



# Fairness and Transparency in Purchasing Decisions

Probity in Australian Government Procurement



Better Practice Guide

August 2007



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# Foreword

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This Better Practice Guide (BPG) provides guidance about the important role that probity plays in public sector procurement.

Probity during procurement is concerned with ensuring the integrity of procedures and processes put in place to provide fairness and transparency in purchasing decisions.

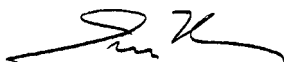
The Australian Government spends approximately \$29 billion annually on purchasing goods and services. Each year nearly 90 000 contracts are awarded. Many of these purchases are for relatively minor amounts; others are significant and cost tens or hundreds of millions of dollars. Australian Government officials need to ensure that these purchasing decisions represent value for money, which is more likely to be achieved when probity principles are put into practice, and purchasing decisions are made in a way that is fair, transparent and accountable.

Whether relatively straightforward or complex, the nature of procurement activity means that it generates a range of probity issues. With this in mind, the BPG emphasises the important role of procedural integrity in managing procurement and probity risks.

The probity guidance in this BPG applies to agencies subject to the *Financial Management and Accountability Act 1997* (FMA Act) and relevant bodies subject to the *Commonwealth Authorities and Companies Act 1997* (CAC Act). While the legal and compliance obligations of FMA Act agencies and CAC Act bodies can differ during procurement, the ANAO considers that the adoption of the probity measures contained in this BPG, where cost effective, will enhance fairness and transparency in purchasing decisions.

In preparing this BPG, the ANAO has built on the guidance provided by the Department of Finance and Administration in its Financial Management Guidance series of publications, including the principles underpinning probity identified in the Commonwealth Procurement Guidelines.

I trust that users of this BPG will find it a useful resource.



Ian McPhee  
Auditor-General

August 2007



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# Coverage of this Better Practice Guide

## 1.1 Procurement Guidance

Procurement by the Australian Government is valued at \$29 billion annually. Government purchases include the acquisition of goods, services, and property, including intellectual property.

This Better Practice Guide (BPG) has been prepared to assist officials<sup>1</sup> who conduct procurement activities in *Financial Management and Accountability Act 1997* (FMA Act) departments and agencies and relevant *Commonwealth Authorities and Companies Act 1997* (CAC Act) bodies.<sup>2</sup>

The Commonwealth Procurement Guidelines (CPGs)<sup>3</sup> set out the Australian Government's procurement framework and apply to all FMA Act agencies and certain bodies subject to the CAC Act. The CPGs provide guidance that is applicable to all procurements and, where relevant, mandatory procedures that should be followed. These include the requirement to adopt procedures aimed at facilitating ethical decision-making.

## 1.2 Ethical behaviour

When public sector entities approach the market to buy property or secure a service, they have a responsibility to obtain value for money. This must be achieved by acting in a non-discriminatory and ethical manner. The Australian community expects business in the public sector to be conducted ethically, displaying honesty, integrity, diligence, fairness, trust, and respect when dealing with others. During procurement, probity is the evidence of ethical behaviour and is commonly associated with the practice of adopting and following well considered and sound procedures.

This BPG is concerned primarily with the behaviour of officials when they are conducting procurement activities, and it highlights the ethical issues that they should be alert to. Ensuring the proper conduct of procurement serves to:

- facilitate the achievement of value for money;

<sup>1</sup> Official is defined in the FMA Act to mean a person who is in an agency or is part of an agency. The *Financial Management and Accountability Regulations 1997*, define an 'approver' as a Minister, a Chief Executive, or a person authorised under an Act to exercise a function of approving proposals to spend public money. An officer in a CAC authority includes, as well as directors, other people who are concerned in, or take part in, the management of the authority. For both FMA Act agencies and CAC Act bodies, the term official includes non-employees (for example, contractors) who conduct a financial task for the entity, including procurement.

<sup>2</sup> In this BPG, where the probity guidance applies to both FMA Act agencies and CAC Act bodies they are collectively called 'entities', otherwise they are referred to using the foregoing terminology.

<sup>3</sup> Department of Finance and Administration, Financial Management Guidance No. 1, *Commonwealth Procurement Guidelines*, Finance, Canberra, January 2005.

- reduce the risk of the Government being exposed to legal and/or financial loss;
- provide potential contractors with confidence about fair treatment, with consequential improvements in competition and performance; and
- guard against collusion and fraud.

### 1.3 Probity as a means of managing procurement risks

Public sector procurement can be large (for example, a major defence equipment acquisition) or small (for example, a routine stationery order). Whether procurement projects are straightforward or complex, officials should behave ethically. Securing value for money and confidence in the outcome is dependent upon the proper conduct of the procurement. An entity's reputation can be affected by its approach to procurement and providing assurance to all stakeholders requires an understanding of, and commitment to, public sector values.

Sound risk management is also a central element of good governance during procurement. Key factors to consider in identifying procurement risks include: the cost of the property or service; the experience of the entity in the market; the technical, legal or financial complexity; and other risks associated with the procurement including, for example, political sensitivity.

Procedural integrity is an important means of managing procurement risks. Following sound procedures, including probity principles, will reduce the likelihood of poor procurement decisions. As a minimum, an entity needs to be able to demonstrate that it used procedures that were consistent with the Government's procurement policies and guidelines.

The greater the size, complexity and sensitivity of a government purchase, the more likely that a poor procurement decision will have adverse consequences. As this risk increases, entities can provide additional guidance and/or require mitigation strategies proportionate to the scale, scope and relative risk of the proposed procurement. Managing probity issues in this way will help ensure that the appropriate level of procedural integrity is applied and the legitimate interests of potential suppliers are understood and respected throughout a procurement.

## 1.4 The structure of this BPG

This guide is not intended to provide prescriptive instructions. Rather it is recognised that individual purchases have specific risks and, therefore, require tailored approaches to the management of probity. While broadly applicable to all procurement activity, this BPG is more relevant to high-value procurements, where the risks are generally greater. In particular, Part 5 illustrates the procurement tasks that take place during each stage of a more-complex and higher-risk procurement, and provides practical probity guidance for preparing a probity plan.

**Figure 1: Structure of this Better Practice Guide**

1. Coverage

2. Legal and Policy Framework

3. Probity Principles

4. Probity Services

5. Guidance for Preparing a Probity Plan



# Legal and Policy Framework for Government Procurement

## 2.1. The Australian Government's procurement objectives

The Australian Government's procurement regime is underpinned by the core principle of value for money:

- ensuring that the best value is obtained by the Government requires a comparative analysis of price and quality for each proposal for the whole period of the contract.

This is enhanced by:

- encouraging competition (non-discrimination)—all potential suppliers should have the same opportunities to compete for government business;
- using resources in an efficient, effective and ethical manner; and
- making decisions in an accountable and transparent manner.

## 2.2 FMA Act agencies

The FMA Act covers departments and agencies that are legally and financially part of the Commonwealth. The Government's policy regarding the manner in which procurement is conducted and the ethical behaviour of officials is supported legally by:

- the *Public Service Act 1999*;
- section 44 of the FMA Act; and
- FMA Regulations 9 to 13.

### ***Public Service Act 1999 (conduct of employees)***

The Australian Public Service (APS) Values provide the philosophical underpinning of the APS and articulate its culture and ethos. The Values reflect the Australian community's expectations of public servants and are directly relevant to procurement.

The *Public Service Act 1999* requires that APS employees at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS. The APS Values, described in section 10 of the Act, require APS employees to:

- have the highest ethical standards;
- be openly accountable; and
- deliver services fairly, effectively, impartially and courteously.

The requirements on APS employees to conduct government business, including its procurement activities, in an ethical manner, are complemented by the requirements of the APS Code of Conduct which is set out in section 13 the *Public Service Act 1999*. Amongst other things, the Code requires that all APS employees:

- behave honestly and with integrity in the course of their employment in the APS;
- disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with their employment in the APS;
- use Commonwealth resources in a proper manner;
- not make improper use of inside information or 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; and
- at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.

### **Section 44 of the FMA Act**

The FMA Act specifies the responsibilities and powers of Chief Executives and officials, including the responsibilities associated with the expenditure of public monies. Section 44 of the FMA Act requires a Chief Executive to manage the affairs of the agency in a way that promotes the efficient, effective, and ethical use of the Commonwealth resources for which the Chief Executive is responsible.

This provision sets out the core obligation underpinning the way in which the activities of an FMA Act agency are managed by its Chief Executive, including in relation to the agency's procurement activities.

### **FMA Regulations 9 to 13: approval to spend public money**

For agencies governed by the FMA Act, a proposal to spend public money must be approved prior to officials entering into a contract under which public money is or will become payable. In this respect, FMA Regulations 9 to 13 specify the requirements that must be satisfied before a person enters into commitments to spend public money by executing a contract, agreement or arrangement. In particular, FMA Regulation 9 states that an approver must not approve a proposal to spend public money unless the approver is satisfied that the expenditure:

- a) is in accordance with the policies of the Commonwealth;
- b) will make efficient and effective use of the public money; and
- c) if the proposal is one to spend special public money, is consistent with any terms applying to that money.

### **Sanctions for failure to comply with requirements**

Commonwealth officers may be liable to criminal or other sanctions for inappropriate behaviour in the course of their employment. Legislation that is of particular relevance to procurement is:

- sections 14 and 41 of the FMA Act make it a criminal offence for a Commonwealth officer to misapply, or improperly dispose of or use public money or property;
- the *Crimes Act 1914* creates offences for the unauthorised disclosure of information and official secrets; and
- the *Criminal Code Act 1995* establishes a range of offences including theft of Commonwealth property, fraud, abuse of public office, bribery and unauthorised access to (or modification of) restricted data.

The Public Service Act also provides for the imposition of sanctions on an APS employee who is found to have breached the APS Code of Conduct. Possible sanctions include: termination of employment; reduction in classification; re-assignment of duties; reduction in salary; deductions from salary, by way of fine; or a reprimand.

## 2.3 CAC Act bodies

There are three types of *Commonwealth Authorities and Companies Act 1997* (CAC Act) bodies:

- Commonwealth authorities created by legislation that are separate legal entities from the Commonwealth and which have the power to hold money on their own account;
- wholly-owned Commonwealth companies other than a company in which any of the shares are beneficially owned by a person other than the Commonwealth; and
- Commonwealth companies under the *Corporations Act 2001* in which the Commonwealth has a controlling interest.

The CAC Act regulates certain aspects of:

- the corporate governance, financial management and reporting of Commonwealth authorities, that are in addition to the requirements of their enabling legislation;
- the corporate governance and reporting of Commonwealth companies, which are in addition to the requirements of the *Corporations Act 2001*; and
- compliance with government procurement requirements by Commonwealth authorities and wholly-owned Commonwealth companies (see part 2.4 below).

The CAC Act imposes a number of obligations on officers and employees of Commonwealth authorities to exercise care and diligence and to act in good faith, including during procurement. An 'officer' is defined in section 5 of the Act as a '*director of the authority, or any other person who is concerned in, or takes part in, the management of the authority*'.

### Conduct of officers

The CAC Act imposes general care and diligence duties upon officers and employees of Commonwealth authorities. For example, section 22 is aimed at ensuring that officers of Commonwealth authorities are subject to comparable standards of conduct as officers of companies under the Corporations law. Section 22(1), a civil penalty provision, provides:<sup>4</sup>

An officer of a Commonwealth authority must exercise his or her powers and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if he or she were an officer of a Commonwealth authority in the Commonwealth authority's circumstances ...

As well as this general duty of care, the CAC Act imposes a number of additional obligations. For example, an officer or employee of a Commonwealth authority must not:

- improperly use his or her position to gain an advantage for him or her or someone else (section 24(1)); and/or
- improperly use information obtained as an officer or employee of a Commonwealth authority to gain advantage for him or her or someone else or cause detriment to the Commonwealth authority or to another person (section 25(1)).

<sup>4</sup> A civil penalty is one imposed by courts applying civil rather than criminal court processes.

In addition, an officer of a Commonwealth authority must exercise his or her powers and discharge his or her duties in good faith in the best interests of the Commonwealth authority and for a proper purpose.<sup>5</sup> An officer or employee of a Commonwealth authority may be liable to criminal sanctions where these obligations are breached (section 26(2)(a)).

The CAC Act also contains rules relating to the disclosure of conflicts of interest by directors of a Commonwealth authority. For example:

A director of a CAC Act entity who has a material personal interest in a matter that relates to the affairs of the authority must give other directors notice of this interest (section 27F(1)).

Subject to specific conditions, a directors who has a material personal interest in a matter that is being considered at a directors' meeting, must not be present while the matter is being considered (section 27J(1)).

## 2.4 The Commonwealth Procurement Guidelines

Revised Commonwealth Procurement Guidelines (CPGs) were implemented in January 2005.<sup>6</sup> These guidelines gave effect to Australia's international obligations to give international suppliers the same treatment and access to Australian Government procurement opportunities as domestic Australian suppliers.

The CPGs outline the broad principles under which procurement is to be conducted. Two main Divisions within the CPGs are:

- Division One—that sets out the elements of the Government's procurement policy framework that apply to all procurements; and
- Division Two—that prescribes mandatory procurement procedures for certain '**covered**' procurements.

### **Division One—The procurement policy framework that applies to all procurement**

Division One of the CPGs articulates the core principle of value for money and other elements of the Government's procurement policy that apply to all procurements. These are:

- the procurement policy framework including the Public Service Act, the FMA Act, the CAC Act, the CPGs and international obligations;<sup>7</sup>
- the principle of value for money that requires a comparative analysis of all relevant costs and benefits of each proposal throughout the whole procurement cycle;
- encouraging competition by ensuring non-discrimination in procurement and using competitive procurement processes;
- promoting the use of resources in an efficient, effective and ethical manner; and
- making decisions in an accountable and transparent manner.

<sup>5</sup> *Commonwealth Authorities and Companies Act 1997*, s 23.

<sup>6</sup> Department of Finance and Administration, Financial Management Guidance No. 1, *Commonwealth Procurement Guidelines*, Finance, Canberra, January 2005.

<sup>7</sup> For example, the Australia–United States Free Trade Agreement (AUSFTA). The AUSFTA requires that United States suppliers are accorded the same treatment and access to Australian Government procurement opportunities as domestic Australian suppliers. Reciprocal arrangements apply to Australian suppliers tendering for contracts in the United States of America.

## Division Two—Mandatory procurement procedures for ‘covered’ procurement

A central procurement threshold is the classification of procurements over a specified value as ‘covered’ procurements to which **mandatory** procurement procedures apply. Unless specifically exempt,<sup>8</sup> a procurement is a ‘covered’ procurement if the estimated value<sup>9</sup> of the property or a service being procured is above the procurement threshold, being:

- \$80 000 for procurements in FMA agencies (other than procurements of construction services);
- \$400 000 for procurements in CAC Act bodies (other than procurements of construction services);
- \$9 million for procurements of construction services in FMA agencies and CAC Act bodies.<sup>10</sup>

For ‘covered’ procurements, mandatory procedures require:

- the use of full open tenders for the purchase of goods and services above the relevant threshold;
- entities to demonstrate mitigating circumstances before ‘select’ tendering or ‘direct’ sourcing methods are considered (specific rules govern the use of select tendering and direct sourcing);
- that the Request Documentation contains information about: the nature of the procurement; all the evaluation criteria; ‘Conditions for Participation’; ‘Minimum Content and Format Requirements’; and the arrangements for the conduct of the tender process;
- all tenderers to lodge submissions within a common deadline; and
- entities to follow publishing and reporting requirements including publishing annual procurement plans, publishing details of all open approaches to the market, and reporting details of contracts and agency agreements.

An entity’s compliance with the CPGs is sufficient to ensure that its procurement activity meets Australia’s international obligations.

### Application of the CPGs by FMA Act agencies

The CPGs establish the core procurement policy framework within the Australian Government and articulate the Government’s expectations for all FMA agencies and their officials when performing duties in relation to procurement.<sup>11</sup> FMA officials **must have regard to** the CPGs when involved in the procurement of property or services.<sup>12</sup> An official who takes action that is not consistent with the CPGs **must** document their reasons for so doing.<sup>13</sup>

8 Exemptions include the leasing or purchase of real property or accommodation and procurement of government advertising services. While fifteen categories of procurement are exempt from the mandatory procurement procedures, they are still required to comply with the procurement policy framework and other government policies specified by the CPGs.

9 The CPGs set out detailed guidance on how to calculate the value of a procurement. The guidance covers such issues as the inclusion of a range of taxes and charges, the inclusion of potential extensions and the costing of procurements of uncertain duration.

10 The CPGs are being updated and clarified to reflect experience since 2005. The covered procurement threshold for construction services is to be increased from \$6 million to \$9 million, to more closely align it with the current maximum threshold contained in the AUSFTA.

