

Probity Guidelines for Procurement

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Attachment I - Outline of the Probity Process

What is probity?

Probity is a risk management approach to ensuring procedural integrity.

A procurement process which conforms to the expected standards of probity is one in which clear procedures, consistent with the Government's policies and guidelines and the legitimate interests of bidders, are established, understood and observed throughout the procurement process. All bidders are to be treated consistently and equitably in accordance with these procedures. Decisions are to be made in a transparent manner, which allows them to be understood and justified subsequently.

Objectives of a probity process

Probity in the procurement process is the responsibility of all stakeholders involved in the process. The broad objectives of the probity process are to:

- ensure conformity to processes designed to achieve value for money;
- provide accountability;
- ensure that all bids will be assessed against the same criteria;
- preserve public and bidder confidence in government processes; and
- improve defensibility of decisions to potential legal challenge or other external scrutiny.

Why is probity important?

Positive outcomes that should result from procedural integrity include:

- avoidance of conflicts/problems;
- avoidance of corrupt practices;
- better outcomes against stated objectives;
- improvements in public sector integrity through organisational and attitudinal change;
- reassurance to the community and those wishing to do business with the public sector that the process and outcome can be trusted;
- provision of an objective and independent view on the probity of the process; and
- minimisation of potential for litigation.

What are the Probity Principles?

There are five essential probity principles to achieve procedural fairness. Agencies and Probity Advisers should consider these principles throughout all stages of the procurement process. They are:

- open competitive process;
- fairness, consistency and transparency of process;
- identification and resolution of conflicts of interest;
- accountability in relation to decision making; and
- monitoring and evaluating performance.

Open competitive process

Consistent with government policy, a competitive process for procurement is to be used at all times. This means that:

- Market testing must be undertaken on a regular basis as it allows new suppliers the opportunity to compete, encourages existing contractors to improve performance and has the potential to identify new procurement solutions.
- Project specifications should be reflected in the predetermined evaluation criteria, and include the expected outcomes and the skills and expertise expected of the service provider.

Fairness, consistency and transparency of process

Potential suppliers are to be treated equally and must have the same opportunity to access information and advice. This means that:

- Evaluation criteria and weightings must be established and documented prior to the calling of bids, they must not be biased and they must not be changed during the procurement process unless all bidders are given an opportunity to revise their bids.
- Bids must be evaluated consistently, in a systematic manner against explicit predetermined criteria available to all potential bidders.
- A contract cannot be awarded to a bidder that lodged an Expression Of Interest (EOI) without going through a more detailed second stage (Tender). A selective tender process cannot be conducted following an EOI unless the bidders are informed in advance that only those short-listed will be permitted to submit tenders.
- All bidders are to have access to the same information and for the same amount of time.
- Confidential information must be protected and no information is to be provided for the benefit, or to the detriment, of particular parties.
- Deadlines, including dates for submission of bids, are to be rigidly enforced, and any extension of time permitted must be granted to all bidders.

Identification and resolution of conflicts of interest

- Policies to deal with potential conflicts of interest must be established at the start of the procurement process.
- TIs 1101 and 1201 provide that agencies must develop and maintain a process for the recording of conflict of interest declarations and that records kept must include details of the action taken to manage the conflict of interest and be auditable.
- Members of an evaluation committee must disclose any actual, perceived or potential conflicts of interest prior to their appointment, through the completion of a Confidentiality and Conflict of Interest Declaration. [Confidentiality and Conflict of Interest Declaration pro-formas](#) are located at www.purchasing.tas.gov.au>Buying for Government>Resource Library>Forms.
- Bidders must be required to divulge all potential conflicts of interest at the time they offer to provide services. Failure to make adequate disclosure may be grounds for terminating the contract.
- Further information on recording conflicts of interest can be found in the [Recording Conflict of Interest Declarations – Guidelines for Agencies](#), located on the Purchasing website at www.purchasing.tas.gov.au>Buying for Government>Resource Library>Publications.

