

PROBITY AUDITING PROTOCOL

Securing value for money and the integrity of public procurement processes

1 Introduction

Public sector procurement, whether undertaken by central government, local government, statutory bodies or by the private sector pursuant to statutory grant (for example, public private partnerships), makes up a significant proportion of economic activity in any State with first world aspirations.

Preserving the integrity of the procurement process in major projects, and securing value for money in project delivery, is of primary importance for any procuring agency with public accountability.

This protocol sets out:

- the purpose of probity auditing public procurement projects
- the basis of the appointment of the probity auditor
- the fundamentals of probity auditing
- the accountability of the probity auditor and compatibility of the role of probity auditor with other roles

and is used as the basis for the appointment of a probity auditor.

Where a procuring agency has its own probity audit policies, they will be reviewed against this protocol, and if any amendments or departures from those policies are required, they will be discussed and agreed with the probity auditor as part of the appointment process.

While every effort will be made to comply with agencies' own policies and processes, the probity auditor needs to meet the standards of independence and impartiality outlined in this protocol.

In practice, this is rarely a contentious issue.

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2 Purpose of Probity Audit

At its simplest, *probity* carries with it the quality of strong moral principles, honesty, integrity and decency.

In practice, a probity audit has multiple purposes:

- advising the procuring party (the Government or other agency engaging in the process to be audited) on probity issues during the process
- monitoring or auditing compliance with the applicable probity policies, procurement processes and this protocol by the procuring agency and all bidders and other participants in the process
- providing a point of contact for all participants in the procurement process to voice their concerns over probity issues

Applying the principles of probity to major procurement projects means more than avoiding corrupt practises. It involves complying with the prescribed procedures in a way which is transparent and ensuring fair dealing between the parties. Well applied, the procuring agency has comfort that it has acted properly, there is accountability to the wider public, and the participants in the process have comfort that they have been treated fairly and in accordance with the agreed procedures.

Contrary to common misconceptions, probity is not concerned with the substance of the process, its outcome or the fairness of the commercial terms. It is purely concerned with compliance with the procurement process, promotion of public sector values and interests and fair dealing between the parties.

If probity issues are considered at the earliest stages of the planning of major projects, they help to:

- clarify the process to maximise the benefits of the procurement process for all participants
- promote confidence in the process, encouraging bidders to commit the time and resources to submitting the best bids and making the most of the process
- remove ambiguities in how bids will be considered, and how negotiations will take place post submission
- promote fair dealing between the parties, improving the likelihood of acceptance of the final award decision by all parties
- minimise the possibility of the procurement process being challenged
- increase the likelihood that project objectives will be achieved
- give confidence to senior management not directly involved in the process and to the wider constituency and the public at large that a fair process has been followed, and value for money achieved

These objectives can only sensibly be achieved if the probity auditor is truly impartial and independent, and if all participants understand what this means.

3 Appointment of Probity Auditor

Probity auditing can be undertaken by internal appointment, by panel or by independent expert.

The approach will vary from project to project, based on a number of criteria:

- the cost of the project
- the technical complexity or risk
- the project's political or strategic importance
- history of controversy over the project
- the potential for conflict of interest to arise
- the cost and/or complexity of bidding (eg, the use of sensitive intellectual property)
- the process involves high levels of interaction with bidders
- the process is relatively flexible or informal
- the process involves an incumbent supplier as a bidder
- there is a single service provider in place, raising the potential for monopsony
- the procuring agency is relatively inexperienced in such processes

Generally, if any of the above are significant factors, an independent probity auditor should be appointed.

4 Probity Audit

There are a number of underlying principles to probity auditing which must be understood by all participants:

(1) *Impartiality*

The probity auditor must be impartial and independent, notwithstanding that the procuring agency appoints and pays them.

As technology has improved, and the expectations of Governments and the voting public of the services they will be provided have increased, the cost and complexity of projects has commensurately increased. With that the cost of tendering, and the expectations of certainty in price and delivery by procuring agencies, and also risen.

In return for participating in competitive tender processes, bidders expect the process to be transparent, honest and impartial. If those expectations

are not met, they will either not participate in the process, or they will challenge it, either in court or politically.

(2) *Conflicts of interest*

There is a natural tension between engaging experts to assist with project delivery, and an expectation that those experts will not have a predisposition to a certain approach, experience with particular suppliers or a direct conflict of interest. Paraphrasing a speech of Lord Hoffman in the last of the *Pratt Construction* cases:

We expect tender evaluation teams to come to the task at hand and to give that task the benefit of the sum of their experiences – they must come with an open mind, we do not expect them to come with a blank one.

At its most basic, a conflict of interest arises where a person discharging a public function has a personal interest in the outcome which may be at odds, or may be perceived to be at odds, with the public interest. Everyone from the public at large to bidders is entitled to expect that anyone with the ability to affect the process discharges their functions without regard to, or the potential to have regard to, their personal interests.

In practical terms, this means establishing and maintaining a register of interests of the project team, the evaluation team and all members of committees and those having a decision making role, and for them to avoid interactions which might call their independence into question.

For political bodies (for example, local authority committees with responsibility for making the final award decisions for major public service contracts), this can be problematic. While it is expected that a political appointee will have a particular view which may have been part of their voting platform (and by extension, is part of their mandate), it is not their role to use their public position to advance that platform other than transparently as part of the political process.