11 Department of Finance and Administration, Financial Management Guidance No. 1, *Commonwealth Procurement Guidelines*, Finance, Canberra, January 2005.

12 Financial Management and Accountability Regulations 1997, regulation 8(1).

13 Financial Management and Accountability Regulations 1997, regulation 8(2).

The FMA Act also requires an approver of a proposal to spend public money to be satisfied that the proposal is in accordance with the policies of the Commonwealth and makes efficient and effective use of the public money.<sup>14</sup> APS employees must also comply with the APS Code of Conduct and uphold the APS Values in the course of their employment, which require that APS employees behave with honesty and integrity, comply with all applicable Australian laws, and use Commonwealth resources in an efficient, effective and ethical manner.<sup>15</sup>

The most appropriate way for FMA Act agencies to meet these legislative requirements, and demonstrate that public resources were used efficiently, effectively and ethically when undertaking procurement, is to comply with the CPGs, especially the mandatory procurement procedures for 'covered' procurements.

## Internal instructions and procedures

### ***FMA Act agencies***

The FMA Regulations authorise the Chief Executive of an FMA Act agency to give instructions to officials in that agency on any matter necessary or convenient for carrying out or giving effect to the FMA Act or the FMA Regulations. These instructions are called Chief Executive Instructions (CEIs). The purpose of the CEIs is to interpret the requirements of the agency's legislative framework into policies and procedures that reflect an agency's particular operating environment. For this reason, CEIs play an important role in the control framework for procurement.

In developing and implementing CEIs, agencies should align their procurement instructions with their particular procurement environment. Setting procurement guidelines in this way assists agencies to focus on their individual procurement need and risks. Well-targeted CEIs for procurement include documented business rules and operational guidelines/instructions based on consideration of:

- the legal and policy framework applying to procurement decisions (see sections above on the Public Service Act, FMA Act and CPGs);
- the agency's specific procurement needs; and
- the procurement risks faced by the agency in delivering its products and services.

### ***Procurement needs***

Finance has provided guidance to agencies to assist them to develop CEIs for procurement based on specific procurement needs.<sup>16</sup> In particular, it is important for an agency to understand the business priorities that drive its procurement program by considering:

- the overall scale and value of procurement in the agency;
- whether the agency uses a centralised or devolved approach to procurement;
- the spread of procurement requirements across programs, State and regional offices and management units;
- the types of property and services the agency procures (for example consultancies, professional services, construction projects, corporate services, information technology) and the nature of the markets that supply these; and
- how frequently the agency purchases the above goods, services, and property.

<sup>14</sup> Financial Management and Accountability Regulations 1997, regulation 9.

<sup>15</sup> *Public Service Act 1999*, s 13.

<sup>16</sup> Department of Finance and Administration, Good Procurement Practice series No. 1, *Chief Executive's Instructions and Operational Guidelines for Procurement*, Finance, Canberra, November 2006.

**Procurement risks**

CEIs should also reflect the nature, size and risk profile of an agency's procurement activity. This approach will assist officials to identify and manage high, medium, and low risk procurements. Procurement risks increase when:

- the expected cost of the purchase is high, or relatively high compared with the purchases normally undertaken by the agency;
- the agency has limited experience in either the nature of the purchase being undertaken or the market;
- the project itself is inherently complex (technically, legally or financially); or
- the project is potentially controversial or politically sensitive.

If a procurement is judged to be a low risk, an agency's CEIs could specify a relatively straightforward process that complies with legal and policy requirements. As procurement risks increase, CEIs could provide additional guidance such as the need for a risk management plan, a specialist procurement team, and situations where external specialist advice is required including probity expertise.

The risk profile of a procurement will also inform agencies whether a systematic risk assessment and probity plan are warranted. Any risk mitigation/management process should be proportionate to the scale, scope and relative risk of the proposed procurement.

**Application of the CPGs by CAC Act bodies**

Although bodies subject to the CAC Act are generally legally and financially separate from the Commonwealth, a number of specified CAC Act bodies must apply the CPGs. Section 47A of the CAC Act empowers the Finance Minister to issue directions to the directors of Commonwealth authorities and wholly-owned Commonwealth companies listed in the CAC Regulations on matters related to the procurement of property or services.<sup>17</sup>

The Finance Minister's Directions 2004 require relevant CAC Act bodies to comply with Division One and Division Two of the CPGs when engaged in 'covered' procurement.<sup>18</sup>

**Internal instructions and procedures in CAC Act bodies**

Most CAC bodies have developed procedures and specific authorisations issued by their Board or the Chief Executive to guide company officials that undertake procurement activities. These internal instructions should be consistent with the probity principles contained in the CPGs.

**2.5 Government involvement**

There are many areas of public administration, including procurement, where decisions are made appropriately by Cabinet, the responsible portfolio Minister or a public official. For particularly sensitive procurements, public officials may have a role only of advising on the merits of a proposed decision.

During any procurement, the Government, Ministers and public officials will need to comply with all legal requirements. What is important in the process is that the body or person making the decision is accountable for it and records are kept to support decisions.

<sup>17</sup> The Commonwealth Authorities and Companies Regulations 1997 prescribe 26 Commonwealth authorities and 2 wholly-owned Commonwealth companies as required to comply with Government procurement requirements.

<sup>18</sup> Finance Minister's (CAC Act Procurement) Directions 2004.

## Cabinet involvement

The CPGs implement Australia's obligations under, among other things, the Australia–United States Free Trade Agreement (AUSFTA). As such, if Cabinet is involved in choosing a preferred tenderer it must act consistently with Australia's obligations to provide non-discriminatory treatment for suppliers, goods and services covered by international trade agreements.

In accordance with the CPGs, all criteria and requirements on which a tender will be decided should be clearly set out in the tender Request Documentation. This includes situations where Cabinet may be the final decision maker. Where it is intended that Cabinet make the final decision on the successful tenderer for procurement, the Request Documentation should alert potential suppliers to this process.

This can be done by incorporating a clause in the section of the Request Documentation dealing with the evaluation process:

The Commonwealth will evaluate tenders on the basis of best value for money in accordance with the evaluation criteria set out in clause <number>. Selection of the preferred tenderer will be made by the Commonwealth on the basis of that evaluation and taking into account considerations such as national interest, affordability, strategic considerations and other whole of government considerations.<sup>19</sup>

The Request Documentation would then set out the relevant evaluation criteria against which the entity would evaluate the submissions.

## Ministerial involvement

Where public officials or statutory officeholders have delegations to make decisions under legislation, it is ultimately for them to exercise their own judgement on the best decision.

In some cases, a Minister may consider it appropriate to be involved in a procurement decision-making process in the context of his/her overall responsibility for the administration of portfolio programmes. In these circumstances, the Minister should be advised of the importance of acting consistently with the CPGs including, for example, the requirement that any decision be based on the evaluation criteria and the processes outlined in the Request Documentation. Any contrary actions could result in the Commonwealth being exposed to legitimate criticism and increase the risk of litigation. Where the Minister exercises the right to make a judgment on the procurement outcome, the Minister is personally accountable for that decision.

In certain instances, it may be suggested that a public official provide a recommendation on a preferred tenderer or make a final decision on a procurement that is not defensible under the CPGs or the relevant criteria against which tenders were evaluated. In such cases a discussion with the Minister's office may clarify the concerns and achieve a satisfactory resolution.

If the concerns cannot be satisfactorily resolved, the issue should be taken to more senior levels, with the head of the agency raising the matter with the Minister if necessary. Neither Ministers nor officials should be placed in a position where they are asked to take responsibility for a procurement decision which they do not consider to be fair and representing value for money.

## Keeping the Minister informed

There are also aspects of a public official's relationship with a Minister or Minister's office during procurement that requires specific consideration. In particular, it could be appropriate to keep the Minister fully informed of the progress of significant and/or potentially sensitive procurements.

<sup>19</sup> Department of the Prime Minister and Cabinet, correspondence to Chief Executive Officers, 31 October 2006.

As well as having overall responsibility for the administration of portfolio programmes, Ministers have a role in understanding their constituents' interests and points of view. However, during significant and/or potentially sensitive procurement, Ministers will want to remain, and appear to remain, free from the undue influence of potential suppliers. For example, it may not be appropriate for a Minister to accept an offer that involved hospitality from a potential supplier, because acceptance may suggest an obligation to provide favourable treatment. For these reasons, the normal process of communication with the Minister or his/her staff should keep them informed of significant and/or potentially sensitive procurement activity and the potential suppliers involved.



# 3 Probity Principles

Probity principles are inherent in the CPGs for both 'covered' and 'non-covered' procurements and are central to achieving value for money and non-discrimination in government procurement. To assist entities to manage probity issues during procurement, the following principles have been identified as providing the foundation for integrating probity considerations in government procurement:<sup>20</sup>

- compliance with the legal and policy framework applying to procurement decisions (see Section 2 above on the Public Service Act, FMA Act, CAC Act and CPGs);
- use of an appropriately competitive process;
- fairness and impartiality;
- consistency and transparency of process;
- identification and management of conflicts of interest; and
- appropriate security and confidentiality arrangements.

These principles need to be considered in any government purchase. Irrespective of the value of a particular procurement, probity principles should guide officials in all aspects of the purchase. Probity management during procurement is concerned with ensuring that appropriate processes and systems are in place so that the integrity of the eventual procurement decision can be assured.

## 3.1 Use of an appropriately competitive process

Competition between potential suppliers is an important foundation in achieving value for money. Value for money is more likely to be achieved when opportunities for government business are open to all potential suppliers and the market is tested regularly. This means that businesses that are capable of supplying goods or services for government should have the opportunity to respond to requests and to be considered on their merits.

Open and impartial processes help to ensure that all potential suppliers have equal opportunity to bid and, therefore, maximise competition. The lack of a competitive field can lead to undesirable consequences, including higher costs to government through suppliers being able to charge premiums for goods or services provided.

For these reasons, entities should have in place procurement processes that are consistent with government policy and assist in obtaining the best value for the public dollar spent. A key

<sup>20</sup> Department of Finance and Administration, Financial Management Guidance No. 14, *Guidance on Ethics and Probity in Government Procurement*, Finance, Canberra, 2005.

factor is whether the entity has tested the market sufficiently to ensure an adequate level of competition. This requirement is supported by the CPGs, which state:

When undertaking a procurement, agencies need to conduct an appropriately competitive process of a scale commensurate with the size and risk profile of the particular procurement. Government policy specifies that specific procurement procedures are to be followed when the value of the property or services subject to a particular procurement is above a certain threshold.<sup>21</sup>

## Purchasing thresholds

If the value of a procurement is over the relevant 'covered' threshold,<sup>22</sup> then mandatory procurement procedures must be followed. Above this threshold, there is a general presumption of open tendering with select tendering and direct sourcing available only in specific circumstances.

It is better practice to identify government requirements for competitive procurement processes in CEIs, internal instructions or other supporting documentation. This includes circumstances where the CPGs mandate open tendering. The thresholds specified in the CPGs for 'covered' procurements are the only procurement thresholds required in CEIs. These are:

- \$9 million for procurements of construction services in FMA agencies and relevant CAC Act bodies, \$400 000 for other procurements in CAC Act bodies, and \$80 000 for other procurements in FMA agencies. At these levels, the CPGs require the application of the mandatory requirements in Division Two of the CPGs and the use of an open tender.

Purchases greater than the thresholds in the CPGs are not homogenous and will vary in complexity and risk. For medium and high risk procurements, CEIs could provide additional guidance that match the scale and risk profile of the procurement. Such guidance could include situations that require a plan to manage the procurement risks, a plan to manage probity risks, and whether external specialist advice is required for any expected technical, legal, financial or probity issues.

For purchases less than the CPG thresholds, agencies often choose to use additional internal thresholds to specify the procurement processes to be undertaken. A well-structured purchasing threshold framework, based on an entity's purchasing profile, can provide guidance and assist officials to determine the use of an appropriate competitive process for less material purchases. Typically, internal procurement procedures establish additional purchasing thresholds that set the dollar amount or range for which certain quotation and tendering procedures are applicable. An example for an FMA Act agency may be:

- \$20 000 to \$80 000—includes purchases against standing offers<sup>23</sup> and relatively high value items. Purchases in this category require a relatively formal procurement process including a basic business case and written responses from selected suppliers against a statement of requirement;
- \$2000 to \$20 000—includes purchases against standing offers and relatively low value items. Purchasing in this category is essentially routine; a well constructed purchase order and written quotations are obtained to assess value for money; and

<sup>21</sup> Department of Finance and Administration, Financial Management Guidance No. 1, *Commonwealth Procurement Guidelines*, Finance, Canberra, January 2005.

<sup>22</sup> See Section 2.4 above.

<sup>23</sup> An arrangement under which a number of suppliers, usually selected through a single procurement process have pre-qualified to supply to the Government, usually at a pre-arranged price.

- nil to \$2000—includes purchases against standing offers and low value, off-the-shelf items. Purchasing in this category requires relatively basic decisions for simple orders; oral quotations are obtained to support a value for money procurement.

The risk to be managed in specifying additional internal thresholds is that they do not lead to unnecessary process. Accordingly, the number of thresholds should be limited to those required to promote efficient and effective processes.<sup>24</sup>

### Direct sourcing of ‘covered’ procurements

The mandatory procurement procedures for ‘covered’ procurements (see Part 2.4 above) have a presumption of open tendering as the procurement method, with provision in certain circumstances for direct sourcing. The CPGs describe direct sourcing as:

a procurement process ... in which an agency may invite a potential supplier or suppliers of its choice to make submissions.

The CPGs require that direct sourcing may only be used in circumstances specified in the CPGs, for example, extreme urgency brought about by events unforeseen by the entity.

However, instances occur where direct sourcing is used outside the permitted circumstances.<sup>25</sup> These include: the use of standing offers that have expired or are non-compliant; the claimed use of standing offers that do not exist; inappropriate claims of compatibility or urgency; and significant contract variations and extensions that do not meet the requirements of the CPGs.

A common issue that arises with direct sourcing is insufficient documentation to support why direct sourcing was used and, if a rationale is documented, an inappropriate justification for the decision. For example, entities often approve direct sourcing on the basis of the need for compatibility with a previous procurement and negotiate directly with one firm or request only one firm or person to place a bid. However, subsequent procurements may be substantially different and/or larger than the original contract.

In these and similar cases, improved planning processes that identify future requirements should reduce the need to direct source.

## 3.2 Fairness and impartiality

Public sector procurement should be conducted without favour or prejudice—all potential suppliers should be provided with the same information and procedures should be put in place to ensure that each bid is given fair and equal consideration.

Potential suppliers seeking to win public sector contracts often invest considerable time and resources to develop and submit competitive proposals. In return, they should receive fair treatment at all stages of the procurement. If agencies are not fair and impartial in their dealings with suppliers they may limit the number of potential bidders in future procurements. A result is likely to be reduced competition in subsequent tenders with flow-on consequences for value for money.

Public officials should not discriminate between bidders in providing access to information. This means that all potential suppliers must be provided the same opportunities to access tender-related information. Tender-related information must be made available to eligible potential

<sup>24</sup> Management Advisory Committee report No. 7, *Reducing Red Tape in the Australian Public Service*, Australian Public Service Commission, Canberra, 2007.

<sup>25</sup> See ANAO report No. 21, 2006–07, *Implementation of the revised Commonwealth Procurement Guidelines*.

suppliers, in the same form and at the same time. As well as procedural information, this may include any relevant commercial information owned by the Australian Government that is being made available for the purposes of the procurement. This is necessary to ensure that all potential suppliers are equally informed of the entity’s requirements.

### Procedures for controlling and monitoring the flow of information

To promote the fair and equitable distribution of tender-related information, entities should establish procedures before the tendering process starts to minimise the risk of discriminatory conduct. Better practice procedures for controlling and monitoring the flow of information to and from bidders have been identified by the Victorian Government Procurement Group (see Table 1).

**Table 1: Procedures for monitoring the flow of tender-related information**

| Control Point                   | Better Practice for Monitoring the Flow of Information  |
|---------------------------------|---|
| <b>Contact points</b>           | A small group of officers and/or advisers should be authorised to deal directly with bidders. It may be more practical for the responsible departmental officer to nominate who can act as the main contact point. This person could be given the power to authorise others to communicate with bidders when required (recognising that extensive contacts with bidders may be required during certain phases of the tender process). |
| <b>Documenting discussions</b>  | Arrangements should be made for documenting key discussions with bidders, including minutes recording the main points raised in face-to-face meetings and telephone conversations.  |
| <b>Approving correspondence</b> | Procedures should be established for the responsible departmental officer to review and authorise correspondence with bidders, recognising the need to send consistent and internally agreed messages to all bidders.   |
| <b>Filing</b>                   | The procurement teams should set up a properly organised system for filing and retrieving correspondence with bidders and other bid-related records.  |
| <b>Verification</b>             | Teams need to establish suitable procedures for collecting and verifying the data which is provided to bidders.   |
| <b>Other contact</b>            | Procedures should be established to ensure that site visits, data rooms, briefing sessions, clarification meetings and other direct contacts with bidders are handled in a way which allows all bidders similar opportunity to acquire information about the tender process.  |

Source: Victorian Government Procurement Group, Department of Treasury and Finance, Good Practice Guidelines, *Conduct of Commercial Engagements in Government*, June 2006.