Accountability in relation to decision making

- Records must be maintained throughout the procurement process, detailing evaluation criteria, weightings, decision-making processes and decisions made. These records should provide sufficient information to enable an audit and independent review functions to be carried out.
- Bids, submissions, expressions of interest and the like, should be evaluated by more than one person, preferably a panel.
- Agencies must seek approval to undertake a process outside the established open procurement procedures. For more information see the guide on Direct/Limited Submission Sourcing at www.purchasing.treasury.tas.gov.au Buying for Government>Resource Library>Publications.
- The appointment of a Probity Adviser should be considered for large, complex or controversial contracts, as a Probity Adviser can provide external scrutiny and ensure integrity of process.

Monitoring and evaluating performance

- Regular and systematic monitoring of contractor performance during the term of the contract should be undertaken to determine whether milestones are being met and that key performance indicators are being satisfied. Milestones and key performance indicators should be developed during the planning stages of the purchase, specified at the time bids are sought and finalised during negotiations with the preferred supplier prior to the contract being awarded.

- An evaluation should be undertaken at the end of the contract to determine whether the contractor has met the needs of users and delivered the required outputs and outcomes identified at the time the contract was initially established. The identification of innovative approaches, useful specifications, evaluation criteria, and problems experienced will greatly assist in improving future procurement processes.

External Probity Services

In any Government procurement process, independent assessment of the procurement process may be necessary. In some cases, this is best achieved by engaging an independent person to act as a Probity Adviser.

What is Probity Advising?

- Probity advising involves the engagement of a Probity Adviser, who is external to and independent of a procurement process:
- to provide scrutiny (by way of observing and reviewing) of the procurement process, to ensure that prescribed processes have been or are adhered to;
- to provide advice on probity issues which may arise before and during the procurement process; and
- to ensure that the process is equitable and conducted with integrity.

The Probity Adviser will provide an independent opinion on probity issues that may arise during the process and confirm, in writing, that the concluded process has met all probity requirements.

In a government context, this advice would involve confirmation that a procurement process followed applicable government policies and that the evaluation process was conducted in accordance with the process set out in the evaluation guidelines issued to bidders.

Probity Adviser vs Auditor

The terms “Probity Auditor” and “Probity Adviser” are generally used interchangeably. However, there is a distinct difference between the two that should be clarified.

A Probity Adviser is more actively involved providing advice on probity issues, which may arise, together with advice on strategies to overcome potential problems. The pro-active approach by the Probity Adviser should help to achieve best practice procurement processes and outcomes.

A Probity Auditor’s role is more generally confined to observing and reviewing the procurement process after it has been completed.

It is expected that in most cases agencies will engage Probity Advisers, as opposed to Probity Auditors, as they actively advise through the procurement process. However, these guidelines apply equally to Probity Advisers and Auditors.

A Probity Adviser can be engaged at any stage during the procurement process. However, for best results it is recommended that they be engaged early on in the procurement process.

Agencies must not engage a Probity Adviser to try and save a process that is already tainted (e.g. when things are already going wrong).

What does Probity Advising achieve?

The immediate task of a Probity Adviser is to ensure that the procurement process is open and fair. In this regard, responsibilities of relevant participants, such as the evaluation committee (or in some cases, the person) conducting the evaluation need to be determined.

Probity advising ensures the process is:

- open and fair;
- not tainted by interference by any interested party;
- conducted in compliance with government policies and guidelines; and
- secure and confidential.

The Probity Adviser, upon completion of the process:

- confirms the process is fair and nothing more needs to be done;
- recommends how to supplement future processes;
- advises how to redress any errors or omissions; and
- as a last resort, recommends the process be repeated.

It should be noted that the involvement of a Probity Adviser or Auditor does not necessarily guarantee the best possible decision is made. However, as the established processes and guidelines are intended to facilitate the making of the decision, ensuring compliance with those processes and guidelines will help to meet that goal.

Do I need to engage a Probity Adviser?

A Probity Adviser should be used as the exception rather than the rule. Agency procurement processes already incorporate a number of review mechanisms, including Procurement Review Committees that independently assess the process to ensure it has been fair and equitable, and that the procurement principles and procedures, outlined in the *Treasurer's Instructions* and/or the *Procurement Practices Manuals* have been followed.

