

Current issues in technology procurement

Procurement of technology is an increasingly important activity for government agencies. This note focuses on a range of current legal issues in information and communications technology (ICT) procurement.

NEW FMA REGULATION 10 DELEGATION: ITS INTERACTION WITH THE ICT LIABILITY POLICY

ICT liability policy

Finance Circular 2006/03: *Limited Liability in Information and Communications Technology Contracts* was released by the then Department of Finance and Administration, now the Department of Finance and Deregulation, 18 months ago. This circular changed the default position for liability capping for the procurement of information and communications technology (ICT) supplies¹ for agencies subject to the *Financial Management and Accountability Act 1997* (FMA Act), requiring that, in most cases, liability of suppliers be capped at appropriate levels.

Finance Circular 2006/03 provides that liability of ICT suppliers contracting with Commonwealth agencies should, in most cases, be capped at appropriate levels and the only instance where it is justifiable to have unlimited liability is where there is a 'compelling reason' to require unlimited liability. The circular indicates that a 'compelling reason' would be where unlimited liability represents an 'accurate reflection of the potential risks' of a particular procurement.

Potential for contingent liabilities to be created

Liability caps can create contingent liabilities. Contingent liabilities not only need to be considered from a Commonwealth policy and risk management perspective; they are also important for compliance with the FMA Act and the *Financial Management and Accountability Regulations 1997* (FMA Regulations) (in particular, FMA Regulation 10).

Since Finance Circular 2006/03 was issued, agencies have been asked to consider stating a liability cap when they issue requests for tender for ICT supplies except where an unlimited liability regime is proposed.² While setting the amount of the cap is important, providing for appropriate exclusions is equally important. This is typically done in the draft contract.

Failure to appropriately draft the exclusions from the liability cap can give rise to contingent liabilities. The circular identifies some specific exclusions that should be provided for in any liability cap.



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Whether a particular spending proposal gives rise to a contingent liability is often difficult for agencies to assess, particularly following protracted negotiations with a supplier.

Liability caps present particularly difficult legal issues and advice should be sought by agencies where they have any doubt whether a contingent liability may be created by a particular transaction.

Any liability cap that covers a situation that might involve third party claims against the Commonwealth where contractor fault may be part of the cause is likely to involve a contingent liability. In particular, any exclusion or limitation of consequential loss of any kind is likely to create a contingent liability, as this has the potential to prevent the Commonwealth from recovering the cost of claims from the contractor that might otherwise have been possible at common law.

Contingent liabilities arising from intellectual property claims

Liability for breach of intellectual property (IP) rights is often the subject of negotiations when procuring technology. Some contractors seek to have their liability to the Commonwealth in relation to breach of third party intellectual property (IP) rights restricted to the Commonwealth's rights provided under an indemnity in the contract (i.e. the indemnity is expressed as a 'sole remedy'). Where this is the case, a contingent liability is likely to arise despite the fact that the indemnity itself is not subject to an explicit cap.

The contingent liability in such cases arises because the wording of the indemnity, the sole remedy, limits the rights that would otherwise be available at law to recover loss or damage from the supplier for IP infringement problems with their product or service. The gap is often narrow (for example, there may be no remedy if the problem is not reported quickly), but suppliers are constantly revising indemnities in ways that make the gap (and hence the contingent liability) wider—particularly in areas such as patent infringement. It is often very difficult to spot potential gaps and other shortcomings in indemnities, so it is wise to seek legal advice on them every time but in particular where a 'sole remedy' provision is involved or a supplier refuses to agree to IP liability being a specific exclusion from the liability cap.

New delegation and Finance Circular 2007/01

Finance has recently issued Finance Circular 2007/01: *FMA Regulation 10*, which provides guidance on the application of FMA Regulation 10. This circular explains the changes to the delegation of the Finance Minister's powers under Regulation 10 in the *Financial Management and Accountability (Finance Minister to Chief Executives) Delegation 2007* (the Delegation).