The fewer the contact points, the more likely that all the potential suppliers will be provided with consistent information. In some procurement, it may be appropriate to nominate a single senior officer to be the sole contact point. This approach has advantages in situations where extensive communication is required with potential suppliers that have other ongoing contracts with the entity.

The use of these procedures should ensure that information provided to proponents about the entity’s requirements and the conduct of the tender process is consistent. This will reduce the risk that no one proponent is advantaged over another.

### Debriefing

The CPGs require relevant entities, upon request, to provide each unsuccessful tenderer with an explanation of why its submission was not successful. It is important that information provided

by an entity at a debriefing does not reveal information that could compromise the commercial interests of any other tenderer or the Government. For these reasons, a debriefing should focus on the particular tenderer's performance against the evaluation criteria and avoid comparisons with the bids of other tenderers.

### 3.3 Consistency and transparency of process

Processes that are consistent and transparent promote the efficient, effective and ethical use of Commonwealth resources and are central considerations during procurement. Entities should also have appropriate mechanisms in place to demonstrate that they are accountable for their procurement practices and the decisions that they make. A well planned, performed and documented procurement that satisfies the requirements in the CPGs is more likely to withstand external scrutiny. Mechanisms that enhance transparency and accountability include:

- the public notification of procurement opportunities;
- following the advertised process;
- the consistent application of the evaluation criteria;
- public reporting of contracts; and
- keeping appropriate records throughout the procurement.

#### The public notification of procurement opportunities

Procurement activities should be visible and transparent. An important reason for making public sector procurement transparent is to provide confidence in the processes that an entity intends to undertake. The CPGs require entities<sup>26</sup> to notify procurement opportunities by publishing on AusTender:

- an Annual Procurement Plan containing information about planned procurements (see AusTender at <http://www.tenders.gov.au>);
- details of all open approaches to the market, including requests for expressions of interest, requests for tender, and requests for application for inclusion on a multi-use list (see AusTender at <http://www.tenders.gov.au>). To the extent practicable, all related documents must also be available for download from AusTender.

#### Following the advertised process

Scrutiny of the management of government procurement processes within the business community is astute and increasing. Failing to conduct a procurement with due regard to probity in general, and adherence to the advertised process in particular, may leave an entity open to legal and other challenges. Notice of a procurement will generate expectations about the way any tender process is to be implemented and the steps that will be taken. If the announced rules, procedures and steps are not followed, it may be possible to challenge the conduct of the tender.

The decision of the Federal Court in the Hughes Aircraft case<sup>27</sup> highlighted the need for entities to ensure that they conduct their procurement processes in a way that is consistent with the advertised process and tender documents. The promulgation of Expression of Interest and/or Request For Tender (RFT) documents, associated evaluation criteria and other terms and

<sup>26</sup> Relevant CAC Act bodies need only comply with these requirements in relation to 'covered' procurements, as defined in the CPGs.

<sup>27</sup> *Hughes Aircraft Systems International v Air Services Australia* (1997) 76 FCR 151.

conditions (for example, the proposed use of a short-listing stage) may generate legitimate expectations on the part of potential suppliers that the advertised process will be followed.

In the Hughes Aircraft case, the Court found that the Civil Aviation Authority (CAA) had not adhered to the evaluation criteria described in its RFT for a new air traffic control system. The Court found that the CAA had altered the selection criteria after tenders had been submitted, giving more emphasis on one particular criterion than the RFT had specified. The CAA made the change without informing the potential suppliers and without requesting them to re-bid on the basis of the modified criteria. The Court held that the process outlined in the documents for the evaluation of tender responses was binding on CAA. The Court also held that CAA had a duty to deal fairly in the process.

Officials should take care in the preparation of tender documents and ensure that processes specified in the documents for the evaluation of tender responses are followed. Defending challenges to evaluation procedures and decision-making is time consuming and costly, can undermine public and supplier confidence in the entity, and can damage the reputations of officials and entity management as well as the standing of the Minister and his or her advisers.

### **Consistent application of the evaluation criteria**

A critical feature of an accountable procurement process is consistency in the development and application of the evaluation criteria. This requires the evaluation criteria and procurement procedures to be agreed and documented in advance. Evaluation criteria need to be clear and capture all the considerations that the entity intends to take into account when evaluating tenders. The criteria can be quantitative (with a numeric value); qualitative (where characteristics are described); or a combination of both. A balanced set of evaluation criteria is important as it facilitates both measurement and judgement, as necessary. Once promulgated to potential suppliers, the evaluation criteria should not be altered unless circumstances change so markedly as to make a revision absolutely crucial.

If an entity does decide to alter the published evaluation criteria, the CPGs require that this be done in a clear and transparent way. If the alteration is made before tenders are lodged, the revised criteria should be published and all potential suppliers given sufficient time to address the change. If the alteration is made after tenders are lodged, the revised criteria should be communicated to all the potential suppliers that are participating at the time the information is amended. They should be provided the opportunity to re-submit their submission.

### **Public reporting of contracts**

Another important element of transparency is public reporting of Commonwealth contracts<sup>28</sup> and agency agreements.<sup>29</sup> To meet the contract reporting criteria in *Guidance on Procurement Publishing Obligations*,<sup>30</sup> relevant entities must publish on AusTender all Commonwealth contracts and agency agreements (including standing offer arrangements and amendments to these arrangements) valued at or over the reporting threshold.

For FMA agencies, the contract reporting criteria threshold is \$10 000. For relevant CAC Act bodies, the contract reporting criteria thresholds are above \$400 000 for procurements other

28 FMA Regulations define a Commonwealth contract as 'an agreement for the procurement of goods and services under which the Commonwealth is obliged, or may become obliged, to make a payment of public money'.

29 FMA Regulations define an agency agreement as an agreement for the procurement of goods and services under which an Agency is obliged, or may become obliged, to make a payment of public money to another Agency. This will often take the form of a memorandum of understanding.

30 Department of Finance and Administration, Financial Management Guidance No. 15, *Guidance on Procurement Publishing Obligations*, Finance, Canberra, July 2007.

than procurement of construction services; or \$9 million for procurements of construction services.

Additional publishing obligations apply to FMA Act agencies including:

- disclosure of procurement information consistent with the Senate Order on Departmental and Agency Contracts whereby FMA Act agencies are required to place lists of all contracts to the value of \$100 000 or more on the Internet;<sup>31</sup>
- disclosure of procurement information for annual reporting purposes whereby departmental Annual Reports must include a summary statement outlining: the number of new consultancy services contracts let during the year; the total actual expenditure on all new consultancy services let during the year; the number of ongoing consultancy services contracts active during the reporting year; and the total actual expenditure in the reporting year on the ongoing consultancy contracts. More detailed information is required for individual consultancy contracts valued at \$10 000 or more. This information can be provided in an appendix to the Annual Report or through the Internet;<sup>32</sup> and
- provision of information required by the Public Service Commissioner, under section 44 of the Public Service Act 1999, for the purposes of preparing the annual State of the Service report.

### Keeping appropriate records throughout the procurement

Maintaining appropriate records provides evidence that an entity's procurement processes were legitimate and is an important way of demonstrating accountability and transparency. Procurement records include minutes of key meetings, any decisions made, and who made the decisions. Documentation should be sufficient to provide an understanding of why the procurement was necessary, the process that was followed, and all relevant decisions made and the basis of those decisions. In particular, there should be evidence of the reasoning behind any significant decisions made and the rationale for any departure from established procedures, including the CPGs, and relevant CEIs or other internal instructions.

Entities should have adequate systems to record and maintain procurement decisions and the reasons behind them. Documentation relating to a procurement must be retained for a period of three years or for a longer period if required by legislation or other reason for a specific procurement.<sup>33</sup>

The nature and risk profile of the procurement being undertaken will influence the mix and level of documentation required. For more-complex and higher-risk procurements, appropriate documentation of the key decisions taken is crucial. A procurement process that is well documented will reduce the likelihood of challenges or, if there is a challenge, enable the entity to be in a position to provide an explanation for its actions.

<sup>31</sup> The list of contracts is required to indicate, amongst other things, whether any of the contracts listed contain confidentiality provisions and, if so, the reason for them. This Senate Order for Departmental and Agency Contracts was originally made in June 2001. It is one of several measures that the Senate introduced to improve openness and transparency in relation to the expenditure of public funds.

<sup>32</sup> Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies*, Canberra, June 2007.

<sup>33</sup> Department of Finance and Administration, *Financial Management Guidance No. 1, Commonwealth Procurement Guidelines*, Finance, Canberra, January 2005.

### 3.4 Identification and management of conflicts of interest

Conflicts of interest occur when public officials are influenced by personal interest while doing their job. Such conflict can arise during procurement where a public official, through his/her particular associations or circumstances, has an affiliation or interest that might prejudice or be seen to prejudice his or her impartiality.

Public officials should not benefit personally from procurement decisions involving expenditure of public money. During any procurement, the community and potential suppliers have a right to expect government representatives to perform their duties in a fair and unbiased way and that the decisions they make will not be affected by self interest or personal gain.

#### Sources of conflict of interest

The ANAO has previously identified potential sources for conflicts of interest:<sup>34</sup>

- **a conflict of personal interest** is a situation in which the impartiality of an officer in discharging their duties could be called into question because of the potential, perceived or actual influence of personal considerations, financial or other. The conflict in question is between official duties and obligations, on the one hand, and private interests on the other;
- **conflicts of role** arise when an officer is required to fulfil multiple roles that may be in conflict with each other to some degree. Good corporate governance processes in public organisations usually address this issue by segregating functions and areas of work from each other. A particular conflict of role that can arise during procurement is where a probity adviser is engaged to take on additional responsibilities, thereby compromising or potentially compromising his/her role in providing independent scrutiny (see below).

#### Actual, perceived or potential conflicts of interest

The New South Wales Independent Commission Against Corruption (ICAC) identifies three kinds of conflict of interest—actual, perceived or potential conflicts of interest—where:

- an actual conflict of interest involves a direct conflict between an official's current duties and responsibilities and existing private interests;
- a perceived or apparent conflict of interest can exist where it could be perceived, or appears, that an official's private interests could improperly influence the performance of their duties—whether or not this is in fact the case; and
- a potential conflict of interest arises where an official has private interests that could conflict with their official duties in the future.<sup>35</sup>

There can be different degrees of conflict of interest, both personal and role-related. They can range from the trivial to the material, either by nature or perceived impact. Some should, and can, be avoided; others cannot. However, they must always be identified and managed appropriately.

The perception of a conflict of interest or of improper behaviour can be as damaging as the reality if not quickly corrected. The critical factor is that officials must not only behave ethically, they must also be seen to behave ethically.<sup>36</sup>

<sup>34</sup> ANAO Better Practice Guide, Public Sector Governance, Volume 2, Guidance Paper No. 6, *Conflicts of Personal Interest and Conflicts of Role*, ANAO, Canberra, 2003.

<sup>35</sup> The New South Wales Independent Commission Against Corruption (ICAC), and the Queensland Crime and Misconduct Commission (CMC), *Managing Conflicts of Interest in the Public Sector*, November 2004.

<sup>36</sup> *ibid.*, p. 10.

## Relevant legislation

As mentioned in Part 2 above, provisions concerning conflict of personal interest affecting public officials can be found in key legislation, such as the *Australian Public Service Act 1999* and the *Commonwealth Authorities and Companies Act 1997 (CAC Act)*.<sup>37</sup>

Members of the APS are bound by the APS Code of Conduct, which requires that APS employees must:

- disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with their employment in the APS;
- not make improper use of inside information, or the employee's duties, status, power or authority, in order to gain or seek to gain a benefit or advantage for the employee or other person; and
- at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.

The CAC Act requires that officers and employees of Commonwealth authorities must not improperly use either their position or information obtained to gain advantage for themselves or someone else. In addition, the general principles articulated in the CPGs require that both FMA Act and CAC Act officials dealing directly with potential suppliers:

- recognise and deal with any conflicts of interest (including perceived conflicts of interest) and do not compromise the Australian Government's standing by accepting inappropriate gifts or hospitality.

## External experts

FMG No. 14 *Guidance on Ethics and Probity in Government Procurement*<sup>38</sup> emphasises that any contractors or external advisers involved in a procurement process should also have regard to the Government's ethical requirements and rules regarding conflicts of interest.

External advisers, including legal, financial and probity advisers, may have actual, perceived or potential conflicts of interest. Also, the firms they work for will be engaged on a variety of projects with a range of clients. It is appropriate, therefore, that external advisers should make a written declaration of any conflicts of interests prior to taking part in a procurement.

Any external advisers that are engaged under a Commonwealth contract should sign an agreement that includes standard requirements regarding the disclosure and review of conflicts of interest during a procurement.

## Tests for conflicts of interest

Not all conflicts of interest involve potential personal pecuniary gain. Non-pecuniary interests may result from a personal interest arising out of relationships based on common interest such as sporting, social or cultural activities as well as family and other relationships.

Determining when private interests and public duty are, or might be, in conflict with each other is not always a straightforward decision. A test for determining whether there is a conflict of

<sup>37</sup> Especially sections 13(7) and 17 of the *Public Service Act* and sections 22(1), 24(1), 25(1), 26(2)(a), 27F(1) and 27J(1) of the CAC Act.

<sup>38</sup> Department of Finance and Administration, Financial Management Guidance No. 14, *Guidance on Ethics and Probity in Government Procurement*, Finance, Canberra, 2005.

interest was set by the Committee of Inquiry into Public Duty and Private Interest, known as the Bowen Committee. The Commission concluded:<sup>39</sup>

if it is likely that the individual with the interest could be influenced by that interest, or that a reasonable individual would believe that he or she could be so influenced, a conflict of interest could arise.

The use of a checklist is a practical way to focus on an official's role and the private relationships and interests of the person concerned, and whether their public interest and private interests are likely to be in conflict during procurement activity. Table 2 lists the potential personal interests that may give rise to a conflict with an official's public duty and may assist in the assessment of whether a conflict of interest exists or may arise.

**Table 2: Check List for Conflict of Interest**

| Check List for Personal Interests that may give rise to a Conflict   | Assessment               |                          |
|--|--------------------------|--------------------------|
|  | Yes                      | No                       |
| Financial and economic interests, such as debts or assets  | <input type="checkbox"/> | <input type="checkbox"/> |
| Family or private businesses   | <input type="checkbox"/> | <input type="checkbox"/> |
| Secondary employment commitments   | <input type="checkbox"/> | <input type="checkbox"/> |
| Affiliations with for-profit and non-profit organisations, sporting bodies, clubs and associations   | <input type="checkbox"/> | <input type="checkbox"/> |
| Affiliations with political, trade union or professional organisations, and other personal interests   | <input type="checkbox"/> | <input type="checkbox"/> |
| Obligations to professional, community, ethnic, family or religious groups in a personal or professional capacity, or relationships to people living in the same household | <input type="checkbox"/> | <input type="checkbox"/> |
| Enmity towards or competition with another individual or group   | <input type="checkbox"/> | <input type="checkbox"/> |
| Significant family or other relationships with clients, contractors or other staff working in the same (or related) organisation   | <input type="checkbox"/> | <input type="checkbox"/> |
| Highly specialised skills in an area where demand for the skills frequently exceeds supply   | <input type="checkbox"/> | <input type="checkbox"/> |
| Specific future employment prospects or plans (i.e. post-separation employment)  | <input type="checkbox"/> | <input type="checkbox"/> |

Source: The Hon. Jerrold Cripps, Leadership and Managing Conflicts of Interest, Public Administration Today, Issue 3: March–June 2005.

### Managing conflicts of interest

A conflict between public duty and private interest is not always avoidable, as officials are also private citizens with relationships and associations. However, provided they are identified early and dealt with effectively, they need not prejudice a procurement process.

Entities should, therefore, take measures to identify actual, perceived or potential conflict of interest before the procurement process commences, rather than attempting to manage such issues on an ad-hoc basis as they arise during a procurement. It is equally important to ensure that officials associated with procurement are aware of how a conflict of interest arises and

<sup>39</sup> *Public Duty and Private Interest: Report of the Committee of Enquiry, July 1979*, Bowen N H (Chairman), Committee of Enquiry Concerning Public Duty and Private Interest, Canberra.

their responsibilities to report conflicts, to ensure that any conflicts are appropriately dealt with, and that the treatment is adequately documented.