In general, all procurement policy advice, including the interpretation of guidelines, should be sought from either your agency's procurement area or from Treasury (Procurement and Property Branch), and not from the Probity Adviser.

There needs to be some level of awareness, or foresight, that a particular project could benefit from an external review mechanism. It is recognised that appointing a Probity Adviser will add to the cost of a project. However, in some circumstances the appointment of an external Probity Adviser may be prudent. A list of the key factors to consider when making this decision is below:

Reasons to engage a Probity Adviser

- the transaction is of high value (> \$500 000)
- the matter is highly complex, unusual or contentious
- the integrity of the project may be questioned
- there has been a history of controversy or litigation
- it is anticipated that a bid may be received from within the agency, or from another Tasmanian Government entity, and there is a need to ensure that appropriate procedures and scrutiny are in place to maintain the integrity of the procurement process
- the matter is politically sensitive
- the nature of the market place makes bidder grievances more likely (i.e. where commercial secrets are important, or where competition may be particularly fierce)
- where there is a high probability of conflict of interest, associated with the purchasing process or participants

Reasons not to engage a Probity Adviser

- to act as insurance against errors in decision making
- to demonstrate probity. Agencies should already have in place systems which incorporate probity
- to justify a decision to depart from a competitive process
- to save a process that is already tainted (e.g. when things are already going wrong)

Once engaged, the Probity Adviser will assist in anticipating problems and preventing them from arising, through suggesting workable solutions to keep the project on track.

The use of internal staff as Probity Advisers is not considered acceptable, given the potential for conflicts of interest, because their opinion may be perceived as not being totally independent of the process.

Issues of probity need to be considered for all tenders. For difficult and or complex tenders, a tender implementation plan that encompasses a set of probity guidelines, and steps within that plan that need to be undertaken should be developed.

Selecting a Probity Adviser - Probity Adviser Directory

All Probity Advisers are to be engaged in accordance with the procurement procedures detailed in the Treasurer's Instructions.

The Department of Treasury and Finance has established a Probity Adviser Directory ("the Directory") to assist agencies in selecting a Probity Adviser, if it has been determined that one is required.

Probity Advisers have been selected to be on the Directory based on the following criteria:

- Demonstrated understanding of probity issues in a Government context;
- Proven experience in dealing with probity issues in a relevant field;
- Ability to analyse complex issues;
- High level inter-personal and communication skills; and
- Professional conduct.

In addition, Directory members must disclose any conflicts of interest they may be exposed to and also provide evidence of current professional indemnity insurance.

When engaging a Probity Adviser, agencies must ensure that the Probity Adviser completes a Confidentiality and Conflict of Interest Declaration.

It is not mandatory for agencies to use the Directory. However, if the procurement is valued at less than the Free Trade Agreements threshold (see the *Treasurer's Instructions 1102 and 1202*) and the agency uses the Directory exclusively the process is simplified. The simplified processes are as follows:

- For engagements valued at \$10 000 or less, agencies may directly appoint a probity adviser from the Directory;
- For engagements valued at more than \$10 000 but less than \$100 000, agencies must seek three written quotations. Given that the generic abilities of all advisers on the Directory will have already been assessed, the quotation will be able to focus purely on price plus any specific needs or skills that the agency sees as necessary; and
- For engagements valued between \$100 000 and the Free Trade Agreements threshold (see the *Treasurer's Instructions 1102 and 1202*), agencies must undertake a selective tender in accordance with the requirements of the *Treasurer's Instruction 1108(5)*. However, the tenderers may be limited to those probity advisers listed on the Directory with areas of specialisation relevant to the tender. As for the quotation process, the tender can be very simple and short with the purchasing decision based on the particular experience or skills of the probity adviser and the price submitted.

These simplified procurement arrangements are restricted to processes that only involve members of the Directory. If an agency conducts a procurement process that involves both members and non-members of the Directory, or where the free trade agreements threshold is expected to be reached, then the agency must follow the full procurement process, as detailed in the appropriate Treasurer's Instructions depending on the value.

