



**Guidance on Ethics and Probity  
in Government Procurement  
January 2005**

FINANCIAL MANAGEMENT GUIDANCE NO.14

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ISBN 0-9752394-7-3

Department of Finance and Administration

Financial Management Group

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Purpose

# 1 Purpose

This guidance highlights ethics and probity issues that *Financial Management and Accountability Act 1997* (FMA Act) departments and agencies (agencies) should consider in order to effectively manage procurement.

It provides general guidance, practical hints and tips for more complex processes.

The guidance supports the *Commonwealth Procurement Guidelines* (CPGs), to help officials understand their policy obligations when undertaking procurement activities.

Information in this guidance should also inform the development of any instructions or guides such as Chief Executive's Instructions (CEIs) that provide more detail on specific agency measures.

In particular, this guidance:

- provides explanations of both ethics and probity;
- describes the obligations of Australian Public Service (APS) employees to behave in a manner which upholds the APS Values and Code of Conduct when conducting procurement;
- describes other obligations under the FMA Act as described in the CPGs; and
- offers suggestions to help officials ethically and effectively manage some practical situations that may be encountered in procurement.

Background

## 2 Background

The FMA Act requires agency Chief Executives to promote the efficient, effective and ethical use of Commonwealth resources. The CPGs outline the broad requirements of government for procurement to be conducted in an ethical manner.

### Procurement

Procurement encompasses the whole process of acquiring property<sup>1</sup> and/or services. It begins when an agency has identified a need and decided on its procurement requirement. Procurement continues through the processes of risk assessment, seeking and evaluating alternative solutions, contract award, delivery of and payment for the property and/or services and, where relevant, the ongoing management of a contract and consideration of options related to the contract. Procurement also extends to the ultimate disposal of property at the end of its useful life.

Ethics and probity are a consideration throughout the entire process of procurement.

### Ethics

Ethics are the moral principles or values that guide officials in all aspects of their work.

**Ethical behaviour encompasses the concepts of honesty, integrity, probity, diligence, fairness, trust, respect and consistency.** Ethical behaviour includes avoiding conflicts of interest, and not making improper use of an individual's position.

Ethical behaviour is important in government procurement as it involves the expenditure of public money, and is subject to public scrutiny. The standards of conduct applicable to all APS employees are the obligations stated in the *APS Values* and the *APS Code of Conduct (Public Service Act, 1999)*<sup>2</sup>. That 'the APS has the highest ethical standards' is one of the APS Values.

Australian Government officials should always behave ethically and fairly, including in their business undertakings. Ethical behaviour supports openness and accountability in a procurement process and gives suppliers confidence to participate in the Government marketplace. Ethical behaviour can also reduce the cost of managing risks associated with fraud, theft, corruption, and other improper behaviour; and enhance confidence in public administration.

### Probity

**Probity is the evidence of ethical behaviour in a particular process.** Probity is defined as complete and confirmed integrity, uprightness and honesty. It contributes to sound procurement processes that accord equal opportunities for all participants. A good outcome is achieved when probity is applied with common sense. Probity should be integrated into all procurement planning, and should not be a separate consideration.

<sup>1</sup> The term *property* is used to refer to every type of right, interest or thing which is legally capable of being owned. This includes, but is not restricted to, physical goods and real property as well as intangibles such as intellectual property, contract options and goodwill.

<sup>2</sup> The APS Values and Code of Conduct are reproduced as Appendices 11.1 and 11.2 of this guidance respectively.

Procurement must be conducted with probity in mind to enable purchasers and suppliers to deal with each other on the basis of mutual trust and respect. Adopting an ethical, transparent approach enables business to be conducted fairly, reasonably and with integrity. Ethical behaviour also enables procurement to be conducted in a manner that allows all participating suppliers to compete as equally as possible. The procurement process rules must be clear, open, well understood and applied equally to all parties to the process.

Agencies should not seek to benefit from supplier practices that are objectionable, dishonest, unethical or unsafe. Procurement of services should be conducted in a way that recognises that agencies are accountable for the delivery of services in the same way as if the agency carried out the service itself.

Conflicts of interest may arise in the course of business operations, especially during the procurement process. Possible conflicts are extremely varied but include pecuniary interests, legal interests, associations with external associations and non-direct personal interests. In carrying out one's duties, officials must not allow themselves to be improperly influenced by family, personal or business relationships.



The Government's Policy

## 3 The Government's Policy

The basis for government procurement policy is Section 44 of the FMA Act, which specifies that Chief Executives are responsible for ensuring the ethical use of resources, including in relation to government procurement<sup>3</sup>.

The CPGs expand on that section of the FMA Act. They establish the core procurement framework and articulate the Government's expectations of all FMA agencies and their officials when performing duties in relation to procurement.

The term *officials* includes an agency's Chief Executive and employees, as well as non-employees (eg contractors) who conduct a financial task for the agency.<sup>4</sup>

The CPGs provide a description of ethics in procurement, providing key guidance for officials when managing the resources of the Commonwealth. They provide a definition of ethics and state the obligations of agencies in maintaining ethical behaviour in procurement.