### Register of private interests

A common instrument for managing potential conflicts of interest in the public sector is to require certain officials to complete and regularly update a statement of their pecuniary and non-pecuniary interests. This requirement is usually targeted at officials in senior positions, and/or in roles at higher risk of encountering conflicts such as during procurement. The particulars required to be recorded include private interests and those of any immediate family. These private interests could, in the future, conflict with aspects of their public work. Maintaining these statements on a register enables an entity to maintain a central record of declared potential conflicts of interest. Typically, such a register is used to record particulars of private interests relating to: real estate; shareholdings; trusts or nominee companies; directorships in companies; partnerships; investments; other assets; other sources of income; any gifts, sponsored travel or hospitality received; liabilities; and any other private interests that may give rise to a conflict of interest with public duty.<sup>40</sup>

### Resolution of conflicts of interest

Entities should also agree on how any conflicts of interests will be resolved. For example, an actual conflict of interest, if not identified and addressed, has the greatest potential to corrupt the procurement process. For this reason, an official who has a direct connection with any of the potential suppliers and stands to gain from the outcome should not be involved in the evaluation and selection process in a way that allows them to influence the outcome. Less direct conflicts of interest may be resolved by the official removing the interest or by declaring, documenting and monitoring the conflict.

As a procurement progresses, pre-existing conflicts may become more obvious or new conflicts emerge. At key stages, especially when the identity of potential suppliers or any likely sub-contractors becomes known, declarations of interest should be updated on a conflict register and reviewed. External experts should also be required to update their interests.

### Gifts and hospitality

Officials involved in procurement should exercise careful judgement when deciding whether to accept gifts and hospitality from participants in, or likely participants in, a tender process. When deciding whether to accept a gift or hospitality, important considerations include:

- as a general principle, APS employees should not accept gifts or benefits;<sup>41</sup>
- 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*; and
- a perception of undue benefit, conflict of interest or inappropriate gain can be easily generated by the acceptance of gifts or hospitality.

Advice from the Australian Public Service Commission is that it is not possible to establish set rules about accepting gifts or benefits as it is contingent on the circumstances. In some instances accepting even minor benefits may be construed as undermining public confidence—for example, when a tender process is under way, either for the procurement of goods and services or sale of assets. Agencies' guidelines and CEIs may be used to clarify particularly

<sup>40</sup> See Circular No. 2007/1: Declarations of Personal Interests: Revised Policy Guidelines, Australian Public Service Commission, June 2007.

<sup>41</sup> APS Values and Code of Conduct in Practice: a guide to official conduct for APS employees and Agency Heads (Chapter 10).

sensitive areas. Employees should make themselves aware of any relevant agency-specific guidelines and CEIs.<sup>42</sup>

Officials dealing directly with potential suppliers 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. Light refreshments offered during the course of a meeting are generally acceptable. If an official does accept gifts or hospitality, it should be appropriately disclosed, approved and documented.

### **Offers of employment with contractors or others**

Conflicts of interest may arise when an official directly involved in a procurement is offered employment by one of the potential suppliers or, following the signing of a contract, takes up a position with the successful contractor. To reduce the risk that a potential supplier could obtain an unfair competitive advantage, entities can:

- include clauses in the Request For Tender (RFT) which state that the contractor, its agents or sub-contractors must not, without prior written consent of the entity, entice entity employees involved in the procurement; and
- list provisions that prevent the contractor for a specified period (say 12 months) after a contract is signed from soliciting key entity personnel involved in the procurement.

Any actual, perceived or potential conflicts of interest to do with offers of employment will need to be balanced against possible restraints of trade. In particular, former employees should not be unreasonably or unfairly constrained in seeking suitable post separation employment. Also, there should not be unreasonable constraints on the on the transfer of knowledge, and skills and experience between government and other sectors.

### **Managing conflicts of role**

A separation of duties conflict occurs when a person is assigned a role that has an inherent/ actual conflict of interest. For example, public officials involved in evaluating a tender bid should not be those who are the delegates approving the outcome of the tender process and approving the spending of public money.

The separation of duties in procurement is a powerful internal control. To ensure adequate separation, roles and responsibilities should be clearly defined and assigned such that no one individual is in charge of all aspects of the procurement from start to finish. The separation of duty also applies to external advisers and the governance arrangements for procurement should allow for the independence of any such advisers.

## **3.5 Appropriate Security and Confidentiality Arrangements**

A variety of ideas and information will be used and generated during a procurement process, some of which may be determined to be confidential including:

- information in the possession of the private sector;
- information in the possession of the Australian Government; and
- information contained in a contract, or information obtained or produced through the performance of a contract.

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<sup>42</sup> *ibid.*

While confidentiality issues will not arise in every procurement, measures to protect confidential information may be required during a commercial engagement process. The security and confidentiality of intellectual property, including proprietary information, to the extent allowed by law, protects both the competitive position of individual bids and the commercial interests of the Government.

## **Managing Confidential Information**

Managing confidentiality issues during procurement requires agencies to balance the requirement of a transparent process against the need to protect the confidentiality of information that could damage the Australian Government's interests or the interests of suppliers.

Finance has issued FMG No. 3 *Guidance on Confidentiality in Procurement* to assist FMA agencies to identify and manage confidential information during procurement.<sup>43</sup> This guidance identifies the Australian Government's policy that contracting information should not be confidential unless there is a sound reason, informed by legal opinion, to do so. Managing confidential information in procurement requires agencies to:

- correctly identify what information is confidential;
- assess any confidentiality requests made by potential suppliers and determine whether the information should be treated as confidential;
- ensure that any confidential information held by the agency is protected;
- use appropriate confidentiality undertakings and contractual clauses to protect confidential information; and
- comply with any relevant legislative requirements.

### ***Identifying confidential information***

Agencies need to determine whether tender/contract-related information is confidential on a case-by-case basis. Potentially confidential information can be held by the agency or by a potential supplier. Circumstances where it may be appropriate for an agency to determine that tender/contract-related information is confidential include:

- where it is in the public interest, such as national security, defence and Cabinet decisions and/or deliberations;
- where legislation provides formal protection of intellectual property rights held by either the agency or potential supplier; and
- where there is a request from a potential supplier to treat other material as commercial confidentiality.

### ***Assessing any confidentiality requests made by potential suppliers***

One of the ways of achieving value for money in the delivery of products and services to the Australian community is by facilitating private sector innovation. Where suppliers want to protect their innovative ideas from competitors, confidentiality issues arise in how to handle proprietary business information.

In the first instance, it is the responsibility of the potential supplier who considers that it has a proposal, concept, or design that includes significant intellectual property to take all necessary commercial and legal steps to protect its intellectual property. Against this backdrop, agencies

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<sup>43</sup> Department of Finance and Administration, Financial Management Guidance No. 3, *Guidance on Confidentiality in Procurement*, Finance, Canberra, July 2007. This guidance does not apply to *Commonwealth Authorities and Companies Act 1997* bodies.

may need to distinguish genuine intellectual property from ideas or concepts presented to government, which may be high level in nature and obtained from many sources.

FMG No. 3 *Guidance on Confidentiality in Procurement* requires officials to make a specific assessment of whether information should be kept confidential before agreeing to make any contractual commitment of confidentiality and provides criteria for making such assessments.

The criteria are:

- the information to be protected must be specifically identified;
- the information must be commercially 'sensitive' (this means that the information should not generally be known or ascertainable);
- disclosure would cause unreasonable detriment to the owner of the information or another party; and
- the information was provided under an understanding that it would remain confidential.

One approach to managing this issue is for procurement teams to clarify early in the tender process the information that the agency agrees to treat as 'proprietary'. Potential suppliers should be provided an opportunity to seek clarification before submitting their bids if they are unclear about the way an agency proposes to categorise and treat proprietary information.

### ***Ensuring that any confidential information held by the agency is protected***

Throughout a procurement process, agencies should ensure that they protect the Australian Government's confidentiality interests where appropriate. This requirement can be managed by:

- potential suppliers being obliged to sign confidentiality undertakings before being given access to confidential information;
- the use of evaluation criteria to assess the capability of potential suppliers to comply with confidentiality requirements;
- ensuring that successful suppliers are made aware of any legislative requirements in relation to the protection of confidential information they may have access to when performing the contract; and
- the use of appropriate confidentiality provisions in contracts.

### ***Confidentiality undertakings and contractual clauses***

Confidentiality undertakings and contractual clauses set out a general understanding between the parties in relation to how they will deal with information either during the tender phase or when performing the contract.

In cases where the tender conditions do not explicitly deal with confidential information (and it is important to maintain the integrity of Australian Government information) potential suppliers should be required to sign a confidentiality or non-disclosure deed/agreement before they are provided with access to such information. Where appropriate, a potential supplier's employees should also sign a confidentiality or non-disclosure deed/agreement.

Where a procurement involves confidential/commercially sensitive information, agencies should safeguard both Australian Government and proponents' information via a series of clauses in the tender conditions section of the Request Documents. These clauses state that the potential supplier accepts the Request Documents on the basis that the information will be protected as confidential information, and the agency undertakes to keep confidential any confidential information provided by the potential supplier.

*Guidance on Confidentiality in Procurement* contains model confidentiality clauses for inclusion in confidentiality undertakings, tender documents, and contracts.

### **Relevant legislative requirements**

Legislation requiring that particular information remains confidential includes statutory secrecy provisions,<sup>44</sup> the *Privacy Act 1988* and the *Public Service Act 1999*.

The *Privacy Act* protects personal information held by the Australian Government and certain private entities. The Act contains specific provisions dealing with the protection of personal information by agencies and by 'Commonwealth Service Providers'. These provisions require Commonwealth Service Providers to behave as if they are an agency when dealing with personal information. The Privacy Act also requires agencies to include certain clauses in contracts with Commonwealth Service Providers to ensure these requirements are met.

### **Confidentiality obligations of APS employees**

As a condition of employment, all APS employees are under a general obligation of confidentiality to the Australian Government. APS employees are bound by confidentiality obligations under the *Public Service Act 1999* and the *Privacy Act 1988*. The *APS Code of Conduct* requires that employees not make improper use of information for personal gain or to benefit anyone else. Because of these provisions, it is not necessary for APS officials who are members of a procurement team to execute a confidentiality undertaking in relation to the project.

### **Confidentiality obligations of non-APS employees**

Non-APS staff who could be indirectly involved in the procurement process, including Ministers and Ministers' staff, may not be subject to a confidentiality obligation in relation to particular information. This should be a consideration when distributing and communicating to them information regarding the procurement. A further consideration is section 70 of the *Crimes Act 1914*. This section makes it an offence for a person, being or having been a Commonwealth officer, to publish or communicate any fact or document which comes to his or her knowledge or possession and which it is his or her duty not to disclose. For the purposes of section 70, a Commonwealth officer includes a person who performs services for or on behalf of the Commonwealth or a public authority.

For officials working in a Commonwealth Authority, section 24 (1) of the CAC Act requires that they must not improperly use information obtained to gain advantage for themselves or someone else. CAC Act bodies usually support this requirement with internal codes of conduct that expect officials to treat as confidential, the entity's confidential information and the confidential information of third parties. Section 70 of the *Crimes Act 1914* can also apply to some CAC Act body employees.

### **Confidentiality obligations of external experts**

While section 70 of the *Crimes Act 1914* may provide a remedy, it may not always be clear to non-public officials involved in a tender process as experts that they are under an obligation of confidentiality to the entity. For this reason, they should provide an undertaking to protect the confidentiality of all the information they obtain in the course of a procurement. All advisers, consultants (and any other third party) that have access to commercially sensitive tender information should provide a formal undertaking to the entity that they will keep this information

<sup>44</sup> There are several statutory provisions, known as secrecy provisions that restrict the disclosure of certain types of information held by the Australian Government.

confidential. This is normally executed by the signing of a confidentiality or non-disclosure deed/agreement.

## Disclosure

FMA Act agencies are required to identify on AusTender whether a contract includes confidentiality provisions. Agencies must separately identify whether the requirements are to maintain the confidentiality of:

- contract clauses or other information contained in the contract (such as a description of methodology to be used by a contractor which reveals confidential intellectual property); and
- information obtained or generated as a result of performance of the contract (such as a consultancy report which contains information that is protected since its disclosure would be contrary to the public interest).<sup>45</sup>

Classifying particular information as confidential, does not, by itself, provide grounds for resisting disclosure. The Australian Government cannot provide an absolute guarantee of confidentiality of information in contracts. To comply with their accountability obligations, agencies may be required to disclose confidential contract-related information to:

- a Parliamentary Committee. Parliament has wide powers of access to information and the claim of confidentiality in itself does not prevent Parliament or its Committees obtaining access to the material as they generally have the power to require a person to produce information and documents;
- the Auditor-General;
- the Ombudsman;
- the public under the *Freedom of Information Act 1982* (FOI Act). A person may request access to information held by an agency and, unless the information is subject to one of the exemptions set out in the FOI Act, the agency will be obliged to disclose it; or
- a court, where the information may be required to be disclosed by law, for example under court subpoena.

For these reasons, all potential or actual contractors to the Australian Government should be advised clearly and conspicuously of the accountability requirements in the Commonwealth and the potential access by various parties to information in contracts, for example, through the Parliament, the courts or through independent review by the Auditor-General or the Ombudsman.

As a general principle, contracts should provide for access to contract-related information by the Parliament and its committees. Specific clauses should also be included in contracts to ensure the Australian National Audit Office (ANAO) has access to a contractor's premises to conduct audits and to obtain information. Confidentiality clauses in contracts should not override disclosure obligations. To assist agencies to manage confidential information provided during procurement, model clauses dealing with these issues are available in FMG No. 3 *Guidance on Confidentiality in Procurement*.

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<sup>45</sup> Department of Finance and Administration, Financial Management Guidance No. 15, *Guidance on Procurement Publishing Obligations*, Finance, Canberra, July 2007.

## Managing Security

The *Protective Security Manual*, which has government endorsement, is the principal means for disseminating Australian Government protective security policy and better practice guidelines for all Commonwealth agencies.<sup>46</sup>

Part F of the *Protective Security Manual, Security Framework for Procurement*, examines the principles involved and outlines the standards to be met to minimise the risks to official Australian Government resources during procurement and contracting activity. The *Protective Security Manual* requires security issues to be considered and managed throughout the key stages of procurement and contracting activity.

The extent to which agencies consider and manage security matters during procurement will depend on the risks involved in the proposed procurement. Factors impacting on the level of security risk include whether a supplier may:

- be required to access any classified or sensitive information;
- be working at the agency's, or their own, premises or at another external location; and
- require access to the agency's information and communications technology systems, including through remote access facilities.

To assist staff manage security risks involved in procurement, agencies should have appropriate and up-to-date policy and guidance material. At a minimum, the policy and guidance material dealing with the management of security risks in procurement should contain a reference to the minimum standards in the Part F of the *Protective Security Manual*. Agencies' policy and guidance material should assist officers to:

- assess security-risks during procurement planning;
- consider the security issues involved with the proposed contractual arrangements when developing the Request for Tender (RFT), including, for example, whether contractors may be required to access security classified information;
- develop tender evaluation plans, which reflect, and provide for, due consideration to be given to relevant security requirements;
- incorporate clauses in contracts that require contractors to adhere to security requirements, including the agency's specific security policies, and provide for the termination of the contract for a failure to meet security requirements; and
- establish robust contract management arrangements, including setting up security-related reporting, auditing and review mechanisms.

Agencies should also establish clear security procedures for handling tender-related documents produced by the Government and tenderers. In particular, agencies need to establish clear security procedures for handling submissions prepared by tenderers and the evaluation documents prepared by the agency. A lack of confidence in security arrangements could prevent potential suppliers from bidding or induce them to reduce the detail and volume of information provided in support of their bids.

If strict control over access to, and movement of, particularly sensitive information is required, the *Protective Security Manual* provides for originators to make this information 'accountable'. Conditions for the use of accountable procurement material require agencies to limit the number of copies of bid related documents produced, with each copy numbered and logged. What

<sup>46</sup> *Commonwealth Protective Security Manual (PSM) 2005*, Attorney-General's Department, Canberra, 2005. Unless specifically directed to do so by their Minister, *Commonwealth Authorities and Companies Act 1997* bodies are not required to comply with the PSM. Notwithstanding, the ANAO considers adoption of the measures contained in the PSM, where cost effective, to be good protective security practice.

constitutes accountable material will vary from agency to agency, but could include tender documents.

Complementary regimes for internal security of procurement documents typically include the following:

- documents, computer discs or electronic devices that contain commercially sensitive information should be stored in secure conditions at all times, with access restricted to authorised officials;
- appropriate protection of electronic information should be maintained by segregating hard drives and storing confidential information and through the use of secure passwords; and
- only authorised officials with a direct 'need to know' should have access to tender-related commercially sensitive information.