Finance Circular 2007/01 provides information about how to determine whether an FMA Regulation 10 authorisation is required, and, if so, whether authorisation can be given under the Delegation.

Is an FMA Regulation 10 authorisation required for liability caps?

In some cases, FMA Regulation 10 authorisation will be required for liability caps. According to Finance Circular 2007/01, spending proposals containing certain types of liability cap will be regarded as contingent liabilities and will generally, depending on the limits of the relevant appropriation, require

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FMA Regulation 10 authorisation. They are:

- liability caps limiting a contractor's liability to a third party so that the Commonwealth is liable to the third party for any excess
- liability caps limiting a contractor's exposure for damage the contractor has itself suffered so that the Commonwealth is liable to the contractor for any excess
- liability caps limiting a contractor's liability to meet costs that the Commonwealth may seek to recover from the contractor, where a third party has sued the Commonwealth for damage resulting from the contractor's action or inaction.

However, if a liability cap only limits a contractor's liability to the Commonwealth for damage that the contractor directly causes the Commonwealth, the Commonwealth's policy in Finance Circular 2007/01 is that the liability cap will not, of itself, result in a need to obtain FMA Regulation 10 authorisation.

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Can the delegation be used to provide FMA Regulation 10 authorisation?

If the spending proposal does include a contingent liability, there is a limited delegation. The test for working out whether the spending proposal is within the limits of the delegation is threefold:

1. The duration of the spending proposal does not extend beyond specified time limits (for departmental items this is 16 years and for administered items this is 10 years).
2. The most probable expenditure, if the contingency were to occur, would not be material.
3. The chance of the contingency occurring is remote.³

In relation to point 1, Finance Circular 2007/01 provides that, when calculating the duration of a spending proposal that involves a contingent liability, agencies should use the period during which events may occur that lead to a contingent liability crystallising. Agencies are not required to include any subsequent period during which a person might make a claim in this calculation.

For point 2, officials are required to assess the 'most probable' expenditure and then they need to assess whether this is 'material'.

Each of these issues must be determined on the basis of a risk assessment.

AGS often assists agencies with legal risk assessments for indemnities, liability caps and, more generally, for Regulation 10 purposes.

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Notes

- 1 It does not matter whether or not the contractor in question is an ICT supplier.
- 2 Whenever an agency is considering capping a supplier's liability for an insurable risk, the agency should contact Comcover to determine whether its own insurance cover is affected.
- 3 The Delegation gives a general guide that an event has a 'remote' chance of occurring if the probability of the event occurring is less than 5%.

ACHIEVING EFFECTIVE PANEL ARRANGEMENTS

Panels involving a number of suppliers can provide agencies with a convenient, flexible, and efficient process for obtaining goods or services covered by the panel arrangement. Once the panel has been established by a formal procurement process, contracts for individual jobs can be let without the delays, costs and elaborate processes involved in a formal request for tender process. Although panel processes are less formal, they still need to ensure that a best value for money outcome is achieved.

Establishing and operating a panel can involve difficult and complex issues. However, many of these issues can be dealt with by using a *Commonwealth Procurement Guidelines* compliant panel membership application process.

What is a panel?

The *Commonwealth Procurement Guidelines* (CPGs) define a panel in the following way:

A panel may be established by an agency by entering into contracts or deeds of standing offer (panel arrangements) for the provision of identified property or services. A panel is defined as an arrangement under which a number of suppliers, usually selected through a single procurement process, may each supply property or services to an agency as specified in the panel arrangements. The respective panel arrangements must contain minimum requirements, including an indicative or set price or rate as appropriate for the property or services to be procured in the period of the panel arrangement.

Essentially, a panel is an arrangement established as a result of a procurement process conducted in accordance with the CPGs. Each panel member enters into a deed of standing offer ('standing offer') with the agency. These standing offers set out the terms and conditions that will apply when goods or services are purchased by the agency. The benefits of a panel are maximised where it is being used to cover goods or services that are purchased regularly. Usually, a separate contract is formed under a standing offer each time an agency purchases goods or services under the panel arrangement.