Under the CPGs, agencies are obliged to ensure that officials involved in procurement, particularly those dealing directly with suppliers:

- recognise and deal with any conflict of interests, including perceived conflicts of interest;
- deal with suppliers even-handedly;
- consider seeking appropriate probity advice;
- do not compromise the Australian Government's standing by accepting inappropriate gifts or hospitality;
- are scrupulous in their use of public property; and
- comply with all duties and obligations including the agency's CEIs, the information privacy principles of the *Privacy Act 1988*, the security provisions of the *Crimes Act 1914* and, where applicable, the Australian Public Service's Code of Conduct as set out in the *Public Service Act 1999* (PS Act).

The CPGs are available from the Finance website at <http://www.finance.gov.au>.

<sup>3</sup> Section 44 of the *Financial Management and Accountability Act 1997* is reproduced as Appendix 11.3 of this guidance.

<sup>4</sup> The term *financial task* is, in broad terms, defined in FMA regulation 3, as a task or procedure (other than one of an outsider authorised under section 12 of the FMA Act) relating to:  
(a) the commitment or spending of public money; or  
(b) the management and control of public money.

The requirements of the FMA Act are complemented by the requirements placed on all APS employees to uphold the APS Values, which are set down in Section 10 of the PS Act. The APS Values include a requirement for the highest ethical standards.

The requirements of the APS Code of Conduct are also set out in the PS Act.

The code requires that all officials must:

- act honestly and with integrity in the course of their employment;
- disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with their employment; and
- avoid improper use of their duties, status, power or authority to gain, or seek to gain, a benefit or advantage.

### ***Handy Tip – Application to non-APS Employees***

Agencies should consider how parts of the APS Values and Code of Conduct might apply to contractors performing services on behalf of the APS. Agencies may need to consider how the Values and Code might be promoted and monitored, including through the use of contract provisions.

Agency heads are bound by the Code of Conduct in the same way as APS employees and have an additional duty to promote the APS Values.

One of the functions of Senior Executive Service (SES) employees as described in section 35 of the PS Act is to promote by personal example, or by other appropriate means, the APS Values and compliance with the APS Code of Conduct.



Ethics in Procurement

## 4 Ethics in Procurement

Value for money is the core principle underpinning Australian Government procurement, incorporating ethical behaviour and the ethical use of resources. The application of the highest ethical standards will help ensure the best achievable procurement outcome.

**Value for money entails more than just getting the best price – ethics are important when considering value for money.**

Ethical behaviour and good probity practices enhance the agency's reputation in the marketplace. This increases business confidence in procurement processes, and is likely to maximise the number of suitable responses for future agency work.

Officials involved in procurement must not make improper use of their position. Officials may have access to very confidential and/or market sensitive information. It is unethical to use inside information provided to the agency as part of a tender process, either for the material benefit of the official or for another person. Criminal sanctions apply to such behaviour.

Employees involved in government procurement should be mindful of potential conflicts of interest that might arise and must not use their position to gain or seek to gain a benefit for themselves or any other person.

They must also strive to avoid *perceptions* of conflicts of interest, or of undue influence, as well as avoiding them in fact. It is important that businesses and the general public are confident that employees involved in procurement are impartial and professional in their approach, and that their activities will withstand public scrutiny. Officials conducting procurement need to be able to demonstrate that their decisions are fair and equitable, and made in accordance with the law, agency rules and guidelines, and conditions of contract.

Awareness of and understanding of their ethical obligations as members of the APS will assist procurement officials avoid any accusations of real or perceived conflicts of interest, fraud, theft or corruption.

An important and effective way to maintain ethics awareness in agencies is to provide training for employees. Ethics training and seminars can be provided, along with training in more specific areas, such as procurement procedures, record keeping, records management, and accountability and administrative law. Staff should seek to develop and maintain levels of knowledge and skill commensurate with their responsibilities.

Agencies must also ensure ethics and accountability are appropriately addressed in procurement processes, and maintain good record-keeping and records management. Regular reviews or audits of procurement processes can be done to ensure probity is being considered and achieved.

The Australian Public Service Commission has issued a number of publications, available on its website, that provide further information regarding the application of the APS Values and Code of Conduct, including *APS Values and Code of Conduct in Practice: a guide to official conduct for APS employees and Agency Heads*<sup>5</sup>. This publication is structured around the various relationships public servants need to manage, and includes material on working with the private sector, guidance on fair decision-making and a chapter on conflicts of interest. Officials conducting procurement will need to be aware of and familiar with these documents and their contents.

<sup>5</sup> Available at <http://www.apsc.gov.au>.



Probity in Procurement

## 5 Probity in Procurement

A process that conforms to the expected standards of probity is one in which clear procedures are established, understood and observed from the outset. These procedures need to be consistent with the legitimate interests of tenderers and the Government's policies and legislation as specified in the *Guidance on Complying with Legislation and Government Policy in Procurement*<sup>6</sup>. All potential tenderers must be treated consistently and equitably in accordance with these procedures.

Good probity management aims to:

- minimise conflicts/problems and the potential for litigation;
- avoid the potential for corrupt practices to occur;
- produce better outcomes against stated objectives; and
- maintain public sector integrity.

Ways of maintaining probity in the procurement process include the separation of duties and responsibilities.

- For example, different officials are responsible for spending approval, evaluation of tenders, and authorisation of payment.