Project Brief / Scope of Work

Broadly, the role of a Probity Adviser should encompass the following:

Examine and evaluate information and processes

- Act as an independent observer and comment on all relevant aspects of the process from beginning to end, and at key stages throughout.
- Scrutinise the process to determine whether relevant government guidelines and appropriate policies are being followed, and that best practice is being followed.
- Ensure that the process is impartial and fair with no party being given advantage over another or unfairly discriminated against, and that confidential information is protected.
- Ensure that all relevant participants in the process are aware of their responsibilities to disclose conflicts of interest.

Advise on the management of probity issues that may arise

- Conduct a risk assessment and identify possible probity issues that may arise before the process commences.
- Provide advice to the agency and interested parties on how emerging issues can be resolved or managed (eg. conflicts of interest).

Documentation and reporting to the agency

- Prepare a signed, written final report describing the agency's performance when conducting the process.

The final report should present the purpose, scope and results of the probity assessment and include an expression of the Probity Adviser's opinion of the process. The report should highlight significant findings and recommendations and inform management of any major deviations from the approved process and the reason for those deviations.

Probity Adviser Accountability

Accountability lines need to be clarified early on in the procurement process, ideally at the procurement planning stage. The template *Tender Evaluation and Probity Plan pro-forma* provides a framework for the accountability lines.

It is important that the Probity Adviser is accountable to and reports to a Senior Officer in the agency who is not involved in the actual tender process. The Head of Agency, and ultimately the Minister, have overall responsibility for the tender process and are accountable for the conduct of the tender and the decisions, which are made.

The report submitted by the Probity Adviser should be appended to the documents/evaluation report submitted to the Procurement Review Committee and subsequently to the person responsible for entering into the contract on behalf of the Crown in Right of Tasmania.

What if a Probity Adviser Criticises a Process or Decision?

An important role of the Probity Adviser is to report any act or omission the Probity Adviser observes in a procurement process that affects, or may affect, its integrity. This role must be agreed at the outset and form part of the Probity Adviser's terms of engagement.

The Probity Adviser must have full and free access to all aspects of the process they are engaged to assess. The Probity Adviser should ultimately report to, and have direct access to, the Head of Agency concerned, should matters worthy of comment arise.

Additional information

For additional information on the content of these guidelines please see www.purchasing.tas.gov.au. Queries can be directed to purchasing@treasury.tas.gov.au.

Attachment I - Outline of the Probity Process

This is a guide on the steps that should be taken to ensure the process is open and the commercial information provided by bidders remains confidential. Steps in a tender implementation plan will include:

I Before Commencing the Process

- Determine necessity for public tender
- Check financial approval has been given to proceed to tender
- Appoint tender evaluation team members
- Check tender evaluation team members are familiar with, and have access to, relevant Tasmanian Government policies and guidelines
- Ascertain whether a Probity Adviser is necessary
- Formulate a Probity Plan (ensure tender briefing meetings are minuted)
- Check invitation documents (include the intended process for managing the tender)
- Confirm requirements of specification and details of evaluation criteria including the scoring methodology.
- Set up process for the receipt, recording and acknowledgment of bids
- Set up confidentiality and security procedures and brief all staff
- Ask for conflict of interest declarations from tender evaluation team members, any advisers and the Probity Adviser

2 During the Process

- Ensure documents are maintained securely
- Notify bidders of any changes to the evaluation criteria
- Assess bids as quickly as possible and ensure all bids are evaluated against the same criteria
- Document interviews
- Assess probity of short listed tenderers
- Notify tenderers not short-listed
- Document any post-tender negotiations
- Document reasons for selection or rejection of bids
- External Probity Report to be finalised and submitted by the Probity Advisor

- Submit Evaluation Report to Procurement Review Committee (PRC) for review and endorsement
- Submit PRC endorsed Report to Management/Minister (whoever provides final approval)
- Notify the successful tenderer its offer is accepted, subject to contract

3 After the Process

- Debrief unsuccessful tenderers
- Settle performance measures and benchmarks and finalise Contract
- Store all documents and electronic information securely