# 4 Probity Services

## 4.1 Procurement process risks

Under the CPGs, entities are obliged to ensure that officials involved in procurement, particularly those dealing directly with suppliers, have access to the appropriate resources required to undertake a satisfactory procurement. While an entity is ultimately accountable for the probity of its procurement process, this may involve seeking probity advice from external probity advisers.<sup>47</sup>

Entities should assess the need for external probity expertise by considering procurement process risks against the skills of the procurement officers and the robustness of the entity's procurement regime. For minor or routine procurements, an entity may decide that probity requirements can be met from within the entity's project team without appointing an external probity practitioner. As procurement projects become more complex, the entity may decide to engage a probity practitioner from inside or outside government.

External probity practitioners are typically engaged to assist in high-risk procurements. Specific probity expertise is often sought when:

- the nature of the market place makes proponent grievances more likely (for example, where trade secrets are commonplace, or where competition is particularly strong);
- an in-house or public sector bid is expected and independent scrutiny is needed to avoid actual or perceived bias;
- there is an incumbent supplier with a history of contracts with the entity, and competitors may require an increased level of confidence in the integrity of the process;
- proponents are likely to have had previous dealings with selection panel members, such that conflicts of interest could become an issue; or
- in the past there has been controversy or litigation relevant to the project, the entity, or one or more of the potential suppliers.

## 4.2 Probity adviser or probity auditor?

The terms 'probity adviser' and 'probity auditor' are often used interchangeably and probity practitioners typically offer both probity adviser and probity audit services. While there are significant differences in the roles of probity advisers and auditors, there is no legal or professional standard in relation to the correct or agreed use of the terms 'probity adviser' and 'probity auditor'.

<sup>47</sup> Department of Finance and Administration, Financial Management Guidance No. 14, *Guidance on Ethics and Probity in Government Procurement*, Finance, Canberra, 2005.

The following distinctions between the advising and auditing function are illustrative:

- a probity adviser provides advice on issues which may arise before and during the procurement. While probity advisers cannot act as decision makers, they are involved in ensuring the integrity of the process in real-time and are likely to be under the broad direction of the client; and
- a probity auditor's role is to provide a review of the procurement process, or a review of key phases, after completion. A probity auditor should be largely self directing and, as a result, should have a higher degree of independence than a probity adviser.

Combining aspects of each function within one engagement may present difficulties and entities need to be clear about the particular probity services it requires and that all parties understand the role the probity practitioner is being engaged to perform. Financial management Guidance (FMG) No. 14 *Guidance on Ethics and Probity in Government Procurement* highlights this risk:

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.<sup>48</sup>

Typically, entities that require practical assistance in identifying and managing a range of probity-related risks during a procurement should engage a probity adviser. Entities that require a high level of independent verification that the tender processes adhered to the CPGs, should engage a probity auditor. The New South Wales Independent Commission Against Corruption (ICAC) has summarised the characteristics of probity auditing and probity advising (Table 3).

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<sup>48</sup> *ibid.*

**Table 3: Aspects of advising and auditing on probity engagements**

| Approach      | Advising  | Auditing   |
|---------------|---|--|
| Timeframe     | 'Forward-looking' — primarily done before the fact.   | 'Backward-looking' — primarily done after the fact.  |
| Opinion       | Provides both opinions and advice contemporaneously to ensure that an established guideline, standard or principle is followed.                     | Provides an audit opinion on compliance with an established guideline, standard or principle.                      |
| Independence  | Independent, but as an adviser, has a level of direct interest in the project. More likely to be under the direction of the client.                 | High degree of independence. Largely self-directing.   |
| Service       | Provides consulting services— anticipates and prevents lapses in probity. More likely to be involved in implementing solutions to probity problems. | Provides assurance services— finds discrepancies and monitors compliance.  |
| Reporting     | Mainly reports to and liaises with the project manager and/or project team. Less responsibility to external stakeholders.                           | Generally reports to a senior manager or steering committee, above the project manager.                            |
| Report format | Higher degree of verbal, informal reporting. However, must still provide written reports.   | Emphasis on formal, written reports.   |
| Methodology   | Unlikely to employ a strict audit methodology; more likely to use own standards or approach.  | Adopts an audit methodology and adheres to audit conventions and professional standards.                           |
| Probity plan  | Likely to be involved in overseeing the preparation of a probity plan or similar document   | Likely to be involved in verifying compliance with a probity plan or similar document, but not in its preparation. |

Source: The New South Wales Independent Commission Against Corruption (ICAC), *Probity and probity advising—guidelines for managing public sector projects*, November 2005.

### 4.3 Considerations when engaging probity expertise

The selection of a probity practitioner should be based on the nature of the risks in the particular procurement process, the extent of involvement required, and the experience of the probity practitioner. Four areas that require consideration are:

- the level of independence/segregation required;
- competency and skills;
- the level of assurance to be provided; and
- entity accountability.

## The level of independence/segregation required

There is no prescriptive policy as to when probity expertise should be engaged. The management of probity issues should be tailored to each case, taking into account the nature of the purchase. Depending upon the risks, probity services can be: ‘fully’ externally provided; externally provided but on call for advice when probity issues arise; or internally provided. The following is a guide based on high, medium and low level procurement risks.

### *High risk procurement*

ICAC provides the following advice in relation to the independence of the probity advice. This advice is appropriate for very high risk purchases:

A probity adviser should not be encumbered by any actual or perceived conflict of interest that could compromise his or her duty to give candid advice about the probity aspects of the project ... The probity adviser or his or her organisation must not be providing another service relating to the project. A probity adviser cannot simultaneously serve in roles such as legal adviser, technical adviser or project manager and still maintain independence. The probity adviser’s role in the project should be strictly confined to probity issues and not stray into other fields of advice, even if the adviser has expertise in these areas. A probity adviser (and his or her organisation) should preferably have no other current or prospective business relationship with the client agency on other projects. However, in practice this is often difficult to achieve.<sup>49</sup>

### *Medium risk procurement*

Engaging external probity advice as a full service for medium risk procurements may be unnecessary. In some cases it may be more appropriate to engage a probity adviser to be available to consider probity issues as they arise or to focus on specific high risk aspects of the procurement. This type of expertise is often available from an entity’s legal panel.

### *Low risk procurement*

Where the procurement is small and/or involves relatively minor risks, the responsible entity may consider it appropriate to either:

- appoint an experienced internal person to act as a probity adviser; or
- rely on the entity’s own internal processes including adherence with the CPGs and the entity’s internal probity guidance, as stated in its CEIs.

Any internally appointed probity adviser should have the necessary autonomy and independence to challenge decisions made and processes followed. In particular, the adviser should possess the authority to convey any concerns they might have to senior management.

Officials or probity advisers who are called upon to wear two or more ‘hats’ during a procurement may find that they have difficulty resolving tensions between their different roles. For example, where an official is used as a probity adviser it is recommended that he/she remain independent of the project team and other procurement advisers. If they are engaged to take on additional responsibilities, even relatively straightforward ones such as project management, there is potential for conflict between this additional role and their core responsibility to provide independent probity advice.

<sup>49</sup> The New South Wales Independent Commission Against Corruption (ICAC), Probity and probity advising—guidelines for managing public sector projects, November 2005.

## Competency and skills

Probity advisers come from an array of professional backgrounds and may offer a wide range of related services. While probity advising services are available from accounting, legal, and engineering firms, it is not recognized as a specialised function within the accounting or other business service professions. Generally, most probity advisers have experience in financial, compliance or performance auditing and have general understanding of audit methodology. Some have formal auditing qualifications and belong to professional associations.

At a minimum, all probity advisers should:

- be able to demonstrate familiarity with audit techniques and standards and, in particular, the conventions relating to independence and the duty to report breaches of probity; and
- have the ability to maintain an independent mind, possess analytical and problem-solving skills and have good communications skills, which includes the ability to address sensitive issues in a diplomatic manner.

Areas where a probity adviser should be able to demonstrate awareness and knowledge include:

- Australian Government laws, policies and guidelines relating to procurement, disposals and major projects;
- policy and guidelines relating to the behaviour of officials involved in procurement;
- details of any relevant case law covering the provision of probity advice and the management of public sector projects;<sup>50</sup> and
- the probity principles outlined in Part 3 of this BPG and their implications for Australian Government procurement projects.

## The level of assurance to be provided

Before a procurement process commences, all parties should have a clear understanding as to the level of assurance that an entity will be seeking from probity and other advisers. Entities should specify whether sign-off is required for the entire process or whether it should occur at the end of specified stages of the process or at particular milestones. Entities should also clearly specify the required level of assurance the sign-offs are to provide.

While sign-off by a probity adviser and/or probity auditor cannot replace a manager's own obligations and accountability for the proper conduct of procurement exercises, decision-makers rely on information provided to them in assessing the outcome of a tender. In this context, expert probity advisers should be required to provide sign-offs to demonstrate their involvement, the extent of their involvement and any conclusions reached.

In most cases, the level of assurance provided by a probity adviser and/or probity auditor will be contingent upon:

- the probity adviser and/or probity auditor being given full access to necessary documentation, personnel, meetings and premises to assess the adherence to the principles of probity; and
- the probity auditor being able to independently determine the nature, timing and extent of the procedures to be performed.

It is especially important that a probity auditor is not subject to restrictions on the audit procedures to be performed. An engagement where an auditor agrees with an entity's restrictions (for example, being limited to a desktop review of selected documents), does not enable the

<sup>50</sup> A good source of information on case law pertaining to the contracting process is Seddon N, Government Contracts—Federal, State and Local, 3rd edition, 2004.

auditor to express adequate assurance. Because the auditor does not determine the nature, timing and extent of the procedures performed, the assurance provided would necessarily be qualified.

## **Entity Accountability**

While a probity adviser is responsible for assisting an entity to meet its probity obligations, the entity undertaking the procurement is ultimately accountable for the probity of the process followed. Public officials retain primary accountability for the procurement decisions they make and this accountability cannot be 'contracted out' to a probity adviser.

Probity should be an integral part of any procurement process and not a last minute consideration. Entities should have systems and procedures in place that are consistent with the CPGs and can measure-up to public scrutiny. Ideally, entities possess their own internal probity standards and do not have to rely solely on external expertise. Entities must also ensure that staff are sufficiently trained in probity policies and procedures.

Accordingly, the use of external probity services should not be seen as a substitute for the adoption of sound internal processes including rigorous management review. In particular, it is not appropriate for a probity adviser/auditor to be engaged as insurance against errors in decision making or to transfer risk from the entity to the probity adviser/auditor.

For these reasons, it is good practice to engage external expertise before a procurement is initiated and not part way through a procurement to remedy an already unsound process. However, a probity expert could provide additional assurance after a problem has been addressed by an entity that probity requirements have been met and it is appropriate to continue with the process.

Entities are not compelled to follow the advice provided by the probity experts they engage. Probity advice can be accepted or rejected. Where an entity decides not to follow probity advice, the decision and the reasons for it should be fully documented along with any alternative action taken by the entity to mitigate the probity risk(s) identified.

# Guidance for Preparing a Probity Plan

## 5.1 Risk Assessment

Probity plans are a central part of the management of more-complex and higher-risk procurement. Taking into consideration the scale and sensitivity of the purchase, a probity plan is a means to identify and manage probity risks.

A probity plan should include, or be based on, a risk assessment of the known and likely probity risks associated with the procurement. Probity plans can be stand alone documents, or be part of a wider risk assessment or procurement project plan. The content of a probity plan should be commensurate with the nature, size and risk profile of the particular procurement.

A risk assessment can be used to make an overall judgement of the procurement risks and whether the proposed probity requirements are commensurate with the value, complexity, and sensitivity associated with a particular procurement. The simple matrix below is illustrative of a tool that would allow officials to determine whether the proposed procurement constituted a high, medium or low risk.

**Table 4: Procurement Risk Assessment Matrix**

| Level of Procurement Risk   | High                     | Medium                   | Low                      |
|---|--------------------------|--------------------------|--------------------------|
| The expected cost of the purchase is high, or relatively high compared with the purchases normally undertaken by the entity | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| The entity has limited experience in either the nature of the purchase being undertaken or the market                       | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| The project itself is inherently complex (technically, legally or financially)  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| The project is potentially controversial or politically sensitive   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

If a procurement is judged to be a low risk, an entity's internal instructions could specify a relatively straightforward process that complies with the legal and policy requirements. As procurement risks increase, internal instructions could provide additional guidance such as the need for a risk management plan, a specialist procurement team, and situations where external specialist advice is required including probity expertise.

The risk profile of a procurement will also inform entities whether a systematic risk assessment and probity plan are warranted. Any risk mitigation/management process should be proportionate to the scale, scope and relative risk of the proposed procurement.

A key to the risk management process is maintaining and improving the transparency of the decision-making process. This does not mean additional red tape, but clearly stating decisions

and factors which led to those decisions as part of the assurance process. This is a discipline that promotes probity and openness of decision-making and is critical to the successful application of risk management by entities and to the confidence of the various stakeholders, including Parliament.

## 5.2 Procurement Stages and Probity Principles

Financial Management Guidance (FMG) documents provided by the Department of Finance and Administration (Finance) outline the requirements for procurement for Commonwealth entities. FMG No. 13 *Guidance on the Mandatory Procurement Procedures*, recognises common stages in a large/complex procurement including:

- planning the procurement;
- preparing to approach the market (including selecting a procurement process);
- approaching the market;
- evaluating submissions; and
- concluding the process.

FMG No. 14 *Guidance on Ethics and Probity in Government Procurement* identifies the following probity principles:

- use of an appropriately competitive process;
- fairness and impartiality;
- consistency and transparency of process;
- identification and management of actual and perceived conflicts of interest; and
- appropriate security and confidentiality arrangements.

## 5.3 Application of probity principles for each procurement stage

The following guidance identifies typical probity issues that often arise as entities manage more-complex and higher-risk procurements. It illustrates the tasks that take place during each stage of such a procurement and provides practical probity guidance to officials undertaking these tasks. In doing so, it is designed to facilitate compliance with the procurement requirements specified in the Commonwealth Procurement Guidelines (CPGs) and associated probity principles.

As such, this guidance provides a starting point from which a project-specific probity plan could be developed. While broadly applicable to all procurement activity, the guidance is more relevant to higher-value, higher-risk, and potentially sensitive procurements. In order to provide free standing assistance, the following guidance for preparing a probity plan reflects the foregoing discussion in Parts 1 to 4 of this BPG.

### The following guidance

Figure 2 shows the application of the probity principles identified in FMG No. 14 for each stage of a procurement as recognised in FMG No. 13. It highlights procurement tasks and identifies the relevant probity principles. For each procurement stage or key decision, an entity should satisfy itself that the appropriate probity principles have been applied.

Figure 2: Probity Guidance for each Procurement Stage

|  | <b>1<br/>Planning the procurement</b>                     | <b>2<br/>Preparing to approach the market</b>               | <b>3<br/>Approaching the market</b>                      | <b>4<br/>Evaluating submissions</b>                                | <b>5<br/>Concluding the process</b>                               |
|--|---|---|--|--|---|
| <b>Use of an appropriately competitive process</b>                                 | <b>1.1</b><br>Determine the objectives and the risks      | <b>2.1</b><br>Select a procurement process                  | <b>3.1</b><br>Notify the market                          | <b>4.1</b><br>Set aside non-competitive bids                       | <b>5.1</b><br>Negotiate the contract                              |
| <b>Fairness and impartiality</b>   | <b>1.2</b><br>Research the market                         | <b>2.2</b><br>Establish a communication protocol            | <b>3.2</b><br>Receive submissions                        | <b>4.2</b><br>Undertake any planned site visits                    | <b>5.2</b><br>Debrief unsuccessful tenderers                      |
| <b>Consistency and transparency of process</b>                                     | <b>1.3</b><br>Define the outcome and specifications       | <b>2.3</b><br>Prepare the request documentation             | <b>3.3</b><br>Deal with any modifications                | <b>4.3</b><br>Evaluate submissions                                 | <b>5.3</b><br>Report publicly                                     |
| <b>Identification and management of actual and perceived conflicts of interest</b> | <b>1.4</b><br>Establish the procurement team(s)           | <b>2.4</b><br>Identify and manage any conflicts of interest | <b>3.4</b><br>Re-assess conflict of interest risks       | <b>4.4</b><br>Check for 'embedded' conflicts of interest           | <b>5.4</b><br>Monitor conflicts of interest during transition     |
| <b>Appropriate security and confidentiality arrangements</b>                       | <b>1.5</b><br>Identify security and confidentiality risks | <b>2.5</b><br>Treat security and confidentiality risks      | <b>3.5</b><br>Manage security and confidentiality issues | <b>4.5</b><br>Evaluate security and confidentiality in submissions | <b>5.5</b><br>Monitor security and confidentiality for transition |

# Procurement Stage 1: Planning the Procurement

## 1.1 Procurement Task:

### Determine the objectives and the risks

## Determine the objectives and the risks

A successful procurement can: enhance an entity's access to skills; enable innovative approaches to service delivery; help to create and cultivate a competitive market; and better enable the entity to meet its objectives.