Agencies should try to ensure that they have a sufficient pool of trained officers who can manage the tender process. An option for smaller agencies with insufficient staffing is secondment from other agencies when a large procurement process is taking place.

Perceptions should not be overlooked when considering probity. It is important not only to do the right thing, but also to be seen to be doing the right thing. The public should be confident that officials conducting procurement will maintain a professional relationship that stands up to public scrutiny.

Appropriate documentation, particularly of decision making, is extremely important in any procurement process. The CPGs make it clear that Chief Executives are responsible for ensuring adequate systems for recording decisions and reasons are maintained. A process that is well documented and visibly sound may reduce the likelihood of challenges.

Decisions made through the courts, including the *Hughes Aircraft Systems International v Air Services Australia*<sup>7</sup>, and *JS McMillan Pty Limited, Pirie Printers Pty Limited and Imsep Pty Limited trading as National Capital Printing Pty Limited v Commonwealth of Australia*<sup>8</sup> cases, highlight the need for agency practices to ensure that tender processes are properly structured and managed to provide fairness for all tenderers. This will minimise the potential for legal liability and maintain the willingness of suppliers to do business with the Australian Government.

A good process maximises effectiveness by producing quality outcomes against stated objectives. It also increases efficiency by reducing the likelihood of resource-intensive conflicts and the potential for litigation. Agencies should actively manage ethical and probity issues, and promote ethics and probity as integral elements of procurement.

<sup>6</sup> Available at <http://www.finance.gov.au> (under the *Government Finances* menu).

<sup>7</sup> *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 Australian Law Reports 1.

<sup>8</sup> *JS McMillan Pty Limited, Pirie Printers Pty Limited and Imsep Pty Limited trading as National Capital Printing Pty Limited v Commonwealth of Australia* (1997) 147 Australian Law Reports 419. Information is available through the Australian Government Solicitor website <http://www.ags.gov.au>.

## Managing a Good Procurement Process

# 6 Managing a Good Procurement Process

The management of probity issues should be tailored to each individual process. Procurement should not be driven by probity, as a focus purely on probity could limit the achievement of value for money. Instead, probity should be applied to each aspect of the procurement process with common sense and flexibility. Specific agency requirements may be identified in operational guidance that should be the primary reference for probity processes. These agency requirements may be contained in CEIs or other supporting documentation.

The following are principles that underpin ethics and probity:

- fairness and impartiality;
- consistency and transparency of process;
- use of an appropriately competitive process;
- appropriate security and confidentiality arrangements;
- identification and management of actual and potential conflicts of interest; and
- compliance with legislative obligations and Government policies.

## 6.1 Fairness and Impartiality

It is essential that procurement is conducted in a way that is fair and impartial. Material needs to be available to all interested parties within the same time frame, and each tenderer needs to have access to the same material within the process for it to remain fair. Each bid also needs to be considered in a fair and impartial manner, with no conflicts of interest or bias towards or against certain bidders.

When communicating with stakeholders, it is important that it is done not only in the same timeframe but also in the same manner for all stakeholders. The most appropriate manner should be selected according to what is being communicated, to whom, and the urgency of the communication.

If all potential tenderers have access to the Internet, additional information provided in response to an individual tenderer's inquiry could be posted on a dedicated website during the tender period so that all potential tenderers have the same clarification of the requirements already provided.

- It is good practice to always provide information in writing, whether in hard copy or electronic form.

This practice also needs to be followed when notifying tenderers whether or not they are successful. Once the successful tenderer has been appointed, all unsuccessful tenderers should know the results of the evaluation as soon as possible. Agencies need to consider the most effective way of notifying tenderers, taking into account postal delays, particularly if there are international tenderers.

# Managing a Good Procurement Process 6

The request documentation must clearly detail the conditions for participation and evaluation criteria and be equally available to all interested parties.

- Well defined conditions for participation provide the market with a clear indication of requirements that they must meet, and reduce the resources wasted as a result of lodgement of unsuitable or misdirected bids.

Decisions on the selection of suppliers must be made purely against these criteria. It is important that potential suppliers feel confident that decisions will not be unduly influenced by external factors.

Request documentation must clearly identify and separate conditions for participation from those evaluation criteria that are 'desirable' or 'optional'. Bids must meet the conditions for participation, and these should be well targeted, clearly measurable, and not excessive in number. The 'desirable' or 'optional' criteria need to be addressed for the agency to be able to rank the submissions in order of suitability for the procurement.

The request documentation can be structured to help bidders focus on the areas where they will be able to differentiate their bid. 'Desirable' criteria can be listed in order of relative importance, or the request documentation can specify the weighting of each 'desirable' or 'optional' criteria.

## *Handy Tip – Managing Innovation*

Procurement processes may call for innovation in delivery of the service. It is not necessary (or often desirable) that all submissions should deliver the same process, however they must all meet the mandatory requirements according to the selection criteria. For example, a request for tender may require information to be provided to the public (output) without specifying the method of delivery (process). This enables tenderers to offer different solutions that are innovative, provide value for money and meet the procurement objective.

Agencies should consider how they could objectively deal with innovation and how they might manage submissions that propose innovative treatment of any of the mandatory elements, such as evaluating extra features as separate criteria or conducting a two-stage process, requesting an expression of interest that allows the supplier to focus on providing the best solution.