It is always open to those with the final decision making power (whether politicians sitting in procurement committees or chief executive officers of council organisations or State Owned Enterprises) to make the final award decision for political or even completely irrational reasons. However, it is not open to them to do so where there is a perception of personal financial gain, or for them to manipulate the process (for example by communicating with one or other of the bidders during the bid process) to favour a party to which they have a connection; political or otherwise.

Where there is the potential for a perception of conflict of interest in a person involved in the process or the decision to award itself, that person must exclude themselves from the process.

(3) *Accountability*

Any public body allocating public resources must be able to justify the way in which such resources are expended.

This means keeping complete and accurate records of how funds have been expended, the process involved in such expenditure, and the authority for it; and being transparent about such expenditure.

This will give rise to some tension between transparency and maintaining control of the process, and the confidentiality inherent in any commercial transaction. Transparency about the process, and accountability for the decisions made do not necessarily carry with them the need to disclose sensitive commercial information.

Probity does not require the entire procurement process to be carried out in the public domain.

(4) *Confidentiality*

The flip side of fair dealing between bidders is the expectation that bids will be kept confidential once received.

The protection of financial information can, at times, be overblown. As a general principle, bids must be considered in their entirety, and evaluation teams must be given the opportunity to get on with the job at hand without being overly constrained by concerns over confidentiality.

However, bidders must be assured that details of their bids will not be disclosed to other bidders, or to their competitors.

At the very least, bids should be opened together, outline details recorded at the time of opening, and they should then be kept secure. Similarly, members of the bid evaluation team must be under strict obligations of non-disclosure, other than when discharging their respective functions – discussions of the bids must only be behind the closed doors of the evaluation room, and no documentation should be removed from the secure room, save where other obligations of confidentiality are in place (for example, lawyers' professional duties of confidentiality over all the client clients' affairs).

(5) *Value for money*

Last, but most critically, probity promotes the competitive environment under which the bidders put together their best offers.

There is a tendency, particularly for complex projects where the volume of material provided by bidders is substantial, to select the most attractive bid, discard the least attractive, and keep the others (at most one or two) in play as fall back options. This does the least to secure value for money, and wastes the benefit the process was designed to procure and the benefits of pricing and innovation the bidders bring to the process.

The ideal outcome of any competitive procurement process, for the procuring agency as well as for the bidders, is for all bidders to have their

best bids before the decision maker for award at the end of the tender validity period. In that event, the bidders have put forward their best proposal, the evaluation team has considered and tested each bid thoroughly, and the decision maker can make an informed choice on final award. The public at large is also assured of accountability if this approach is followed.

This does not mean that the lowest bid as submitted is accepted, nor does it mean that the evaluation team is at all constrained from going back to bidders to clarify aspects of the bid which are unclear, in error, or not what was asked for. It is the role of the evaluation team to test the bids, and to present those bids on a common basis, with a recommendation for award which can be justified.

Each of these principles will apply to varying degrees, but they are common and important to all projects.

5 Accountability and compatibility with other roles

The independence of the probity auditor is critical to the success of the role.

This necessitates a number of ground rules:

- all bidders must be advised of the appointment of the probity auditor, and they must be invited to contact the probity auditor directly if they have any concerns
- similarly, the probity auditor must be empowered to review the procurement procedures, all communications with bidders, all evaluation guidelines, and to attend any and all project meetings, including all meetings with bidders and all evaluation meetings
- where a probity issue arises, whether by reference from the project team, a bidder, or from the auditor's own investigations, the probity auditor must investigate the issue and report to the project team and/or the complainant, with a recommendation
- all reports and recommendations by the probity auditor must be confirmed in writing
- the probity auditor must review the tender recommendation, and issue an independent report to the decision maker, or chief executive where a decision is to be made by a board or committee of political appointees, on the probity of the procurement process and the reliability of the recommendation

It is part of that independent function that the probity auditor may make a recommendation to disqualify a bidder or a person from the evaluation or the decision-making process due to concerns over the probity of the process.

Ultimately, it is the probity auditor's obligation to preserve the wider expectation of probity in the process which must prevail over the expectations or preferences of the person who appointed and even pays them.

6 Conclusion

Providing public services has become complex and expensive. There is a public expectation that the procurement process for such services will be competitive, and will provide value for money. That can only be achieved, and bidders will only commit the resources to bidding, if they are satisfied the process will be fair, and applied in an even handed fashion.

An independent probity auditor is the most effective means of achieving this end; especially when compared to the cost of defending a challenge to the procurement process, or a less than value for money award.

In discharging their functions, the probity auditor must have a relatively free hand to investigate and report on issue of concern, to make recommendations on how to improve the process, and to receive complaints or other communications directly from the bidders.

The ultimate sanction available to an probity auditor is a recommendation to disqualify a bidder or to remove a member of the valuation or decision-making team, and to issue a qualified or adverse report with the tender recommendation. The impact of such a report, from an accountability perspective, is not to be under-rated.

On the positive side, probity properly applied can genuinely give value for money results which all parties can accept; even if they were unsuccessful, bidders will participate in future procurement rounds if they have faith in the process.

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