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Probity in procurement: tips from a professional

The Commission recently sat down with Scott Alden, HWL Ebsworth Partner, to talk about probity. Mr Alden is an experienced probity adviser and projects lawyer, having specialised in government procurement and probity for over 20 years. He is also the head assessor of the NSW Law Society's Specialist Accreditation Committee for Government and Administrative Law, and has written and lectures two masters programs in government procurement and probity. Mr Alden regularly speaks and publishes thought-leadership articles on probity and procurement matters.

Let's start with a broad question. Tell us about some of the tricky probity questions or sharp practices that come up in your work.

Probity is difficult for some people to understand. A lot of people do not know what it means, let alone what it entails and what is required to act in a way that minimises or avoids probity risk and probity issues. Most people only seek professional advice for the more difficult problems. A lot of the trickier questions I get relate to conflicts of interest, and how best to manage them.

A conflict of interest arises when a public sector duty and a personal interest conflict. Typically, in a procurement, the official has a public sector duty in relation to the function he or she is carrying out in relation to the procurement. In addition, that person has interests (both financial and non-financial) outside of work, and where these relate to, or intersect with, the procurement in any way, then it is likely a conflict has arisen.

"Be objective. When something looks wrong, it probably is wrong. Follow the probity principles, remain focused on achieving value for money and when in doubt always err on the side of caution – make the disclosures, record the decisions and act decisively."

Here are four conflict of interest issues examples that I have dealt with.

- A university was buying a high-end medical device. A professor at that university was receiving royalties from one of the tenderers for use of a patent that he had registered. There were only two tenderers. The professor was adamant that this did not present a conflict of interest. This was a clear conflict, and one which he ultimately disclosed (albeit reluctantly), and it was therefore managed appropriately.
- When I asked a project manager of a high-value government contract whether he had any conflicts of interest he said, "No, unless you count the dozen bottles of wine he gives me for Christmas every year". He was being serious. I told him that, yes, I did count that, and that does create a conflict, which he would need to register.
- I was advising on one of the state's most valuable contracts. At the end of the procurement process, with the evaluation complete, and the report on its way to the final delegate for approval, the chair of the evaluation committee disclosed that he had

been interviewing for a job with the recommended tenderer three months ago, but that he had not wanted to say anything as he had not absolutely decided to leave at that time, and had since decided to stay. This gave rise to a serious issue regarding a process that had been seriously compromised by an undisclosed conflict.

- While attending and advising on a pre-tender briefing, a senior government official decided, against my strong advice, to get in the car with the incumbent maintenance contractor, and then travel with them around the site visit. The other tenderers saw this, and some mentioned it in the post-tender briefing following the incumbent's reappointment. This was a clear breach of probity and gave rise to conflict of interest issues.

Shareholdings present issues around conflicts of interest. There needs to be an understanding of:

- the proportion of shares that are held against the total (for example, level of control)
- whether the shares are directly held or held through a superannuation trust, or other financial management arrangement, where trading decisions are not taken by the individual
- when the shares may vest, or become tradeable
- the impact of the decision on the share price of the entity (if any).

Specialised industries, with few specialists, give rise to conflict of interest issues. In particular, where a private sector individual is asked to sit on an advisory or steering committee, where they are also senior managers, executives or advisers to an entity. This is particularly an issue where:

- the employee stands to obtain a significant benefit if the employer is successful in the procurement or project, or
- the individual is able to shape government policy or decision-making that their employer will benefit from.

In specialist sectors and industries, a government entity often seeks the input of a particular individual or entity to assist in preparatory, needs identification or similar work in respect of an opportunity. In such cases, the individual or entity will usually also want to be able to bid for the final (and usually more lucrative) contract that stems from their earlier input. This is occurring more and more frequently and gives rise to conflict of interest issues that need careful management.

Wherever there is interaction between government and a supplier in a procurement process, particularly collaborative processes, where there is inevitably close engagement, care needs to be taken to maintain appropriate relationships and ensure equal treatment, fairness and confidentiality.

In addition to conflict of interest scenarios, the public sector should avoid sharp practices, such as:

- tailoring evaluation criteria/specification to favour a particular tenderer or solution
- placing pressure on tenderers for lower bids
- requesting bids from unqualified tenderers to drive prices lower, or to manufacture an outcome where only the compliant/qualified bidders will be taken forward
- accepting a low bid that is well below the project estimate, knowing that the tenderer will not be able to deliver the project at that price
- seeking to take advantage of obvious mistakes in tenders (for example, miscalculated pricing)
- abusing a prequalified list of contractors by continually going to the same contractor/s, following appointment to a list or panel via an appropriate process (in this way, an official can continually direct appointment of a prequalified supplier for a sum well in excess of the standard direct negotiation thresholds).