If stakeholder representatives or contractors are used to assist with the specification and/or evaluation of a procurement process, agencies may choose to exclude these individuals or organisations from tendering for the project. However, in some instances, it may be preferable to leave the tender open to them and take caution that they do not obtain an unfair advantage.

To maintain fairness in a process, the separation of duties is important. Officials involved in evaluation should not be those who are approving the spending of public money.

# 6 Managing a Good Procurement Process

## 6.2 Consistency and Transparency of Process

Procurement processes used by agencies must be consistent and transparent. Decisions need to be made in a visible manner and appropriately documented to allow them to be understood or justified upon review - for example, by tenderers, the relevant Ministers, the Parliament, the Auditor-General or the judiciary.

The CPGs state that transparency is a primary consideration throughout the procurement process from the initial identification of need through to the final disposal of any property. The CPGs require agencies to offer unsuccessful bidders a written or oral debriefing as to why their offers were not successful.

Another important element of transparency is public reporting of opportunities and agreements. The CPGs identify agencies' reporting obligations. Further detail is available in the *Guidance on Procurement Publishing Obligations*<sup>9</sup>.

## 6.3 Use of an Appropriately Competitive Process

The method used for procurement processes should suit market circumstances as well as the size and nature of the procurement. It should also provide reasonable access for suppliers to government procurement opportunities. Agencies should investigate the relevant market conditions and consider whether an open procurement process is appropriate.

- A key element of the procurement framework is open competition. Procurements above a certain threshold (known as covered procurements) must **follow specific procedures**. These procedures are outlined in the CPGs. Agency guidance such as CEIs may provide further details of any requirements in this area.

Agencies should aim to ensure that the cost of tendering for opportunities does not deter competent suppliers. They must provide adequate and timely information to prospective bidders, and avoid asking for unnecessary information or requirements.

Requests for unnecessary information may occur when details are required for pre-selection, and then the same details are required again in the tender, making it time-consuming and expensive to be a part of the tender process.

Agencies should therefore be familiar with any pre-selection or prior processes to avoid requests for duplicate information. Agencies should also set and meet reasonable timeframes for any procurement process, to enable bidders to confidently allocate resources to their bid.

## 6.4 Security and Confidentiality

Agencies will need to have measures in place to manage the security and confidentiality of documents, including physical security of submissions and related documents, access to secure documents, and confidentiality of commercial information.

<sup>9</sup> Available at <http://www.finance.gov.au> (under the *Government Finances* menu).

Physical security of documents is an important aspect to ensure no information is leaked to the public. A lack of confidence in security could deter bidders, or reduce the detail or volume of information they include in their bids, both of which are poor outcomes for government.

### PROBITY IN PRACTICE

#### *How important is physical security?*

If an agency does not have measures in place for the security and storage of submissions, it can create a variety of problems. Documents can be misplaced, requiring the companies involved to supply extra copies of their document and bringing into question the agency's processes and professionalism. Another problem arises if various copies are made of commercial-in-confidence documents and no secure area or file is created. It can become impossible to keep track of the documents and their location. As a result, documents can be misplaced and the probity of the process may be compromised.

Physical security measures used by agencies can include keeping a document register, numbering all the documents, and having a central storage area for all tender documents. The measures used should be commensurate to the size, complexity and risk of the tender.

Agencies should establish clear physical security measures for the handling of documents related to the tender.

- Security measures should include the usage and security of the tender box; appropriate storage of submissions; limiting the number of and numbering copies made of the documents; limited access to the submissions, such as only allowing access by authorised staff; and ensuring documents are not removed from the agency's premises.
- Agencies should also consider electronic security issues, and have documented processes and strategies for electronic storage and communication. Agencies should ensure they have controls over electronic delivery of submissions, and protection of data stored on networks, including segregation of hard drives storing confidential information and allocation of secure passwords to those authorised to access this information. Other security measures may include transmitting documents as Portable Document Format (PDF) files to prevent alterations and double-checking any emails and attachments before sending to potential suppliers.

Security measures can be reviewed or endorsed by a probity expert, if one is utilised in the process.

## 6 Managing a Good Procurement Process

Officials who receive commercially sensitive material from tenderers and contractors may be subject to a range of confidentiality obligations. Such obligations may arise from legislation or contract, or independently where commercial information is communicated in circumstances in which there is an understanding that confidentiality will be maintained. Confidentiality of submission information is particularly important prior to the letting of the contract and should only be shared on a 'need to know' basis.

Non-APS staff who aren't directly involved in the procurement process, including Ministers and Ministers' staff, may not be subject to the same confidentiality requirements. This needs to be considered when communicating and distributing information. In particular, employees of a potential provider who may be on the premises as part of a separate arrangement (e.g. a services contract) should not be privy to sensitive material unless necessary, and all parties should be aware of any access granted.

### PROBITY IN PRACTICE

#### *What should an official do at a social event with a tenderer?*

Officials, particularly those involved in the procurement process, should try to avoid social events held by potential suppliers prior to and during the process. However, if social contact is unavoidable, the official should avoid conversation about the process, or if questioned, should specify that they are not at liberty to speak about it. If a staff member is found to have related confidential details regarding the tender process to one of the tenderers at a social event prior to the awarding of the tender, action under the provisions in the PS Act for dealing with suspected misconduct may be taken. Sanctions for misconduct are set out in section 15 of the PS Act and include termination of employment.