Once set up, a panel can provide a convenient and efficient process for purchasing goods or services while still achieving value for money.

Panel arrangement challenges

Panels often require more initial effort to create and manage than other types of procurement arrangements. Entering into an agreement with potential panel members may involve negotiating a separate standing offer with each successful tenderer rather than a single negotiation with a preferred tenderer. This can result in agreements with panel members that contain different terms and conditions. These contractual differences can later complicate the evaluation of quotes for goods or services to be provided under the panel arrangement.

However, attempting to negotiate a level playing field with the same terms and conditions for all panel members may also create problems. In any situation where there is a 'must have' participant who is in a strong position to dictate the terms of the arrangement, applying the same terms to all panellists might result in the other panel members achieving more favourable terms than they may otherwise have obtained. This could undermine the achievement of value for money outcomes from the panel.



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There are two main implications that follow from these issues:

1. There is a much greater need to think carefully about the terms and conditions at the start of the procurement process to ensure that the standing offer is likely to be acceptable to a sufficient range of suppliers to make up an effective panel.
2. It is important to remember that negotiations when establishing a panel are very different from negotiations with a single preferred tenderer. In the panel context, an agency needs to determine what changes, if any, it is prepared to accept (and whether these should be on a global basis). Generally, these changes would be put back to the preferred panel members on a take it or leave it basis. Any form of iterative discussion or negotiation will be more difficult than with a single tenderer.

Despite these complexities, once established, a panel can provide an agency with a simpler process for purchasing goods or services through that panel. At the same time, a successful panel arrangement provides competitive pressures to assist in ensuring procurements continue to represent value for money.

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The panel membership application process: a streamlined approach

In order to take advantage of the convenience and efficiency of a panel while at the same time minimising the difficulties associated with establishing a panel arrangement, AGS has been assisting some agencies to develop a new, streamlined approach to the panel creation process.

The streamlined approach uses a CPG compliant panel membership application process as opposed to a traditional request for tender process.

Benefits of the application process

Commercial leverage for agencies when determining terms and conditions

One of the main advantages of an application process is that it provides an agency with maximum leverage when determining terms and conditions. All potential panel members are invited to apply for panel membership on the same terms and each supplier has to decide whether or not to join the panel on the offered terms by submitting an application. The result is that each supplier will be aware that their competitors may join the panel on the offered terms and that failing to sign up may result in missed opportunities.

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High degree of compliance with terms and conditions amongst panel members

The use of this commercial leverage in the application process results in a high degree of compliance with the terms and conditions proposed. The resulting consistency of terms and conditions has the follow-on benefit of simplifying the evaluation of subsequent quotes. At the same time, the application process can help to avoid the situation where negotiations with a single prospective panel member result in more favourable terms and conditions for all members.

Improvements in management and administration

Agencies that have taken advantage of this innovative application approach have reported considerable reductions in the time and cost of establishing

panels and significantly enhanced flexibility in the ongoing management and administration of the panel arrangements.

Flexibility for agency on panel membership

The application approach is suitable for setting up a 'closed' panel where all members for the term of the panel are included in the initial establishment. However, it can also be used to establish 'open' panels where new members can be added in subsequent application rounds, provided they agree to the same terms and conditions as the existing panel members and the process for further application and admission to the panel is on the same basis as the process that set up the original panel.

Suitability of application process and management of potential issues

As with all types of procurement processes, the application process for establishing a panel is not suitable in all situations and it is important to be aware of the potential limitations on its use. These limitations generally relate to all panel arrangements, not just those established using the application process, and usually relate to the market that the panel covers.

For example, if the particular market that the panel covers is a seller's market then it may be that an agency is less likely to get suppliers to sign up to the terms and conditions it proposes. As discussed above, another potential difficulty arises in markets where there are one or two dominant suppliers that must be included to establish an effective panel. Suppliers in this position may be less likely to apply to join the panel on a take it or leave it basis.

Of course, these issues can be partially addressed by ensuring that the terms and conditions of the standing offer balance the interests of the agency and suppliers. Indeed, determining the nature of the terms and conditions that an agency approaches the market with is a significant determinant in the success of all procurements.