A further gap relates to the engagement of subcontractors on government projects. While the head contract will usually need to be properly procured in a fair, competitive, market-tested environment, the subcontractors to that head contract do not. This can be at risk of probity breaches and issues where the official influences the appointment of the subcontractor (for example, uses known mechanisms in the contract such as select/nominated subcontractor to force the head contractor to select subcontractors with whom they have an interest).

In addition, once the contractor has been appointed; repetitive, uncontrolled, high-value variations can create risk. There is little understanding that a variation to an awarded contract is, in fact, a direct negotiation or sole supply. Even small variations, where they add up to be disproportionate in terms of the original contract value, lead to a clear breach of probity and procurement guidelines.

Members of a Tender Evaluation Committee (TEC) will sometimes have knowledge about a particular tenderer that is not evident in its tender response. For example, a TEC member might be aware that a tenderer is currently doing a piece of work that is late and over budget. How should TECs manage this type of knowledge? Similarly, what is the best process to follow if a TEC wants to speak with a "referee" that has not been nominated by a tenderer?

Strictly speaking, a tender should only be assessed based on what it contains, including the references provided by the tenderer, and not reference-checking outside of that. However, where a TEC member has knowledge of work a tenderer has done, or is doing, that may be useful to evaluate value for money, the TEC can consider whether, and how this knowledge can be used in the procurement process at hand.

Generally speaking, there will be relevant information about all tenderers that is not contained in their request for tender (RFT) responses. If the TEC decides to obtain and rely on this information for one tenderer but not others, it would risk creating an "uneven playing field".

An "even playing field" is maintained where the tenders are only assessed on the basis of what is submitted or all tenderers' other, additional, experience is considered.

This is sometimes done by government, in different ways, depending on the TEC and the agency. They all have probity concerns and issues associated with them and I have seen all of the below methods adopted. The various ways (in order of most to least probity risk) are:

1. for the TEC to simply contact the other agencies or businesses that have engaged the tenderers and ask for a reference without regard to any clause in the tender, or without advising the tenderers
2. to prescribe tendering conditions that allow the TEC to seek references from any other agency or business that has engaged the tenderers
3. for the TEC to ask the tenderers, through the clarification process, to nominate additional referees as specifically identified by the TEC itself.

With regard to point (2), for example, the Commonwealth Government tender conditions allow the TEC to:

- obtain and take into account information from referees, enquiries and investigations, including:
  - from referees on prior or current projects on which a tenderer may have been involved (whether or not nominated by the tenderer in, if a registration of interest process was used, its registration of interest or its tender, or if a registration of interest process was not used, its tender)
  - in connection with any other Commonwealth project, or
  - from financial information or documents
- take into account any information lodged by the tenderer in any registration of interest process, tender process or similar procurement process in connection with the Project or any other Commonwealth project.

Agencies often go to a great deal of trouble to establish pre-qualified panels of suppliers. What are your tips for getting these panels to operate fairly?

Pre-qualified panels of suppliers can be a backdoor to corruption. Once a supplier makes the panel, it can be continually engaged and provided with work at values above the amount that would otherwise qualify as a sole source. The same contractor can be used repetitively, with no need to go to others on a panel, or provide equal opportunity to all, despite obligations around value for money.

Tools and methodologies can be introduced to improve probity regarding the use of panels, such as:

- written, transparent guidelines regarding the use of the panel (and ideally shared with the panellists) ensuring that panellists will be selected to quote on a rotational basis, unless there is good reason to do otherwise (for example, geographic location or particular expertise)
- firm KPIs and regular contractor performance review meetings, which may also go to contractor re-selection (provided they are objective)
- separation of function between panellist selection and panel user
- quarterly reports (again, ideally shared with the panellists) on number of engagements from the panel; who received which quotations and who was successful.

Agencies and officers also sometimes re-specify work or package it into smaller chunks in order to make it fit within the rules of the panel.

Finally, where officers use panels for the procurement of works or services outside of the original scope of the panel, this is a significant probity and procurement breach. For example, a panel for minor works should not be used for major works, panels for grounds maintenance/cleaning services should not be used for facilities management/maintenance, and so forth.

What are some of the common probity challenges in early tenderer engagement and multi-stage procurement methods?

Care needs to be taken in relation to early contractor involvement (ECI). ECI is a multi-stage procurement model that can be both positive and negative from a probity standpoint.