Finance has issued *Guidance on Confidentiality of Contractors' Commercial Information*<sup>10</sup> to assist agencies in the identification and treatment of confidential commercial information. The guidance identifies the Australian Government's policy that information is not to be kept confidential unless there is a good reason to do so, and provides criteria for making such assessments. The guidance also indicates that information provided by potential suppliers prior to the award of a contract will be treated as confidential. This also applies after contract award in respect to the information of unsuccessful tenderers. Agencies should consider in advance how they will manage information received from tenderers.

<sup>10</sup> Available at <http://www.finance.gov.au> (under the *Government Finances* menu).

## *Handy Tip – Data Rooms*

Agencies may consider setting up data rooms to provide potential suppliers with controlled access to confidential or detailed information that may assist them in preparing their submissions. Data rooms are generally only necessary when a procurement is very large and complex, as they are expensive and can involve a lot of time and effort.

A data room:

- provides a central secure environment for sensitive/confidential information, preventing distribution of such information into the wider domain;
- ensures that all potential suppliers are provided with the same information;
- avoids the need to copy and distribute large amounts of information such as Government and agency policy documents, site maps, plans of buildings etc;
- allows controlled access to information through the monitoring and recording of who has accessed it; and
- maintains the integrity of agency information, particularly in larger, more complex tenders such as outsourcing.

## 6.5 Conflicts of Interest

A conflict of interest arises where an official or adviser has an affiliation or interest that might prejudice, or be seen to prejudice, his or her impartiality. The key management strategy is for all parties to be aware, before the process commences, that the APS Code of Conduct requires APS employees to disclose, and take steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.

Any contractors or external advisers involved in a process should also have regard to the Government's ethical requirements and are bound by the APS Values and Code of Conduct. Measures will need to be developed to manage conflicts of interest in case one does arise, despite taking reasonable steps to avoid it. Request documentation should identify measures to manage conflicts of interest within each process.

- Any person involved in the tender process, including contractors such as legal, business or probity advisers, should make a written declaration of any actual or perceived conflicts of interests prior to taking part in the process. This declaration includes other employment, prior employment or financial interests in organisations who may be potential suppliers and relationships with people who have interests in these organisations.

## 6 Managing a Good Procurement Process

Conflicts of interest can endanger both the actual and perceived objectivity and probity of the procurement process. Agencies need to have a policy regarding staff with potential conflicts of interest, such as whether those with only minor conflicts should still be part of the procurement process. It can also be helpful to provide a Conflict of Interest Declaration template for all officials to complete prior to involvement in a procurement process.

### PROBITY IN PRACTICE

#### *Can a procurement official attend a seminar offered by a tenderer?*

Attendance by a procurement official at a public seminar offered by a potential supplier is unlikely to create a conflict of interest. However, the official must not discuss confidential matters relating to the tender process, and must not use the tender process to obtain a discount on any registration fee. Officials directly involved in the tender process should inform the tender management team as well as their own supervisor, and gain approval for their attendance at the seminar, which should be fully documented.

### *Gifts and Hospitality*

Acceptance of gifts and hospitality from the private sector requires careful judgement.

- As a general principle, APS employees should not accept gifts or benefits, see: *APS Values and Code of Conduct in Practice: a guide to official conduct for APS employees and Agency Heads* (Chapter 10).

A perception of undue benefit, conflict of interest or inappropriate gain can be easily generated. Employees directly involved with the private sector should be especially diligent to avoid conflicts of interest during procurement processes, and as a general rule, should never accept gifts or hospitality during those periods. At its extreme, it could be perceived as a bribe, which is an offence under the Criminal Code and a breach of the APS Code.

In some instances refusal may cause offence, particularly in diplomatic situations. In commercial environments the offer and acceptance of hospitality is often considered an industry practice. APS employees need to consider carefully the implications of accepting or rejecting hospitality in such situations and may need to seek the advice of their supervisor or manager. Acceptance of gifts or hospitality will not usually be appropriate if the person or company is involved in a tender process with the agency.

Due care and diligence should therefore always be exercised by officials when providing or accepting gifts or hospitality. Important factors are the monetary value, the likely public perception if the details are made known, and any specific agency policies or instructions (such as CEIs).

## PROBITY IN PRACTICE

### *Can officials accept gifts or hospitality?*

As specified in the *APS Code of Conduct in Practice* and the CPGs, accepting gifts and hospitality is not encouraged in the APS. When deciding whether to accept a gift or benefit, an important consideration is the reputation of the agency and the APS. If an official does accept gifts or hospitality, it should be appropriately disclosed, approved and documented. Refreshments offered during the course of a meeting are generally acceptable, as are minor stationery items. It may be useful to document these, to avoid later confusion.

Accepting a benefit that may be defined as a bribe can be a breach of the *APS Code of Conduct* and the *Criminal Code Act 1995*. The maximum penalty for a person giving a bribe to a Commonwealth public official or for an official receiving a bribe is imprisonment for 10 years. Bribery of a foreign public official is also an offence under the *Criminal Code Act* and such an offence carries a maximum penalty of 10 years imprisonment.