Where a particular term is considered potentially contentious, the standing offer entered into as a result of the application can provide enough flexibility to vary certain terms when proposals or quotations are sought from panel members for specific jobs. The standing offer can also provide for additional terms to be included in specific requests for proposal or quotations. This flexibility can be used to limit the possibility that suppliers will consider the terms of a particular panel to be unbalanced with respect to specific purchases. It also ensures that, where it is necessary to further tailor the terms to a specific purchase from the panel, this can be achieved.

Conclusion

Once they are established, panels provide agencies with a convenient and efficient process for purchasing goods and services without the requirement to conduct further formal tender processes.

However, panels can be complex to create. They potentially require negotiation with a number of suppliers, each of which may have its own concerns regarding the terms of the standing offer. In order to take advantage of the benefits of panel arrangements while minimising the effort required to create and manage a panel, a streamlined approach to panel establishment can be advantageous.

An application process for establishing a panel provides a number of advantages over more traditional approaches to creating a panel. These include maximising commercial leverage for an agency and ensuring the

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consistency of terms and conditions of the standing offer with each panel member. At the same time, the approach is flexible enough to allow terms to be tailored to a specific quote where required.

If you would like to know more about the streamlined approach to establishing panel arrangements, please contact one of the authors of this article, or Simon Anderson or Deborah Browitt (see back cover for contact details).

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Simon Thornton *has advised on a range of ICT issues including software licensing arrangements and all stages of procurement processes, from the release of an RFT through to legal evaluation and the final negotiation of a contract. This work has included advising on, and drafting commercial documents for, the establishment and management of a number of ICT related panels.*

COOPERATIVE AGENCY PROCUREMENT

Cooperative agency procurement provides agencies with an opportunity to share procurement costs and gain the benefit of economies of scale and process.

The Finance Minister has recently announced a review of the Australian Government's management of information and communication technology (ICT), including ICT procurement, as part of the broader reform agenda to improve the efficiency of government spending and deliver better value for money. Cooperative agency procurement is one way agencies can increase the efficiency of their ICT procurements. The latest Good Procurement Practice guide—*Cooperative Agency Procurement*—issued by the Department of Finance and Deregulation (Finance), provides some practical assistance to agencies interested in such arrangements.

The attraction of cooperative agency procurement

Agencies bound by the *Financial Management and Accountability Act 1997* (Cth) (FMA agencies) must comply with the *Commonwealth Procurement Guidelines* of January 2005 (CPGs) and other Australian Government policies in relation to procurement. FMA agencies also have in place internal procedures to be followed in procurement.

A cooperative procurement can allow for costs associated with procurement to be shared between agencies, thus reducing the overall cost to the Commonwealth. This is particularly so for new and small agencies, which could expect to gain administrative support and other savings by accessing the procurement experience and contracts of larger agencies. The cost of the goods and/or services procured may also be reduced as the increased supply requirement may result in a better price being achieved.

It is important to note that cooperative agency procurement may also reduce the costs to tenderers. By allowing tenderers to submit one tender for the provision of goods or services to a number of agencies rather than re-tendering for each agency requirement, tender costs can be reduced, and this may also lead to a saving for the procuring agencies.

This paper describes two types of cooperative agency procurement—clustering and piggybacking—and discusses the challenges associated with each of them while providing practical advice about how those challenges can be met.

When can agencies take advantage of cooperative agency procurement?

Agencies will need to consider their obligations under the CPGs when deciding whether to undertake cooperative procurements. Value for money remains the paramount consideration. This means that a reduction in procurement costs is a relevant consideration but will not justify cooperative agency procurement unless the procurement will ultimately deliver value for money to the agency.

Agencies should also consider whether conducting a cooperative agency procurement will have a negative impact on small and medium enterprises (SMEs). The CPGs require agencies to ensure that procurement methods do not unfairly discriminate against SMEs by, for example, requiring excessive quantities of services. SMEs may struggle to meet the supply required by a cooperative procurement and therefore may not bid, which may lead to a reduction in competition in the market and ultimately to higher prices for agencies.



