the procurement processes, and the project legal adviser generally responsible for the drafting of the contract(s), reviewing and advising on tenderer statements of compliance, and contract negotiation with the preferred tenderer(s).

The legal process adviser takes on a broader strategic role for the project, often advising on the overall procurement strategy, reviewing compliance of all advisers with that strategy, ensuring that all elements of the procurement strategy (including all process documentation) comply with applicable legal and process requirements, advising generally on all process issues, supporting decision making, and providing process sign off on issues that might arise during the conduct of the project.

Whether you are considering engaging a probity adviser or a process adviser, if it is intended that their advice should attract legal professional privilege, the terms of engagement for the adviser will clearly need to specify that they are engaged to provide legal advice in relation to probity and/or process issues.<sup>5</sup>

#### ***How does the role of a probity adviser differ from the role of a probity auditor?***

The terms probity auditor and probity adviser are also often used interchangeably. However, there is a distinct difference between these roles. A probity adviser works closely with the client from the beginning of the procurement process, providing advice on probity/process issues which may arise, and providing advice on strategies to overcome potential problems. The probity adviser is therefore expected to give advice which is proactive and strategic in nature. A probity adviser is closely involved in the procurement process, and so cannot be regarded as an 'independent' party. The probity adviser can also fulfil the role of legal adviser to the client.

In contrast, a probity auditor's role is more generally an 'after the fact' role, auditing the process after the process is completed, or at key stages during the process. The process and associated documentation are audited and any probity issues are identified. The issues are addressed in a probity audit report. A probity auditor must be completely independent, and therefore cannot be the legal adviser or otherwise involved in the project.

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## When are probity services needed?

Many procurement projects are undertaken without the requirement for probity or process services. However, an agency may decide to obtain probity services if, for example:

- the transaction is of high value
- the project has a high profile and is likely to be subject to scrutiny both within government (Parliament/Australian National Audit Office) and externally (for example, significant media and other external stakeholder interest)
- the matter is highly complex, unusual or contentious
- the integrity or fairness of the project may be subject to question
- the matter is politically sensitive
- there is a high probability of conflict of interest
- there is an increased likelihood of grievances by tenderers (for example, competition between tenderers is expected to be intense).<sup>6</sup>

## What kind of probity role is required?

The extent of proactive involvement by a probity or legal process adviser varies from project to project and client to client. In some cases the client may only require the adviser to be involved at certain key stages of the tender process (for example, at tender opening and to review the tender evaluation process). In other projects, a client might see the adviser as being an integral member of the tender team and expect the adviser to play a proactive role throughout. In other words the role needs to be tailored to the client's own requirements and expectations.

Some clients employ a legal process adviser without appointing a separate legal adviser for the project. In that case they principally seek advice on process related issues with an expectation, however, that the process adviser would also comment on contractual issues where applicable (in many cases, the client will have used its in-house legal or contracting area to develop the contract in the first instance). Where this occurs the approach has been generally to have one or more team members examine the tender documentation (including the tender evaluation plan) from a probity or legal process perspective, and other team member(s) look at the proposed transaction documents (usually the contract) from a legal perspective.

On occasions the same firm may be approached to formally act as both the legal adviser and the probity adviser for a particular project, with both roles being specifically recognised in the terms of engagement. In this situation, unless the client otherwise agrees to the roles effectively being combined, the approach has similarly been to have one team member focus on the probity/process issues and another team member focus on the legal issues. As there can be occasions where the dividing line between probity or process and legal issues is not altogether clear, it is important that these team members work closely together. However, the client needs to be aware that the probity adviser role cannot be totally independent.

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The extent of the role undertaken by the probity or process adviser directly affects the extent of the sign off on the tender process which can be provided. If the role is a limited one this would be stated in the qualifications to the sign off and obviously the sign off could not provide any assurance on aspects of the process which the probity or process adviser had not been involved in reviewing.

*Peter Kidd has worked in the private sector, in industry and with government agencies over a 20 year career, including a period of four years with a major legal practice in London. Peter has been extensively involved in government procurement and associated probity and process matters, including work both as a legal and probity adviser and work designing and establishing probity processes with major government departments and agencies.*

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## Notes

- <sup>1</sup> *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1, discussed in AGS *Legal Briefing* No. 33, 2 July 1997. See also *Cubic Transportation Systems v State of NSW* [2002] NSWSC 656, discussed in AGS *Commercial Notes* No. 5, 30 August 2002.
- <sup>2</sup> Refer to paragraph 4.3 of the *Commonwealth Procurement Guidelines*, Department of Finance and Administration, January 2005, <<http://www.finance.gov.au/ctc/>>.
- <sup>3</sup> *MBA Land Holdings Pty Ltd v Gungahlin Development Authority* [2000] ACTSC 89.
- <sup>4</sup> Refer to paragraph 6.20 of the *Commonwealth Procurement Guidelines*.
- <sup>5</sup> See 'Legal professional privilege and commercial transactions' in AGS *Commercial notes* No. 11, 7 September 2004.
- <sup>6</sup> Refer to section 8 of the *Guidance on Ethics and Probity in Government Procurement*, Financial Management Guidance No. 14, Department of Finance and Administration, January 2005.

## AGS contacts

AGS has a national team of lawyers specialising in probity and process issues in government procurement. For further information on this note, or on other procurement issues please contact John Scala or Peter Kidd or any of the lawyers listed below.



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