It is a two-stage process, which typically involves:

- an open approach to market pre-delivery phase (typically an EOI) to select the ECI stage 1 participant
- engagement of the stage 1 contractor/s (depending on whether it is a single or multiple ECI) to collaboratively work with government to refine and workshop the project through design finalisation, risk identification, innovation, programming, and so forth, to arrive at a point of re-pricing and contract finalisation for stage 2
- contractor/s (depending if single or multiple) re-price for the final major works contract
- contract award and delivery of the project (stage 2).

On the one hand, ECI can assist in clarifying the design aspects and pricing framework for a project, which has cost-saving benefits for the government entity. On the other hand, it can favour larger companies with the resources to offer stage 1 (the cheaper stage) at reduced costs or pro bono.

Further, the ECI workshop period can be relatively resource-intensive, depending on the number of ECI workshops, and this may deter smaller tenderers. One way to mitigate this is to offer tenderers a flat-fee for participation in the stage 1 process.

An ECI process can also result in a loss of competitive tension in the procurement. This is somewhat mitigated by running a double or triple ECI process (with two or three shortlisted tenderers), which is required for any local government entity under NSW local government procurement requirements. For state or federal government, the loss of competitive tension in a single ECI needs to be weighed against the increased resource commitment required for a double or triple ECI process.

NSW local councils are unable to run a "single ECI" process with only one proponent due to NSW local government procurement requirements including under the *Local Government Act 1993*, as opposed to state and federal government who are able to run single ECI processes with a single shortlisted proponent. Probity issues that arise from these types of processes include:

- a double ECI – collusion between the two bidders
- influence, corrupt conduct or over-familiarisation from numerous pre-bid interactions

- no charge for the stage 1 in order to secure the stage 1 role, leading to capture for stage 2 and significant loss of value for money (this can be fixed by the agency setting and paying a fixed fee for stage 1)
- a double ECI – risk of cross-contamination of ideas from one bidder to the other, especially if using a common government team for both (which is often the case due to resourcing issues).

What is a "no reason recusal"?

This is where a panel or committee member withdraws without reason from their involvement in the project, without providing detail as to why or where the conflicts lie.

There is nothing wrong with having a conflict, it only becomes a problem when it is not disclosed, or if it remains without any action being taken. Promoting the acceptability of no reason recusals more readily enables a conflict to be dealt with, but without the stigma, embarrassment, or other discomfort that disclosure may bring.

It is also important to design the procurement and probity process for a project so that it can continue if a key member of the TEC recuses themselves or is withdrawn for any reason. The project itself should not be jeopardised.

Here are examples of where a "no reason recusal" has been used in my experience:

- job applications (that is, an individual does not want to disclose that they are considering resigning to take up employment with a supplier or tenderer)
- membership of certain political, sporting, religious or other clubs
- romances
- extra-marital affairs
- enmity towards a particular supplier.

What should an agency do if it wants to make use of ideas or intellectual property (IP) contained in the bid of an unsuccessful bidder?

A multi-stage procurement process will typically involve an expression of interest (EOI). One of the main reasons to conduct an EOI is to assist to clarify aspects of how the project will be delivered, or to improve a design, methodology or any other aspect of the project.

It is critical that the EOI makes it clear that the agency may use the ideas, and other information submitted by the tenderer, in any subsequent contract or process. If it does not, then an affected tenderer, which is unhappy that its ideas were used without consent, may claim breach of copyright or breach of confidentiality.

By disclosing that IP/ideas may be used as part of the second stage (RFT stage), tenderers are able to consider whether to disclose them in their EOI response, or "keep their powder dry" for the second stage. This is a balanced decision, as disclosure in the EOI may assist shortlisting; and not disclosing, but waiting, may assist in winning the final project.

I have also seen situations where an agency negotiates with an unsuccessful tenderer to include its ideas and innovations in the final contract with the successful tenderer. Again, unless this is provided for in the original RFT, this is a clear breach of IP/confidentiality. This is only possible through engagement with the losing tenderer whose ideas are attractive, and an appropriately drafted Deed of Assignment of IP (with or without compensation depending on what is negotiated).

Have you got some general tips for maintaining impartiality in the TEC?

The TEC is such an important part of any process. If the TEC's evaluation is wrong, or corrupted, then it puts the entire project in jeopardy.

When it comes to the TEC, it is important to ensure that:

- it comprises the right number of members, and the right members
- enough time is given for individual assessment and consensus assessment
- all members feel that they have a free and equal voice in the discussions and the decision
- there are no conflicts of interest, that the concept and meaning of conflict of interest is well understood by all, that all conflicts are disclosed, that additional management strategies are considered and implemented where necessary, and that all members understand that conflict of interest identification disclosure and management is an ongoing process
- all meetings are documented, and reasons for decisions outlined (post-completion audits or reviews are a valuable exercise as well).