Procurement objectives should be decided very early in the process, particularly the results the entity or the Government expect from the activity. Clear objectives will make it easier to choose how to approach to the market, including whether to seek expressions of interest or move straight to a tender process. Establishing clear objectives will also assist in deciding on the scale and scope of the tender. For example, if the objective of the purchase is to increase the choice of service deliverers, the entity could encourage diversity by having many small service providers.

These and similar decisions will inform the procurement and probity risks. An indicator of procurement risk is its dollar value. The *Commonwealth Procurement Guidelines* (CPGs) state that mandatory procurement procedures apply for purchases above specific thresholds. Procedures to which the mandatory procedures apply are known as 'covered' procurements (see Section 2.4 above and Division Two of the CPGs). A 'covered' procurement is one where the value of the property or services being procured exceeds one of the following thresholds:

- for procurements in FMA Act agencies, other than procurements of construction services, the procurement threshold is \$80 000;
- for procurements in relevant CAC Act bodies, other than procurements of construction services, the procurement threshold is \$400 000 (these CAC bodies have been directed by the Minister for Finance and Administration to apply the CPGs); or
- for procurements of construction services, the procurement threshold is \$9 million.

Except in very limited circumstances, entities must not purchase goods and services above the relevant threshold without going out to a full open tender. Officials who take action that is not consistent with the CPGs or their entity's Chief Executive Instructions (CEIs), including not following threshold requirements, must make a written record of the reasons for doing so.

## 1.1 Probity Guidance:

### Issues to consider in a Probity Plan

## Use of an appropriately competitive process

When determining a purchasing method, officials should encourage competition as a means to delivering the most favourable submissions and, ultimately, a better value for money outcome. In many procurement situations, officials may be required to exercise their judgement to determine whether a purchasing method is appropriate for a particular procurement. In coming to a view, public officials should examine the nature and risks of the purchasing activity.

A key issue in undertaking effective procurement is properly identifying the requirements and the general 'sizing' of the purchase. For example, an entity could purchase a single load of paper, or procure a 5 year contract for the supply of paper. Different approaches may advantage some suppliers over others. A further consideration is that a procurement must not be divided into separate parts for the purpose of avoiding a procurement threshold. Entities should ensure that 'order splitting' is not undertaken to reduce the dollar value with the intention of bypassing a specified procurement threshold.

Although officials are not formally obliged to apply the mandatory procedures of the CPGs for 'non-covered' procurements, they must: have regard to the procurement policy framework of the Commonwealth for all procurements. Officials who take action that is not consistent with the CPGs or their entity's CEIs, including not following threshold requirements, are required to make a written record of the reasons for doing so, and should also inform management.

## 1.2 Procurement Task:

### Research the market

## Research the market

Consultation with industry prior to calling for tenders or advertising a complex procurement may be appropriate to gain a better knowledge of the market or to clarify the specifics of the requirement. Market research can assist in understanding the competition within the market, recent developments, supply issues and innovation opportunities.

## 1.2 Probity Guidance:

### Issues to consider in a Probity Plan

## Fairness and impartiality

Officials need to ensure that any market research activities or pre-tender discussions do not provide an advantage to a particular potential supplier. Any contact with potential suppliers needs to be in keeping with a predetermined process. It is good practice to document contact with potential suppliers and record it on file.

Care should be taken to ensure that any information provided to potential suppliers is not prejudicial to any forthcoming tender, and cannot be mistaken by a potential supplier for the actual Request Document.

Procedures will need to be established to ensure that any future contact with potential suppliers will be handled in a way which affords all potential suppliers the same opportunity to acquire information about the requirements and the procurement process. Typical contact points that are likely to arise include unsolicited inquiries, briefing sessions, data room visits, and site visits.

## 1.3 Procurement Task:

### Define the outcome and specifications

## Define the outcome and specifications

An important feature of a well managed procurement is consistency in the development and application of evaluation criteria. The evaluation of submissions against pre-determined criteria is a key task in determining value for money. An important step in determining evaluation criteria is to articulate the property or service required and define any:

- proposed functions to be fulfilled by the product or service (functional specifications);
- performance standards to be met by the product or service provider (performance specifications);
- physical characteristics of the product or service (technical specifications).

For 'covered' procurements, any technical specifications must be based on relevant international standards. The exception is where the use of an international standard would not meet the entity's procurement requirements or would impose greater burdens on the user of the product or service than the use of the relevant Australian standard.

**1.3  
Probity  
Guidance:**

Issues to consider  
in a Probity Plan

## Consistency and transparency of process

For more-complex and higher-risk procurement, functional, performance, and technical specifications should form the basis of the evaluation criteria in the Request Document. The criteria need to be defined to only assess the required functionality and not to unnecessarily limit particular suppliers or solutions. During the evaluation, these criteria will need to be applied consistently to prevent any actual or perceived bias. This requires the criteria to be clear, be documented in advance, and be made known. Any changes will need to be notified to all the potential suppliers that are participating at the time the criteria are amended.

If contractors are used to assist with procurement specifications and/or the evaluation of submissions, they should be excluded from tendering for the project.

**1.4  
Procurement  
Task:**

Establish the  
procurement  
team(s)

## Establish the procurement team(s)

Minor purchases are normally dealt with by individual officials operating within an entity's established delegations. For more-complex and higher-risk purchases, a specialist procurement team will often be put in place and consist of:

- a delegate;
- an internal Evaluation Committee; and where considered appropriate
- external professional expertise (to help define, for example technical specifications, and assist with probity and legal issues that may arise).

These individuals may have actual, perceived, or potential conflicts of interest. The required response to a conflict of interest varies. Actual conflicts should result in the individual being redeployed onto other duties or an adviser's engagement terminated. A perceived or potential conflict of interest can often be managed by documenting and declaring it. A key control is up-to-date conflict of interest declarations.

**1.4  
Probity  
Guidance:**

Issues to consider  
in a Probity Plan

## Identification and management of actual and perceived conflicts of interest

Conflict of interest provisions apply to Australian Public Service (APS) employees as part of their conditions of employment (as set out in the APS Code of Conduct). However, for more-complex and higher-risk procurements, officials could be asked to acknowledge in writing that they are aware of their obligations in relation to conflicts of interest. This is supported by the general principles in the CPGs that oblige both FMA Act agencies and CAC Act bodies to ensure that officials dealing directly with potential suppliers recognise and deal with any conflicts of interest, including perceived conflicts of interest.

External advisers who are involved in procurement should be required to make a conflict of interest declaration and be obliged to update it should circumstances change during their engagement.

While a perceived conflict of interest can often be managed by documenting and declaring it, in some circumstances the perception of a conflict of interest will be sufficient to require credible and clear action to be taken so that all parties retain confidence in the procurement process.

It is good practice to advise the Minister or his/her staff of potentially sensitive procurement activities and the stakeholders involved, especially where the Minister is the decision maker. This will allow them to be mindful of the need to be careful about accepting hospitality from potential suppliers.

**1.5  
Procurement  
Task:  
Identify security  
and confidentiality  
risks**

## Identify security and confidentiality risks

### Security

The *Protective Security Manual*, which has government endorsement, is the principal means for disseminating Australian Government protective security policy and better practice guidelines for all Commonwealth agencies. Unless specifically directed to do so by their Minister, *Commonwealth Authorities and Companies Act 1997* bodies are not required to comply with the PSM. Notwithstanding, the adoption of the measures contained in the PSM, where cost effective, is good protective security practice.

To manage security-related issues during procurement, agencies should:

- identify and assess security-related risks associated with the proposed procurement and contractual arrangements;
- ensure that the approach to the market contains details of relevant security requirements and, where necessary, refers to the minimum standards in the *Protective Security Manual* including those covering the handling of security classified information.

Sections of the *Protective Security Manual* most relevant to procurement are: Part C: Information Security; Part D: Personnel Security; Part F: Security Framework for Procurement; and Part E: Physical Security.

### Confidentiality

When preparing for a procurement, confidentiality will need to be considered and, where appropriate, managed during all the procurement stages including its planning; approaching the market; evaluating submissions; and awarding and managing the contract.

Depending on the nature of the procurement, confidentiality issues could arise for either the Australian Government or potential suppliers. In the case of the Australian Government, it may wish to protect:

- its own commercial interests such as trade secrets arising from research and development; and/or
- national security information associated with Australia's security, defence, international relations or national interest.

Confidentiality issues are likely to arise for the Australian Government where:

- potential suppliers need to have access to confidential information in the possession of the Australia Government in order to have enough information to be able to lodge a submission;
- the successful tenderer will need to have access to confidential information in the possession of the Australia Government in order to fulfil the requirements of the contract; or
- the information generated as a result of performing the contract is confidential.

In the case of potential suppliers, they may:

- submit commercially sensitive information as part of a tender;
- consider their strategy to win the tender to be confidential;
- seek to protect commercially sensitive information contained in the contract; or
- seek to protect commercially sensitive information during and after the performance of the contract.

**1.5  
Probity  
Guidance:**  
Issues to consider  
in a Probity Plan

## Appropriate security and confidentiality arrangements

During a procurement process, the protection of confidential information (of both proponents' and the Government) is an important probity requirement. A lack of proponent confidence in security arrangements for a procurement could deter potential suppliers from tendering or reduce the detail and amount of information provided in support of bids. In an extreme case, the inappropriate release of confidential information could result in a tender being aborted.

Officials who receive confidential information from potential suppliers will be subject to a range of confidentiality obligations. APS officials are bound by confidentiality obligations under the *Public Service Act 1999* and the *Privacy Act 1988*. 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. Because of these provisions, APS officials do not need to sign confidentiality deeds/agreements.

For officials working in a Commonwealth Authority, section 24 (1) of the CAC Act requires that they must not improperly use information obtained to gain advantage for themselves or someone else. CAC Act bodies usually support this requirement with internal codes of conduct that expect officials to treat as confidential, the entity's confidential information and the confidential information of third parties.

To demonstrate a commitment to confidentiality, it is better practice to confirm that:

- APS officials are fully informed of confidentiality procedures associated with the procurement and that the APS Code of Conduct prohibits them from disclosing confidential information;
- CAC Act officials are reminded that they must not improperly use information obtained to gain advantage for themselves or someone else; and
- non-APS employees (for example, advisers, contractors and consultants) assisting the Government with the procurement process have confirmed that they understand their confidentiality obligations by signing a confidentiality or non-disclosure deed/agreement.

## Procurement Stage 2: Preparing to Approach the Market

### 2.1 Procurement Task: Select a procurement process

### Select a procurement process

There are a number of tendering methods available for use in a tender process. The CPGs identify three generic categories: open tendering; select tendering; and direct sourcing.

#### Open tendering

An open tender involves publishing a request for tender and accepting for evaluation all submissions received by a deadline. Open tenders must be advertised on AusTender. Tenders can involve a one-stage Request For Tender (RFT) or a two-stage process involving an Expression Of Interest (EOI) followed by an RFT.

#### Select tendering

A select tender process involves issuing an invitation to tender to nominated potential suppliers. Select tendering is permitted for 'covered' procurements when:

- it is the second round of an open tender, that is, an EOI has been used to generate a large number of respondents from which a limited number will be asked to submit an RFT;
- potential suppliers are selected from a multi-use list of pre-qualified tenderers established through an open approach to the market;
- the selection is from an established list of all potential suppliers that have been granted a specific licence or comply with a specific legal requirement.

#### Direct sourcing

For 'covered' procurements, the CPGs state that direct sourcing is only available in exceptional circumstances. For example, for goods purchased on a commodity market or where, during a state of emergency, goods or services cannot be obtained in time under usual tendering rules.

### 2.1 Probity Guidance: Issues to consider in a Probity Plan

### Use of an appropriately competitive process

Selecting a tender process requires consideration of the value of the procurement, the time frames involved, and the capabilities of the market. Project planning for an approach to the market should consider the requirements for effective competition including:

- will the proposed procurement method encourage competition and not discriminate against particular suppliers, particularly new entrants to the market or foreign suppliers; and
- have options to reduce the costs to industry in contesting the procurement been considered? For example, if tender costs are low, a single stage process may be appropriate, but if tender costs are high, a two-stage process with only a few potential suppliers progressing from the EOI stage to the second RFT stage may be the most suitable.

A feature of a well-conducted procurement is that it is supported by a documented process for deciding on the most appropriate process to be used. In the case of 'covered' procurements, if an entity does not adopt an open tender approach and uses a select or direct method, it should document the decision and the reason the mandatory requirements were not followed.

Direct sourcing may only be used in circumstances specified in the CPGs, for example, extreme urgency brought about by events unforeseen by the entity. A common issue that arises with direct sourcing is insufficient documentation to support why direct sourcing was used and, if a rationale is documented, an inappropriate justification for the decision.

When using a select tender process entities are required to ensure that the process is non-discriminatory. For construction services, the procurement threshold for open tendering is \$9 million and select tendering is quite common for multi-million dollar construction contracts. In these cases, particular care is needed when determining who to invite for select tenders.

## 2.2 Procurement Task:

### Establish a communication protocol

## Establish a communication protocol

It is a general procurement principle that, as far as possible, information held by an entity that is relevant to the procurement should be provided to each tenderer on the same basis. Public officials should not discriminate between tenderers in providing access to procurement-related information. This means that information should be made available to all potential suppliers at the same time and with common deadlines for responses. Adherence to deadlines is necessary to maintain the integrity of a tender process. To demonstrate fairness, entities will need to follow documented procedures for:

- communicating with potential suppliers;
- setting time limits; and
- clarifying tender requirements or modifications and notifying the market of these changes.

For 'covered' procurements, the CPGs specify the time that a request is to remain open and the manner in which the market is notified about the procurement and any subsequent modifications. These requirements are summarised below.

### Time limits

Time limits include:

- from the date of advertisement, a 25 day minimum period in which to lodge a submission applies (in certain circumstances, outlined in Division Two of the CPGs, this may be reduced to a minimum of 10 days);
- all proponents must be required to lodge a submission within a common deadline; and
- an entity must promptly notify tenderers of its final decision.

### Clarifying tender requirements or issuing modifications

If an entity modifies the evaluation criteria or technical requirements set out in an approach to the market it must transmit all modifications to those potential suppliers that are participating at the time the information is amended. Adequate time will need to be provided for potential suppliers to modify and re-lodge any initial submissions.

### Receipt and opening of submissions

Procedures to receive and open all submissions must ensure fairness and impartiality, and submissions must be treated in confidence.

**2.2  
Probity  
Guidance:**  
Issues to consider  
in a Probity Plan

## Fairness and impartiality

One of the central tenants of procurement is that proponents are treated fairly and impartially. It is not appropriate for information to be provided to one proponent that gives that proponent an unfair advantage. This means that entities should provide the same guidance and instructions on the conduct of a tender to all proponents.

Before the tender process starts, it is important to establish procedures to deal with prospective and actual tenderers, including dealing with inquiries. It is good practice to put in place a communications protocol to help ensure:

- that contact with potential suppliers is made only through authorised personnel, normally one person;
- if meetings/briefing sessions/site visits are planned with potential suppliers at any stage before a decision is made, what can be discussed at those meetings is clear;
- arrangements to record key discussions with potential suppliers, including documenting the main points raised in face-to-face meetings and telephone conversations; and
- processes for disseminating information provided during such discussions to all potential suppliers.

The time limit for response should be considered carefully. For example, in a multi-stage project, the supplier for stage 1 may have an advantage for stage 2 if the minimum 25 day minimum time period is used.

**2.3  
Procurement  
Task:**  
Prepare the  
request  
documentation

## Prepare the Request Documentation

Procurement for the Australian Government above the thresholds identified in the CPGs is typically managed within a competitive bid process involving either a one-stage RFT or a two-stage process involving an EOI followed by an RFT.

For such 'covered' procurements, the CPGs state that Request Documentation (the EOI and/or RFT) must include a complete description of:

- the nature of the procurement
  - including the functional, performance and technical specifications;
- all evaluation criteria
  - the evaluation criteria must clearly identify any criteria that will be treated as essential requirements in the evaluation of submissions;
- any 'Conditions for Participation'
  - any such conditions must not impede competition (for example, require previous experience with the Australian Government) and be limited to assuring the legal, financial, technical and/or commercial capabilities of the potential supplier. Once set, entities must not award a contract to a supplier that fails to meet a stated condition;
- any 'Minimum Content and Format Requirements'
  - an entity may impose standards in relation to providing documents, for example, a certificate of insurance; and

- the arrangements for the conduct of the tender process
  - for example: deadlines; whether a multi-stage EOI approach is being used; if submissions are to be short-listed; protocols for handling day-to-day contact; how confidentiality issues will be dealt with; procedures that will be used to notify participants of any required modifications and subsequent bid variations; and situations where Cabinet may be the final decision maker.