Procurement processes involving outsourcing are at far greater risk of a conflict of interest. For example, a conflict situation may also arise in an outsourcing process where in-scope staff who may be eligible for job offers are asked to participate in the evaluation and selection process. Staff in this position should be excluded from the process to the extent possible, and any conclusions they reach should be reviewed by other staff members.

### *Employment After Leaving the Public Service*

*APS Values and Code of Conduct in Practice* suggests that agencies need to be able to demonstrate that ethical issues have been explicitly considered when an employee leaves the public service and looks for a position in the private sector. This is particularly important in the tender process, where an official involved in the procurement process could subsequently be employed by the successful tenderer.

### *Access to Market Sensitive/Confidential Information*

Officials with access to confidential information need to be aware that they cannot use or disclose this information outside the procurement process. Subsection 13 (10) of the *APS Code of Conduct* requires that employees do not make improper use of information for personal gain or to benefit anyone else. Procurement officials cannot use the information they acquire in the tender process to buy or sell shares in companies involved in the process, as they may have access to information not accessible to the public that may affect the value of the shares.

## 6 Managing a Good Procurement Process

### 6.6 Compliance with Legislative Obligations and Government Policies

Procurement must be conducted in compliance with all relevant legislation and Government policy. It is important that all staff involved in procurement have access to and are familiar with the relevant procurement policies.

Regulation 9 of the *Financial Management and Accountability Regulations 1997* requires that an approver must (among other things) be satisfied that a spending proposal is in accordance with Australian Government policies. Procurement officials with Regulation 9 delegation need to ensure that they are aware of relevant policies and legislation, and satisfied that all relevant obligations have been met. The Department of Finance and Administration has issued *Guidance on Complying with Legislation and Government Policy in Procurement*<sup>11</sup> to assist agencies in this regard.

<sup>11</sup> Available at <http://www.finance.gov.au> (under the *Government Finances* menu).

Probity Plans

# 7 Probity Plans

A probity plan can be a useful tool to ensure that probity issues are considered prior to the start of procurement, and will promote good probity in a process. A probity plan is useful when the procurement is:

- of high value;
- in need of careful management;
- likely to encounter ethical problems; or
- subject to a high degree of public scrutiny.

Where utilised, probity plans should be customised to suit the procurement, taking into account the size, complexity and risks, and should be regularly reviewed and used throughout a procurement process.

Things to consider in creating a probity plan are:

- development, documentation and approval of a Submission Evaluation Plan containing relevant evaluation criteria and weightings (if appropriate) prior to releasing the request documentation;
- maintenance of consistent evaluation criteria during the process unless all tenderers are given an equal opportunity to change their submissions;
- uniform access to information for tenderers (including the same information and the same timeframe);
- consistent management of deadlines and extensions;
- appropriate identification and management of any information considered to be commercial-in-confidence;
- strategies to deal with any deviation from the process; and
- procedures for managing actual, perceived and potential conflicts of interest.

Each agency should articulate their processes for dealing with these matters and should provide clear guidance to officials undertaking procurement. Procurement officials should always refer to their CEIs and operational guidelines to determine the level of documentation required.

Appendix 11.4 is a checklist of probity issues, which can be used in the construction of a probity plan. Procurement activities of low value and low risk may not need to have a formal probity plan, but officials will need to keep in mind the probity issues contained in the checklist while conducting the procurement.

Probity Experts

## 8 Probity Experts

Procurement officials should ensure that they have access to appropriate resources required to undertake a satisfactory procurement, recognising the nature of the process (e.g. size, complexity, sensitivity) and the potential risk factors. It may be appropriate to draw on internal expertise and advice for processes that are routine and small in value. It may also be appropriate to take advice from external advisers in the development of probity plans and other key documents.

In large or complex transactions an external probity specialist may be involved to provide independent oversight of the process. A list of key factors that would influence the appointment of a probity adviser include where:

- the transaction is of high value;
- the matter is complex, unusual or contentious;
- the integrity of the project may be questioned;
- there has been a history of controversy or litigation in relation to the matter;
- the matter is politically sensitive;
- the nature of the market place makes supplier grievances more likely (such as where competition is strong and commercial confidentiality is particularly important); and
- there is a high probability of a conflict of interest.

The decision on whether to engage a probity expert should weigh the benefits of receiving advice independent of the process against the additional cost involved.

An advantage of engaging a probity expert is that at least one person will be completely focussed on the probity of the process. It is important to ensure that the awarding of a government contract is not subject to perceptions or suspicions that due process may not have been followed. It is also important that those undertaking the tender remain alert to any problems or issues that could have implications for the perceived probity of the process. A probity expert can ensure proper process and improve the perceived probity of the process by keeping a complete and objective report of probity issues throughout the tender process.

- While probity advisers bring many benefits to a process, they do not represent the entire probity solution and cannot remove the accountability of the process from the agency; nor do they replace good internal management, including good record keeping.

If a probity expert is engaged, and problems do occur in the tender process, it is recommended that they be consulted in regard to any possible course of action. An adviser will be able to provide advice on whether the problem can be remedied and how to go about it, or an auditor will be able to ensure it is appropriate to continue with the process and that all probity requirements have been met. (See section 8.1 for a discussion on the roles of probity advisers and probity auditors.)