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It may also be worthwhile, prior to undertaking a cooperative agency procurement, to test the market to ensure that tenderers can meet what may be high volume requirements. Not doing so may result in a lack of suitable tenders and a failure of the tender process.

Clustering

Clustering occurs where agencies conduct a procurement process together. In order to achieve the best value for money outcome, all agencies involved in a clustering arrangement should participate in the development of request documentation and the evaluation of submissions. Note however that, if an agency compromises on its initial requirements in order to participate in a clustering arrangement, there is a real risk that the agency will have to return to the market to obtain further goods and/or services.

Agencies will need to consider whether one agency should lead the procurement. The role of the lead agency can vary but, practically, it is likely to be more efficient if one agency conducts the management of the tender process and carries out the related administrative tasks (for example, notifying the market, communicating with tenderers and receiving submissions).

In a clustering arrangement, agencies should determine:

- what kinds of advisers may be required to assist, who will engage them, and how costs for advisers will be shared between the agencies
- whether a lead agency should conduct the evaluation (having regard to the need for each agency to be satisfied that there has been a value for money outcome)
- whether a representative committee should conduct the evaluation, chaired by a lead agency
- how each agency intends to contract with the successful tenderer; that is, whether each participating agency should contract directly with the supplier/s or be listed on a schedule of the lead agency's contract.

Where there are a number of agencies participating in the evaluation, probity considerations will be particularly relevant: when many agencies are involved, there is an increased risk that information will be inadvertently disclosed or that conflicts will arise.

In some circumstances, notwithstanding its involvement in the procurement process, an agency may determine that submissions do not represent value for money for that agency. To address this situation, request documentation should allow participating agencies to pursue other procurement options.

Agencies should note that the term 'clustering' does not refer to circumstances where an agency becomes party to a contract after it is executed or standing offer arrangement after a panel is established: this is called 'piggybacking'.

Piggybacking

Piggybacking occurs where an agency accesses an established contract or standing offer arrangement of another agency. It is important to note that in most cases an agency can piggyback on the contractual arrangements of another agency only if this was contemplated in the original procurement process and in the contract. If the procuring agency anticipates that other agencies may wish to piggyback in the future, it will need to ensure that

Clustering occurs where agencies conduct a procurement process together.

the relevant procurement documentation and contract allow for this. Agencies should also note that piggybacking agencies may need access to evaluation materials, so they should ensure that confidentiality provisions in the request documentation and contract do not restrict other agencies from accessing the relevant material.

When considering including a piggybacking arrangement, agencies should consider what effect piggybacking will have on the supplier:

- Does the request documentation need to specify potential usage, to avoid overburdening the supplier (and potentially causing supply problems) and to allow the tender to offer pricing options (such as volume discounts) that may present better value for money?
- Do potential piggybacking agencies need to be identified in the arrangement (for example, if the procurement is conducted by an agency with a number of portfolio agencies, should all potential agencies within the portfolio be identified), or will this unnecessarily limit the potential for piggybacking?
- Will additional agreements (such as a deed of undertaking from the supplier to the piggybacking agency) be required for the piggybacking to be effective and, if so, does this need to be included in the request documentation?

When piggybacking, participating agencies should consider formalising the arrangements between themselves and consider whether the contract or standing offer should be amended to reflect the arrangement. This may be necessary to avoid unintentional amendments to an agency's pre-existing contract or standing offer if the piggybacking arrangement is not entered correctly.

Finally, an agency that is considering piggybacking should consider when the original procurement took place and whether the market has since changed, as a new or innovative procurement option that represents better value for money may exist.

Managing cooperative agency procurement

In addition to the specific issues relevant to each of clustering and piggybacking, some general principles should be kept in mind when managing any cooperative agency procurement.