### 2.3 Probity Guidance:

#### Issues to consider in a Probity Plan

## Consistency and transparency of process

The quality of the Request Documentation provided to potential suppliers in a tender process is central to promoting probity. Generally, the RFT sets the legal framework for the conduct of a particular procurement. For this reason, the EOI and/or RFT should be carefully reviewed and approved before they are sent to potential suppliers. The Request Documents should contain all information necessary to allow potential suppliers to prepare and submit responsive submissions.

If a tenderer fails to comply with any of mandatory requirements identified in the Request Documentation (that is, any evaluation criteria to be treated as essential requirements; Conditions for Participation; Minimum Content and Format Requirements) their tender will need to be excluded from further evaluation.

Unless a tenderer makes an unintentional error of form in its submission, the entity should automatically disqualify a bid that does not meet any pre-determined mandatory requirements. Therefore, it is important that the RFT only specifies those mandatory requirements that are genuinely relevant to the success of the procurement.

Once a tender has been issued, it is generally not appropriate to change the tender criteria or process and should be avoided wherever possible. However, there may be circumstances that require changes to be made to tender documentation including, for example, to correct errors or omissions.

Request documentation should, therefore, be drafted to allow the entity a degree of flexibility to adjust its requirements. So that potential suppliers understand the basis on which they participate, such a provision should emphasise that all tenderers will be given the same information regarding any revised criteria at the same time and the same opportunity to respond.

### 2.4 Procurement Task:

#### Identify and manage any conflicts of interest

## Identify and manage any conflicts of interest

All actual, perceived, and potential conflicts of interest relating to tenders must be identified and dealt with conclusively. All disclosures of conflicts should be fully documented. To ensure there is no public perception of conflict of interest or bias, it is necessary to confirm that:

- both FMA Act and CAC Act officials have no conflicts of interest with the procurement in which they are involved and are aware of their disclosure obligations if an actual or potential conflict arises during the procurement process (this includes offers of employment from potential suppliers); and
- that non-APS employees (for example, advisers, contractors and consultants) assisting the Government with the procurement process have confirmed that they have no conflicts of interest by signing a conflict of interest declaration.

External advisers, such as probity advisers and probity auditors should be engaged under Commonwealth contracts that include appropriate requirements regarding the disclosure of potential and actual conflicts of interest.

## 2.4 Probity Guidance:

Issues to consider  
in a Probity Plan

## Identification and management of actual and perceived conflicts of interest

The central probity task at this stage is to ensure that individual procurement officers and participants in a procurement team, including advisers, declare any conflicts of interest before the tendering process begins and at critical stages throughout the process, and to ensure that any issues arising are promptly resolved.

While FMA Act officials are bound by conflict of interest obligations as part of their employment conditions, it is better practice in more-complex and higher-risk procurement that they are asked to acknowledge in writing that they are aware of their obligations in relation to conflicts of interest. A similar written acknowledgement from CAC Act officials is also good practice. All external contractors, experts/advisers who are involved in the process should be required to make a conflict of interest declaration. This includes the need to declare any actual or potential conflicts should their circumstances change.

## 2.5 Procurement Task: Treat security and confidentiality risks

## Treat security and confidentiality risks

### Security

The *Protective Security Manual* defines a security classification system which has been devised primarily to ensure that official information held by, or shared between, Commonwealth agencies receives adequate protection based on the degree of harm that could be caused to the Commonwealth in the event of unauthorised disclosure of the information.

When a security classification has been applied to official information, the minimum standards for the protection of the information detailed in the *Protective Security Manual* must be applied, including how to assign protective markings. The *Commercial-In-Confidence* marking is used when the compromise of the information could cause limited damage to the Commonwealth, the Government, commercial entities or members of the public. The protective marking *Commercial-In-Confidence* should be applied to information if unauthorised disclosure of the information could:

- disadvantage the Government in commercial or policy negotiations with others;
- cause financial loss or loss of earning potential to, or facilitate improper gain or advantage for, individuals or private entities.

The *Protective Security Manual* states that agencies should also have procedures in place for handling the electronic transmission and storage of tender documents and communication with proponents. The *Protective Security Manual* is complemented by the *Australian Government Information and Communications Technology Security Manual (ACSI 33)*. ACSI 33 sets access control standards for *In-Confidence* information and recommends use of Secure Socket Layer technology to protect transmission of information over any network, but particularly the Internet.

## Confidentiality

Finance has issued FMG No. 3 *Guidance on Confidentiality in Procurement* to assist FMA agencies to identify and manage confidential information during procurement. This guidance does not apply to *Commonwealth Authorities and Companies Act 1997* bodies.

Throughout a procurement, agencies should ensure that they protect the Australian Government's confidentiality interests and, where appropriate, assess information provided by potential suppliers and determine whether it should also be protected as confidential.

The Australian Government's confidentiality can be protected by:

- potential suppliers being obliged to sign confidentiality undertakings before being given access to confidential information;
- the use of evaluation criteria to assess the capability of potential suppliers to comply with confidentiality requirements;
- ensuring that successful suppliers are made aware of any legislative requirements in relation to the protection of confidential information they may have access to when performing the contract; and
- the use of appropriate contractual confidentiality provisions in contracts.

Where a procurement is commercial in nature and/or potential suppliers are likely to make specific claims to confidentiality, agencies should identify these circumstances early in the process and:

- consider the degree to which potential suppliers will need to submit commercially sensitive information in response to the tender;
- be able to assess whether any claims to confidentiality are consistent with the requirements of the particular procurement;
- assess any longer-term consequences of protecting information as confidential. A good example is the ability of confidential information to be provided to a third party during a transition to a new supplier;
- consider the use of an evaluation criterion that allows an assessment of the impact of confidentiality provisions on value for money. The extent to which potential suppliers seek protection of particular information, such as intellectual property, may impact on the overall cost and risk of the proposal; and
- inform potential suppliers of the agency's position in relation to supplier claims for confidentiality. This should be foreshadowed in the Request Documentation. Request Documentation, including any draft contract, should reflect the agency's requirements for confidentiality and position on commercially sensitive information.

**2.5**  
**Probity**  
**Guidance:**  
Issues to consider  
in a Probity Plan

## Appropriate security and confidentiality arrangements

The probity principle of transparency means that contracting information should not be confidential unless there is a sound reason to do so. It requires officials to make a specific assessment of whether information should be kept confidential before agreeing to make any contractual commitment of confidentiality.

Information that is provided to potential suppliers as part of the Request For Tender (or proposal) package should make clear that the approach being taken is to promote disclosure of contractual information to the maximum extent.

During the tender process, parties should be asked to identify what information, if any, that is to be included in the contract which they consider should be protected as confidential information and the reasons why. The reverse onus principle should apply, that is, that disclosure is the expected approach unless there is good reason for confidentiality.

## Procurement Stage 3: Approaching the Market

### 3.1 Procurement Task: Notify the market

### Notify the market

AusTender is the Australian Government's medium for advertising, publishing, and reporting procurement activity. The CPGs require all open approaches to the market to be published on AusTender in accordance with the instructions set out in FMG No. 15: *Procurement Publishing Obligations*. These obligations include publishing electronically on AusTender the details of all open approaches to the market requesting:

- expressions of interest;
- tenders; and
- applications for inclusion on a multi-use list.

The minimum time for the lodgement of a submission in response to a notification is 25 days (Division Two of the CPGs outlines certain circumstances where this may be reduced to a minimum of 10 days). To the extent practicable, all related documents should be available for download from AusTender. The information must also include the entity's name, contact details, a description of the procurement, the closing date for submissions, and the timeframe for the delivery of the goods or services.

### 3.1 Probity Guidance: Issues to consider in a Probity Plan

### Use of an appropriately competitive process

At this stage, it is appropriate to check that advertising arrangements are directed towards obtaining the maximum levels of interest and competition. As well as publishing on AusTender, this could include press advertisements and the placing of information on an entity's website. It is not a requirement to advertise open tenders in the press. This decision should be based on an understanding of the market and the most appropriate way to achieve value for money. If it is decided to advertise in the press, the content of any other notices should be identical to that provided in AusTender and be provided in the same timeframe.

### 3.2 Procurement Task: Receive

### Receive submissions

The CPGs require entities to reply promptly to any reasonable request for relevant information by a potential supplier participating in a procurement. In doing so, public officials need to avoid responses that could lead to any potential supplier gaining an unfair advantage. At this stage of a procurement, communication with potential suppliers can arise from unsolicited queries and/or briefings arranged by the entity.

### Brief potential suppliers

Briefing sessions for potential suppliers provide an opportunity for potential suppliers to learn more about the proposal (for example, its purpose, evaluation criteria, time frames, milestones, relevant government policies) and for potential suppliers to ask questions. Public officials should

provide consistent information when briefing potential suppliers. Any substantive questions and answers at briefing sessions should be communicated to all potential suppliers.

### Respond to queries

Requests from potential suppliers for further information, and the response provided, should be recorded. If additional information is supplied to any one potential supplier, all other potential suppliers must be informed. It is not appropriate to disclose the source of the request for further information. All information relating to a tender that is not general public knowledge must be communicated to all potential suppliers in a timely way (provided that this will not disclose sensitive financial information about a potential supplier or *Commercial-In-Confidence* material received by the entity).

### Receive submissions

FMG No. 13: *Guidance on the Mandatory Procurement Procedures* states that:

- submissions should not be opened until after tender closing;
- the details of submissions received should be recorded; and
- submissions that arrive after closing time should be considered late and not accepted (unless the lateness was caused by mishandling by the entity).

## 3.2 Probity Guidance: Issues to consider in a Probity Plan

### Fairness and impartiality

It is important to keep appropriate records of inquiries made by potential suppliers. Contact with potential suppliers should be made only through authorised personnel, and there should be an understanding that any information provided to a potential supplier is factual and will be communicated to all potential suppliers.

If briefing sessions are held, all potential suppliers should be given a reasonable opportunity to attend and be provided with the opportunity to submit questions prior to the briefing. However, anonymity must be respected. If any information about the procurement that is not general public knowledge is communicated to one potential supplier, it should be communicated to all potential suppliers.

If it is known that all potential suppliers have access to the internet, a useful approach is to provide for any additional information made available in response to one supplier's question to be posted on a dedicated entity website. This would allow all potential suppliers to have access to the identical information.

Tender closing requirements must be adhered to. Tenderers could be considered to have obtained an unfair advantage if they are allowed additional time to prepare submissions. Submissions should not be opened before the nominated closing time. If they are opened earlier, there is a risk that details of those submissions could be communicated to other potential suppliers, yet to lodge their submissions.

**3.3  
Procurement  
Task:****Deal with any  
modifications**

## Deal with any modifications

During the course of a procurement, an entity may need to vary the process or the Request Documentation. If an entity decides to change the published Request Documentation, it must do so in a clear and transparent manner.

For 'covered' procurement, the CPGs specify that all modifications must:

- be issued to all potential suppliers that have responded to the AusTender notice or are participating in the procurement process at the time the information is amended; and
- in the case where an entity keeps a register of potential suppliers receiving the Request Documentation, it should send the modification to all these potential suppliers. Where there is no register, the entity should publish the modification in the same manner as the original information.

If modifications are requested, entities must provide adequate time to allow tenderers to modify and re-submit their initial submissions. This could entail extending the date for delivery of submissions.

In cases where a tenderer's submission does not meet any specified mandatory requirements (that is, any evaluation criteria to be treated as essential requirements; Conditions for Participation; Minimum Content and Format Requirements) the entity must automatically disqualify the tenderer from the procurement process. Where the tenderer has made an unintentional error of form in the submission, the entity has discretion to allow the submission to be corrected (entities do not necessarily need to accept corrections). Otherwise, tenderers should not be permitted to take an opportunity to correct errors or to provide additional information in support of their proposal.

**3.3  
Probity  
Guidance:****Issues to consider  
in a Probity Plan**

## Consistency and transparency of process

An underlying probity principle is that any modifications to the process or evaluation criteria do not adversely affect the integrity of the procurement. If modifications are made, entities should provide potential suppliers an adequate time frame in which to adjust and/or re-submit tenders.

The terms and conditions in the Request Documentation and the process for conducting the procurement may bind both the entity and tenderers. Modifying the published tender specifications before or after bids are lodged should be done only in exceptional circumstances. If the modification being considered potentially alters the attractiveness of the tender for some potential suppliers, the entity may be liable to compensate any potential suppliers that are able to demonstrate they were adversely affected.

### 3.4 Procurement Task:

#### Re-assess conflict of interest risks

## Re-assess conflict of interest

Throughout more-complex and higher-risk procurements, conflict of interest declarations will need to be updated. As the tenderers become known, the conflict of interest status may change for entity staff and external advisers involved in assessing submissions. Approaching the market will introduce new conflict of interest risks including the potential for:

- contact with the incumbent supplier in the office/work environment;
- contact with tenderers at business meetings/social functions;
- offers of gifts/hospitality from tenderers;
- offers of employment from tenderers;
- the family or relatives of entity staff to be involved in a bid; and
- entity staff to have pecuniary or non-pecuniary interests in a particular tenderer.

Where there is a prospect that an official involved in a procurement may take up employment with a tenderer, it could be appropriate to require that employee to enter into a Deed of Undertaking in respect of post-separation employment. Requiring a separating employee to agree that he/she will not engage in particular activities or areas of work for a specified period (say 12 months) is intended to protect all parties—the entity, the individual, and the prospective employer from any potential charge of impropriety or conflict of interest.

Any actual, perceived or potential conflicts of interest to do with offers of employment will need to be balanced against possible restraints of trade. In particular, former employees should not be unreasonably or unfairly constrained in seeking suitable post separation employment. Also, there should not be unreasonable constraints on the on the transfer of knowledge, and skills and experience between government and other sectors.

### 3.4 Probity Guidance:

#### Issues to consider in a Probity Plan

## Identification and management of actual and perceived conflicts of interest

At this stage of a procurement, it will be appropriate for officials to be reminded of their obligations in relation to conflict of interest and, where appropriate, be required to acknowledge this in writing. All external advisers who are involved in the procurement should be required to update their conflict of interest declarations.

As general principles, officials:

- should exercise caution at contact points with tenderers and should not discuss any matter relating to the tender, other than what is publicly known;
- should not accept any gifts, hospitality or other benefits; and
- have an obligation to notify their supervisor if a tenderer offers them employment.

The Minister or his/her staff should be informed of progress in potentially sensitive procurements, especially where the Minister is the decision maker. This will allow them to be aware of the stakeholders involved and the need to be careful about accepting hospitality from tenderers.

### 3.5 Procurement Task:

#### Manage security and confidentiality issues

## Manage security and confidentiality issues

### Security

When approaching the market to invite organisations to bid for contracting work, it is important that documentation associated with the Request For Tender (RFT) sets out the specific requirements, including any security requirements, relating to the procurement. These documents should also clearly indicate the minimum conditions or criteria prospective contractors will be required to meet. Approaches to the market in procurements should include a draft contract containing security provisions relevant to the property or services being procured, and must clearly indicate clauses that are mandatory to meet the minimum standards and those that are optional or desirable. These should also be reflected, as appropriate, in the evaluation plan/criteria for the procurement.

The Government has determined the minimum standards and procedures that must be applied to functions that involve the generation, handling, storage, transfer or transmission of official information. The Request Documentation must refer to these minimum standards that are explained in Part C: Information Security; Part D: Personnel Security; and Part E: Physical Security of the *Protective Security Manual*.

Submissions should be received into a secure environment. In approaching the market, consideration will need to be given to the appropriateness of the entity's security and confidentiality procedures. Physical security measures relevant to a more-complex and higher-risk procurement include:

- the use and security of a tender box;
- the secure storage of submissions and tender documents;
- limiting the number of tender documents and numbering any copies made;
- limiting access to tender submissions; and
- controls over electronic delivery of submissions and protection of data stored on networks and stand-alone personal computers.

Tender boxes, whether physical or electronic, and subsequent handling processes must ensure that confidentially is protected before and after the close of tenders. Depending upon the dollar value of the procurement and the sensitivity of the documents (for example, financial viability documents), tender documentation should be stored, in ascending order of security: lockable filing cabinets; C-Class cabinets (bi-lock cabinets); and B-Class cabinets (combinations lock).