If the committee is adopting an "Individual Scoring" followed by "Consensus Scoring" method of assessment, it is an important probity step to ensure all members have had sufficient time to conduct their individual scoring prior to convening to undertake the consensus scoring process. It is obviously helpful if all members of a TEC reach agreement. However, the evaluation methodology should not force the TEC to reach an artificial agreement. It should be acceptable for members to submit a minority opinion.

Agencies should also be aware of "passenger" members on the TEC, who may be happy to be led by others or reluctant to explain or defend their evaluation scoring. Engage with all members and discuss reasons for particular scores to improve transparency of the decision-making. In addition, keep an eye on evaluation members that are loud, aggressive and "steamroll" other members with their views and recommendations. A simple way to encourage equal contribution is for TEC members to take turns to state their scores and reasoning.

In terms of probity and integrity, which important pieces of case law should procurement officials be aware of?

Although few probity and procurement cases have come before the courts, there, nonetheless, is important authority that should be kept in mind.

Hughes Aircraft Systems International v Air services Australia [1997] 146 ALR 1 (Hughes Aircraft)

This was the first case to establish what is called the "process contract" in Australia. The process contract is a contract between the principal seeking bids (often the government) and a bidder where the terms of the contract are the bidding and process rules that the government represents to the bidder. For example, the criteria upon which the bids will be assessed, and how bidders and bids will be treated during the bid phase.

The following also deal with issues relating to process contracts:

- *Karimbla Properties (No. 50) Pty Ltd v New South Wales & Anor* [2015] NSWSC 778
- *IPEX ITG Pty Ltd v State of Victoria* [2010] VSC 480
- *State Transit Authority of NSW v Australian Jockey Club* [2003] NSWSC 726.

Cubic Transportation System Inc v State of New South Wales & 2 Ors [2002] NSWSC 656

This case involved the integrated ticketing project in NSW. The unsuccessful tenderer argued, among other things, that the integrity of the tendering process had been compromised. This included a member of the project team owning shares in the preferred bidder and an allegation that the legal advisers had a conflict of interest. The judgment was decided in favour of the government, but it contained several lessons relevant to the role of the government appointed probity adviser.

Eden Constructions Pty Ltd v New South Wales (No 2) [2007] FCA 689

Here, we are reminded that government entities can use contractor "review lists" and restrict contractor engagement on tenders for certain projects, and that this information can and should be shared between agencies, departments and entities of the state. Such lists are often informed by, and created from, regular contractor performance review reports. If these are used, it is important they are regular, transparent, and accountable (that is, shared with the contractor).

JS McMillian Pty Ltd and Ors v Commonwealth of Australia [1997] 147 ALR 419

This serves as a reminder to purchasers to take care when drafting procurement documentation and in communications with tenderers so as to avoid accusations of misleading conduct or being seen to favour particular tenderers.

What other advice would you give to someone who has been appointed as their agency's internal probity adviser?

1. Beware of site visits – they present many opportunities for inadvertent or deliberate advantaging.
2. Ensure you put in place proper probity controls/ information barriers where you are dealing with related entities, or entities that have a shared parent company or ultimate holding company. A probity deed outlining responsibilities and properly executed statutory declarations confirming compliance with the deed can assist with this process.
3. Heed the warnings of the 2019 NSW Auditor-General's report on the engagement of probity advisers and probity auditors, which found that certain agencies failed to:
    - ensure the probity practitioner was sufficiently independent
    - manage the probity practitioner's independence and conflict of interest issues transparently
    - provide probity practitioners with full access to records, people and meetings
    - establish independent reporting lines
    - evaluate whether value for money was achieved.
4. When advising on a procurement process, consider the various documents needed to ensure an appropriate, documented process and proper paper trail. These include:
    - probity plan
    - procurement plan
    - probity protocols
    - code of conduct
    - conflict of interest registry
    - communications register
    - an agreed evaluation and scoring methodology
    - probity deeds and statutory declarations
    - minutes of all meetings
    - records supporting all decisions
    - probity report.

Be objective. When something looks wrong, it probably is wrong. Follow the probity principles, remain focused on achieving value for money and when in doubt always err on the side of caution – make the disclosures, record the decisions and act decisively.

5. Probity advisers and government agencies need to be cautious with private sector consultants and advisers. The obligations required by public sector codes of conduct must be embedded in the contract, and the importance of them thoroughly explained to non-public sector participants in a process.
6. If re-tendering a contract where there is an incumbent, it can often be difficult to get the "level playing field" balance right. On one hand, it is important to ensure the new entrants have the same information and knowledge as the incumbent. However, the agency must be careful to not disclose confidential or commercially sensitive information.

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