It is sound practice to document any requests for advice from any other parties consulted, including a probity expert or a legal adviser, in addition to documenting all advice provided for file and for future reference.

## 8.1 Auditor or Adviser?

The terms 'probity auditor' and 'probity adviser' are often used interchangeably, but there are significant differences in the roles.

Generally the 'probity auditor' should be self-directing and will independently establish a program of audit testing based on identified criteria. The auditor seeks to report an objective opinion on probity issues, generally after the process has been completed. A probity auditor should not be called in during a process to try and remedy problems, but could provide sign-off after a problem has occurred to ensure the probity requirements have been met and it is appropriate to continue with the process.

A 'probity adviser' would typically provide advice as requested before and during the course of the process, including on specific issues that arise. The pro-active approach by the adviser should help to improve the process and outcomes.

If a probity expert is engaged as an auditor, they need to maintain their independence and objectivity, and should therefore not be involved in offering advice to solve any probity problems. If an auditor is asked for advice when a problem occurs, they are then actively involved in the process, and would therefore be unable to carry out an independent audit of the tender. If the probity expert is an adviser and will not be involved in auditing the process, they can offer advice and solutions if any problems occur.

Regardless of the term used, it is important that all parties clearly understand the role a probity expert is being engaged to perform.

## 8.2 Adviser Sign-offs

Sign-off by expert advisers cannot replace managers' own accountabilities and obligations in regard to the proper conduct of procurement exercises. However, decision-makers rely on information provided to them in assessing the outcome of a tender. In this context, expert advisers may be asked to provide sign-offs to demonstrate their involvement, the extent of their involvement and any conclusions reached.

Before the process commences, all parties should have a clear understanding as to the level of assurance that the agency will be seeking from the adviser. Agencies should specify whether a final sign-off is needed for the entire process, whether sign-offs should be provided at the end of specified phases of the tender process, or at particular milestones, and should clearly specify the timing and the level of the sign-offs required.

## 8 Probity Experts

Agencies should ensure that all expert advisers clearly understand the level of sign-off they will be asked for, and agencies should understand what information they will be required to provide to achieve this. A good way to ensure that this occurs is to document these requirements in an agreement. In the case of external advisers, this may be in the contract. Agencies also need to ensure that any sign-offs requested are obtained and recorded at the appropriate stage of the procurement process, including an overall sign-off at the end of the process.

Managing Problems

## 9 Managing Problems

In any tender process there is always the possibility that actions, errors or omissions may occur that result in a breach of probity requirements. These problems will need to be addressed quickly and in accordance with the request documentation, such as the request for tender and/or, if one is being used, the probity plan.

The question to be addressed when a probity error occurs is whether the process can continue while still ensuring all tenderers receive, and are perceived to receive, fair and equal treatment. Where the issue can be resolved, participants are to be notified of any factors that may affect their offers, and consideration may need to be given to allowing revised bids from all parties.

Sometimes the probity issue is of such significance that it is impossible to ensure that all parties receive equal treatment, and it may be necessary to cancel the process if it is not in the public interest to award a contract. However, this is not a decision to be taken lightly, and needs to be done in accordance with the CPGs. Cancelling the process will come at a cost to both tenderers and the agency.

The *Hughes*<sup>12</sup> and *McMillan*<sup>13</sup> cases demonstrate that agencies need to conduct their tender process in a manner consistent with the tender documents. The existence of the request documents, such as the request for tender, may give an obligation to the agency to follow through with the tender process. If the process is cancelled, all parties must be notified as soon as practicable. It is important to document any actions and decisions taken in this area, as well as all relevant information, risks and options, so the process remains transparent.

From a probity perspective, the process by which these decisions are made can be just as important as the outcome of the decision. In any procurement, there is always a possibility of a challenge to a tender process. It is important that the agency can clearly demonstrate that their decisions were made using proper and ethical processes.

### 9.1 Acceptance of Late Tenders

Submissions received after the closing time and date must not be accepted unless the lateness is due to an agency error, as stated in the CPGs. Acceptance of late tenders has the potential to compromise the probity of the procurement process. Agencies should consider stating on their approach-to-market documentation that late tenders will not be accepted. This will ensure that all potential suppliers are aware that this is the case.

If a submission is late due to an agency error, the affected supplier must not be penalised in any way, and the reasons for their lateness must be fully documented. If a probity expert is involved, they should be notified and a probity sign-off obtained, as it is essential that they are aware of any errors made and approve of the continuation of the procurement process.

<sup>12</sup> *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 Australian Law Reports 1.

<sup>13</sup> *JS McMillan Pty Limited, Pirie Printers Pty Limited and Imsep Pty Limited trading as National Capital Printing Pty Limited v Commonwealth of Australia* (1997) 147 Australian Law Reports 419. Information is available through the Australian Government Solicitor website <http://www.ags.gov.au>.

## 9.2 Requests for Extensions

Requests for extensions can be a difficult issue. Adherence to deadlines is important in maintaining the integrity and probity of the tender process. If a request for extension is accepted, all potential suppliers need to receive the same extension, and this may affect the probity of the process. However, if a request for extension is refused, the agency may be excluding the best tender. Agencies therefore need to make decisions with due care and consideration.