Close cooperation between agencies is required

Each participating agency needs to ensure that its goals, objectives, policy requirements and supply requirements are agreed and well documented before the market is approached. It is important that agencies have a common understanding of the agreed arrangements. Where a clustering arrangement is being considered, agencies will need to agree (possibly through an MOU or exchange of letters) how the procurement process will be managed (for example, the role of each agency, how the procurement costs will be met and how the evaluation will be conducted), whereas, for a piggybacking arrangement, the focus is more likely to be on managing the process of establishing the piggyback contract.

Agencies should be aware that, as with any other procurement, poor management of a cooperative agency procurement can result in agencies procuring goods and/or services that do not completely meet their requirements.

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Where there are more than two parties to a contract, issues of contract management and the related responsibilities may arise. Cooperative agency procurements need to be carefully managed to avoid disconnects between multiple parties, which could result in goods or services not being supplied as required, unintentional breaches of contract by the contractor or an agency, or unintended contract variations. Carefully drafted notice and change control processes will aid in managing this, but they are not a substitute for close contract management.

Cooperative agency procurements need to be carefully managed to avoid disconnects between multiple parties

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Summary

Cooperative agency procurement presents agencies with an opportunity to achieve the best possible value for money outcome for the Commonwealth by reducing the administrative costs of procurement. Cooperative agency procurement does have its pitfalls, but these can be managed through well-developed and consultative procurement processes.

If your agency wants to join a cooperative agency procurement, contact the procurement office in your agency, or check the Annual Procurement Plans on AusTender for information on potential clustering opportunities.

Adrian Snooks has considerable experience in ICT procurement and commercial drafting and negotiation. He has advised on some of the largest acquisitions of technology by the Australian Government.

Simon Anderson specialises in intellectual property agreements and negotiations but advises more generally on ICT procurement, competitive tendering and contracting, and general commercial matters.

MANAGING PROBITY AND PROCESS ISSUES IN ICT 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 are 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 and costly, and can undermine public confidence, affect reputations and act as a distraction from government's core functions.

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

Common issues in procurement processes

Disconnect between request for tenders and evaluation plan

The decision in *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 established that a process contract may arise from procurement processes and that, when the procuring entity is a government agency, it may be appropriate to imply in the process contract a duty to act fairly. In most cases, one aspect of this duty will involve the requirement to evaluate bids according to the priorities and methodology specified in the request for tenders (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.

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. This will enable a 'side-by-side' review to be done to ensure that the evaluation



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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 information requested 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. This issue is best remedied by ensuring 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.

Management of 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 will usually need to be made available to all interested parties. 'Interested parties' can be 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. One way of making the information available is to place it on AusTender.

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.

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Management of conflicts of interest

The *Commonwealth Procurement Guidelines* emphasise that procurement processes must be conducted in an ethical manner which avoids conflicts of interest and the misuse of power. Conflicts of interest will arise where a member of a procurement team or an adviser to a procurement team has an affiliation or interest which prejudices—or might be seen to prejudice—their impartiality.

Typically, all members of the procurement team, and their advisers, will be required to declare all conflicts of interest before the beginning of the bidding process and to keep their declarations up to date. Having 'conflicts of interest' as the first agenda item at meetings of relevant teams, committees and panels can help to ensure that conflict issues do not go unnoticed.

The response to conflicts and potential conflicts of interest will vary depending on the nature of those conflicts. Where a serious or potential conflict of interest is identified, the officer or adviser concerned may need to be removed from the procurement process. Where this is not practical, other mitigation measures may need to be put in place. If a less serious or potential conflict of interest is identified, some ring fencing or quarantining of the individual or of sensitive information may be sufficient to deal with the problem.

If you are considering engaging a probity adviser, AGS has a Probity Fact Sheet available on our website: <http://www.ags.gov.au/publications/agspubs/legalpubs/Probityfactsheet.pdf>

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AGS contacts

AGS has a national team of lawyers specialising in advising agencies on a wide range of information and communications technology (ICT) matters. For assistance with any ICT matters, please contact John Scala, Linda Richardson, Tony Beal or any of our specialist ICT lawyers listed below:

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