It is good practice to specify in the request for tender whether or not requests for extensions will be accepted. It is recommended that agencies have procedures and guidelines in place for requests for extensions. A description of the guidelines should be included in the request documentation, so all potential suppliers are aware of the procedures the agency will follow. Agencies may consider having a closing date for requests for extensions to be considered stated in the request for tender, to prevent extensions being requested on the morning the submission is due.

Any actions regarding requests for extension need to be exercised with due care and be fully documented. If a request is received and granted, good process dictates that all potential suppliers should be offered the same extension and receive the same advantage. If a probity expert is involved in the process, it is recommended that their advice be utilised in this situation, and a probity sign-off obtained before proceeding with the process.



References

## 10 References

The following documents provide further information on issues discussed in this publication.

*APS Values and Code of Conduct in practice: a guide to official conduct for APS Employees and Agency Heads*

<http://www.apsc.gov.au>

*The Australian Public Service Code of Conduct*

<http://www.apsc.gov.au>

*The Australian Public Service Values*

<http://www.apsc.gov.au>

*Commonwealth Procurement Guidelines*

<http://www.finance.gov.au>

*Crimes Act 1914*

<http://scaleplus.law.gov.au>

*Criminal Code Act 1995*

<http://scaleplus.law.gov.au>

*Financial Management and Accountability Act 1997*

<http://www.finance.gov.au>

*Financial Management and Accountability Regulations 1997*

<http://www.finance.gov.au>

*Guidance on Complying with Legislation and Government Policy in Procurement*

<http://www.finance.gov.au>

*Guidance on Confidentiality of Contractors' Commercial Information*

<http://www.finance.gov.au>

*Guidance on Procurement Publishing Obligations*

<http://www.contracts.gov.au>

*Public Service Act 1999*

<http://www.apsc.gov.au>

Appendices

# 11 Appendices

## 11.1 The APS Values

The Australian Public Service:

- is apolitical, performing its functions in an impartial and professional manner;
- is a public service in which employment decisions are based on merit;
- provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves;
- has the highest ethical standards;
- is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public;
- is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs;
- delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public;
- has leadership of the highest quality;
- establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace;
- provides a fair, flexible, safe and rewarding workplace;
- focuses on achieving results and managing performance;
- promotes equity in employment;
- provides a reasonable opportunity to all eligible members of the community to apply for APS employment;
- is a career-based service to enhance the effectiveness and cohesion of Australia's democratic system of government;
- provides a fair system of review of decisions taken in respect of employees.

## 11.2 The APS Code of Conduct

APS employees are required, under the Code of Conduct, to behave at all times in a way that upholds the APS Values.

### *The Code*

The Code of Conduct requires that an employee must:

- behave honestly and with integrity in the course of APS employment;
- act with care and diligence in the course of APS employment;
- when acting in the course of APS employment, treat everyone with respect and courtesy, and without harassment;
- when acting in the course of APS employment, comply with all applicable Australian laws;
- comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction;
- maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff;
- disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment;
- use Commonwealth resources in a proper manner;
- not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment;
- not make improper use of:
  - (a) inside information, or
  - (b) the employee's duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person;
- at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS;
- while on duty overseas, at all times behave in a way that upholds the good reputation of Australia; and
- except in the course of his or her duties as an APS employee or with the Agency Head's express authority, not give or disclose, directly or indirectly, any information about public business or anything of which the employee has official knowledge.

# 11 Appendices

## 11.3 *Financial Management and Accountability Act 1997 - Section 44*

### *Promoting efficient, effective and ethical use of Commonwealth resources*

- (1) A Chief Executive must manage the affairs of the Agency in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible.
- (2) If compliance with the requirements of the regulations, Finance Minister's Orders, Special Instructions<sup>14</sup> or any other law would hinder or prevent the proper use of those resources, the Chief Executive must manage so as to promote proper use of those resources to the greatest extent practicable while complying with those requirements.

In this section:

proper use means efficient, effective and ethical use.

<sup>14</sup> Links are provided to the *Financial Management and Accountability Regulations 1997*, the *Financial Management and Accountability Orders* and the *FMA Legislation Delegations of Powers and Functions* page.

## 11.4 Checklist for Probity Planning




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### PROBITY PLANNING

- Determine whether a probity auditor and/or adviser is needed
- Obtain conflict of interest declarations from team members
- Obtain confidentiality agreements from external participants
- Finalise the probity plan, if one is being used
- Consider confidentiality requirements
- Set up physical security procedures, such as the document register or data room
- Ensure team members are familiar with all relevant policies and documents
- Set up procedures so all potential suppliers have access to the same information

### PROCUREMENT PROCESS

- Review probity at the end of the tender preparation process
- Set up a process for receiving, recording and acknowledging submissions
- Set up a procedure for opening the tender box
- Document any changes that occur, and notify all potential suppliers
- Ensure evaluation of submissions is fair, consistent and competitive
- Review probity at the end of the evaluation process
- Notify the successful tenderer as soon as possible
- Notify the unsuccessful tenderers as soon as possible
- Debrief unsuccessful tenderers
- Ensure all actions are documented, and the documents are stored appropriately
- Review probity at the end of the process