### Confidentiality

In response to an approach to the market, potential suppliers may seek to protect their information as confidential. If this occurs, agencies can:

- invite potential suppliers that put forward a claim for contractual confidentiality to specify in writing what information they seek to keep confidential;
- call upon the evaluation criterion that allows the value for money assessment to take into account potential suppliers claims for confidentiality;
- include appropriate confidentiality clause in the draft contract.

Where the agency is not prepared to provide protection for commercially sensitive information after the award of the contract, the agency should:

- have clearly stated this position in the Request Documentation and the draft contract; and
- request potential suppliers to agree in writing that they do not require any information to be kept confidential after the award of the contract.

Classifying particular information as confidential, does not, by itself, provide grounds for resisting disclosure. Commonwealth agencies may be required to disclose confidential contract-related information to:

- a Parliamentary Committee;
- the Auditor-General;
- the Ombudsman;
- the public under a Freedom of Information request (if not exempted); or
- a court.

**3.5  
Probity  
Guidance:**  
Issues to consider  
in a Probity Plan

## Appropriate security and confidentiality arrangements

As an increasing number of procurement processes are conducted electronically, electronic security is becoming more important. For example, AusTender enables potential suppliers to obtain access to Request Documentation electronically.

Particular controls over electronic information include segregating hard drives, separately storing confidential information and allocating secure passwords to those authorised to access this information. Other security measures may include transmitting documents in a format that prevents easy alteration (for example, secured Portable Document Format [PDF] files) and double-checking any emails and attachments before sending to potential suppliers.

When dealing with potential suppliers, agencies should take care to ensure that they do not make representations about maintaining the confidentiality of suppliers' commercial information that are not consistent with the Request Documentation or the draft contract. In providing answers to potential suppliers' questions, officials need to be careful not to disclose *Commercial-In-Confidence* information about another potential supplier including sensitive financial information received by the agency.

For probity reasons, all tender-related submissions should be treated as confidential. Similarly, all unsuccessful submissions will need to be kept confidential after the award of the contract. However, accountability and transparency requirements mean that details of the resulting contract with the successful tenderer would not necessarily be treated as confidential.

All potential or actual contractors to the Commonwealth should be advised clearly and conspicuously of the accountability requirements in the Commonwealth and the potential access by various parties to information in contracts. To ensure suppliers are fully aware of these disclosure obligations they should be set out in Request Documentation and in contracts. For this reason, it is good practice for the Request Documentation to include a copy of the draft contract with standard clauses referring proponents to relevant Australian Government policies that apply to confidentiality including that accountability requirements may require agencies to disclose contract details to the Parliament and its committees, the Auditor-General, the Ombudsman, the public through a Freedom of Information request, or through court proceedings.

## Procurement Stage 4: Evaluating Submissions

### 4.1 Procurement Task:

#### Set aside non-competitive bids

### Set aside non-competitive bids

In the event that a significant number of tenders are received, submissions that are clearly non-competitive and have no prospect of exhibiting the best value for money compared to other submissions, may be excluded from detailed evaluation. Where it is intended to adopt this approach, it should be flagged in the evaluation plan and the reasons for exclusion should be defensible and properly documented against the requirements and evaluation criteria specified in the approach to the market and Request Documentation.

### 4.1 Probity Guidance:

#### Issues to consider in a Probity Plan

### Use of an appropriately competitive process

While it is not necessary to progress non-competitive bids to subsequent procurement stages, care should be taken in excluding tenders at this stage. On the other hand, it may be inappropriate to put uncompetitive tenderers to the effort and expense of continued involvement in the procurement if they are clearly unlikely to be successful.

### 4.2 Procurement Task:

#### Undertake any planned site visits

### Undertake any planned site visits

Site inspections may be appropriate to establish the capacity of tenderers to provide the services required and to assist in the evaluation process.

If conducted, site visits should be planned and details documented. Site visits should be handled in a way that allows all tenderers similar opportunity to acquire information about the tender process. Tenderers should be advised that a site visit is not an opportunity to revise or alter their bid. Site visits should not be used to discriminate against overseas based suppliers.

### 4.2 Probity Guidance:

#### Issues to consider in a Probity Plan

### Fairness and impartiality

To ensure fairness is maintained, site visits, where relevant, should be offered to all tenderers and should be of similar duration. Tenderers may wish to take the opportunity of a site visit to provide additional information or change their tender price and/or service levels. To ensure the integrity of the process, officials should not:

- accept a price or service level change;
- advise or imply the status of any tender, for example, as a tender being 'lowest', 'under special consideration', 'not under consideration' or 'rejected'; or
- frame requests for clarification that actually constitute requests for additional information and/ or result in any one tenderer gaining any advantage over other tenderers.

**4.3  
Procurement  
Task:****Evaluate  
submissions**

## Evaluate submissions

The evaluation stage of a procurement typically involves: checking the submissions for compliance with any predetermined mandatory requirements, evaluating the submissions, short-listing (if an EOI stage was signalled to the market), and recommending a preferred tenderer.

### Check compliance with any predetermined mandatory requirements

The Evaluation Committee should determine if tenders meet any mandatory requirements identified in the Request Documentation (that is, any evaluation criteria to be treated as essential requirements; Conditions for Participation; Minimum Content and Format Requirements). If an entity has set such mandatory conditions, the CPGs require the automatic exclusion of any tenderer that does not comply.

### Evaluate submissions

Submissions must be evaluated against the predetermined criteria identified in the Request Documentation. In particular, the Evaluation Committee needs to ensure that it assesses the submissions against the evaluation criteria rather than against other submissions.

### Request clarification, where required

After the initial analysis of tenders, entities may need to seek clarification from tenderers on aspects of their submission. Where clarification is required, all communication with tenderers should be confirmed in writing. Requests for clarification should not allow a tenderer to revise or modify its tender in any substantive way.

### Short-listing

Short-listing can be used to reduce the number of tenders being subject to a full evaluation. It is good practice for the potential use of a short-listing process to be identified in the Request Documentation. Short-listing requires a preliminary evaluation of value for money against the selection criteria in the Request Documentation. This step is most useful in procurements where there is a large field of tenderers.

### Interview short-listed tenderers

An entity may request tenderers to attend a private interview or to provide a presentation. If only short-listed tenderers are invited, it is good practice to also signal this step in the Request Documentation. Tenderers will need to be given the same amount of notice to prepare. Presentations/private interviews with tenderers should be of similar duration. Tenderers should be advised that while a presentation/interview is an opportunity to highlight aspects of their proposal, it is not an opportunity to revise or alter their bid.

### Arrange for a probity check on short-listed tenderers

For 'covered' procurements, probity assessments including ownership, financial and security checks should be conducted on short-listed tenderers. These checks should be conducted even if the particular short-listed tenderer appears to be a financially sound, well-recognised and respected organisation. Probity checks could reveal, for example, that the tenderer has been involved in anti-competitive business activities which will need to be taken into account in the tender evaluation. The preferred supplier's claims should be confirmed with the nominated referees. It is open to the evaluation team as to whether it seeks feedback from other parties.

### Recommend preferred tenderer

The evaluation team must prepare a written report once the tender evaluation is completed and a preferred tenderer or short-listed pre-qualified service providers are recommended. This report should describe the evaluation and recommend the outcome of the tender process. The recommendation for the preferred tenderer should be based on a comparative analysis derived from the evaluation criteria.

**4.3  
Probity  
Guidance:**  
Issues to consider  
in a Probity Plan

### Consistency and transparency of process

To properly evaluate tenders it may be necessary for an entity to request clarification of the information provided in a submission. A risk to probity is the potential for tenderers to use a clarification request as an opportunity to improve their bids by providing additional information, and changing their pricing and/or service levels. Any clarification request should be sought in writing. Answers to clarification requests should not allow tenderers to revise their original submission by changing either their price and/or nominated service levels.

If a tenderer is invited to an interview or to make a presentation, any matters of clarification raised by the entity and the answer(s) provided should be carefully considered. In some cases, the answer provided by a tenderer may change its bid and, therefore, amount to a 'revised bid', rather than a 'bid clarification'. Before inviting or accepting additional information from one tenderer, entities should consider whether they could be affording an advantage or disadvantage to other tenderers. To treat all tenderers consistently, it may be appropriate to allow all tenderers the same opportunity.

Similarly, if an entity decides from an assessment of tenderers' responses that a modification to the nature of the procurement is necessary for the project to proceed, it should consider fully the probity implications before making such changes (see Stage 3.3: Deal with any modifications).

**4.4  
Procurement  
Task:**  
Check for  
'embedded'  
conflicts of  
interest

### Check for 'embedded' conflicts of interest

After an initial assessment of the submissions, an entity may need to engage additional external experts to assist with the evaluation of technical or other issues. The assessment of the bids may also reveal that a number of tenderers intend to rely on the use of sub-contractors to deliver the goods and/or services specified in the Request Documentation. These additional parties may present new 'embedded' conflicts of interest and the conflict of interest status of entity staff should be updated. Any additional external experts will need to make a declaration that they also have no conflicts of interest.

**4.4  
Probity  
Guidance:**  
Issues to consider  
in a Probity Plan

### Identification and management of actual and perceived conflicts of interest

Officials involved in evaluation tenders should have particular regard to relevant Codes of Conduct as well as any entity specific guidelines on behaving ethically. In particular, it is generally accepted that the acceptance of gifts or other benefits during a tender process is not appropriate. This should be made clear at the start of the procurement process and confirmed at the evaluation stage.

If site visits and/or presentations occur during the tender, officials should be reminded/advised not to accept any:

- gifts;
- free travel or accommodation; or
- hospitality (this does not preclude the acceptance of light refreshments).

**4.5  
Procurement  
Task:  
Evaluate security  
and confidentiality  
in submissions**

## Evaluate security and confidentiality in submissions

### Security

The evaluation of tender responses should include an assessment of each potential supplier's ability to meet relevant security standards. The extent that security issues are considered when evaluating tenders should vary according to the security risks involved in the proposed contract, including whether contractors will require access to sensitive or classified information.

The Part F of the *Protective Security Manual* requires that procurement evaluation plans properly reflect security requirements contained in the approach to the market.

### Confidentiality

When evaluating submissions, agencies may need to:

- assess the capability of potential suppliers to comply with the confidentiality requirements of the Australian Government, and in accordance with stated evaluation criteria;
- assess potential suppliers' claims for their information to be treated as confidential. The overall cost and risk of the proposal may be influenced by extent to which potential suppliers seek to protect particular information, such as intellectual property.

FMG No. 3 *Guidance on Confidentiality in Procurement* requires APS officials to make a specific assessment of whether information should be kept confidential before agreeing to make any contractual commitment of confidentiality and provides criteria for making such assessments.

The criteria are:

- the information to be protected must be specifically identified;
- the information must be commercially 'sensitive' (this means that the information should not generally be known or ascertainable);
- disclosure would cause unreasonable detriment to the owner of the information or another party; and
- the information was provided under an understanding that it would remain confidential.

Examples of information that may meet these requirements are provided in FMG No. 3 *Guidance on Confidentiality in Procurement* and re-produced at Stage 5.5 in this Better Practice Guide.

**4.5  
Probity  
Guidance:****Issues to consider  
in a Probity Plan**

## Appropriate security and confidentiality arrangements

The evaluation of tender responses should involve officials with a mix of skills and knowledge that are relevant to the function(s) being contracted out. Depending on the complexity of the issues involved, subject matter specialists may need to be involved in, or consulted during, evaluation processes. For example, in those cases that involve the evaluation of responses to security specific standards, agencies might consider including a member of the protective security team, or someone with a sufficient level of knowledge and understanding about those security requirements, on the evaluation team.

If confidentiality requirements in the draft contract are not able to be met by a potential supplier, they should not be considered to be fully capable of undertaking the contract. Under the CPGs a contract is not required to be awarded to a supplier that the entity has determined is not fully capable of undertaking the contract.

The evaluation of the bids may identify that some of the tenderers intend to rely on sub-contractors to deliver elements of the goods and/or services specified in the Request Documentation. Where appropriate, any sub-contractors should also be requested to sign a confidentiality or non-disclosure deed/agreement.

Tender evaluation reports may contain some information from tenders that is considered to be confidential. It could be argued that the disclosure of parts of evaluation reports, where the merit of one tenderer is assessed against another, would not be in the public interest. Disclosure of such information may be considered by tenderers to be an unreasonable cost of doing business with government. Evaluation reports should be treated as confidential as they are part of the deliberative processes of government.

## Procurement Stage 5: Concluding the Process

### 5.1 Procurement Task: Negotiate the contract

### Negotiate the contract

A period of negotiation may arise with the successful tenderer/preferred supplier following the completion of the tender phase. The major reasons for negotiating at the contract development phase include: confirming or obtaining better value for money; achieving a full understanding between the parties; and establishing or refining the performance regime.

It is important that any contract negotiations are conducted in a structured manner. During negotiations, it is not acceptable for a preferred supplier to initiate a change to its bid that reduces the attractiveness of the bid for the entity. Similarly, entity officials should recognise that the preferred supplier also needs to be satisfied with the result. To achieve the objectives sought over the life of the contract, officials should keep issues that are not negotiable to a minimum while being prepared to trade-off less important requirements.

Any attempt to add or remove significant elements of the requirements set out in the Request Documentation from the final contract could be interpreted as resulting in a different procurement from what was tendered for. For this reason, any negotiation should be restricted to how substantive requirements will be satisfied rather than whether or not they are included in the contract. The possibility of exploring different service levels and attendant prices during contract negotiations should have been made clear in the Request Documentation.

During negotiations acquiring entities should, as far as possible, avoid any suggestion that the preferred supplier is certain to be awarded the contract because this can undermine the effectiveness of the negotiations. Preferred suppliers should be advised that the negotiations are subject to a formal written contract properly signed and authorised by the appropriate delegate. They should not be advised, or otherwise given the impression, that they have been awarded the contract until the contract negotiations have been concluded and the final contract is agreed by both parties.

The CPGs state that, unless an entity determines that it is not in the public interest to award a contract, it must award a contract to the successful tenderer that the entity has determined:

- satisfies the pre-set conditions for participation;
- is fully capable of undertaking the contract; and
- whose submission was determined to provide the best value for money, in accordance with the evaluation criteria specified in the approach to the market and Request Documentation.

Entities may decide not to award a contract and to cancel the procurement process. Taking such a decision, particularly when the procurement has involved a tender process, is a serious step with potential legal and management risks that should be considered before a decision is made. For example, cancelling a major procurement may impact on the entity's credibility and discourage participation in future procurements. Termination of a procurement is not appropriate where it is due solely to dissatisfaction with the outcome of a competitive assessment conducted in accordance with the CPGs.

**5.1  
Probity  
Guidance:****Issues to consider  
in a Probity Plan**

## Use of an appropriately competitive process

The procurement process must achieve value for money for the Government. When negotiating with a preferred supplier, it is important to have a clear understanding of whether any potential change represents an increase in price, or a change in scope that may or may not apply equally to all tenderers.

Significant price increases or changes in scope should be monitored extremely carefully as these changes can, either individually or cumulatively, be of a size or nature that would require a new procurement process to be undertaken. For example, during negotiations, the preferred supplier may seek to increase its effective price, or modify the risk allocation between itself and the Australian Government.

If the negotiations are likely to result in a major change to the original requirements, it may be necessary to give all tender respondents the opportunity to revise their responses. Negotiation around significant issues at this stage could be seen as discriminatory unless other potentially capable tenderers (such as those short-listed) were given the same opportunity. The need for this depends on the circumstances but will generally involve a consideration of the extent and nature of the change to the original requirement. If there is any doubt, specialist advice should be obtained to assist with making the decision.

It is equally important to obtain specialist advice when seeking best and final offers or where parallel or simultaneous negotiations are being undertaken. Parallel negotiations involve undertaking negotiations with two or more tenderers at the same time. If commenced or conducted inappropriately, parallel negotiations can have serious consequences such as legal action by the tenderer(s), the need to re-tender, and damage to the acquiring entity's reputation.

The possibility of parallel negotiations should have been included in the documentation used to approach the market. As is the case for other negotiations, parallel negotiations require the ongoing application of probity principles. Confidentiality and ethical standards need to be maintained and, if additional information is provided by the acquiring entity, it should be provided to all tenderers involved at that stage of the procurement.

**5.2  
Procurement  
Task:****Debrief  
unsuccessful  
tenderers**

## Debrief unsuccessful tenderers

Following the award of a contract, the acquiring entity should promptly inform all tenderers of the decision.

The CPGs require relevant entities, upon request, to provide each unsuccessful tenderer with an explanation why its submission was not successful. The debrief may be oral or in writing, but a record should be kept of the persons involved in the debriefing and the feedback provided. Similarly, if a tenderer is not invited to participate in the second or subsequent stages of the multi-stage process, that tenderer should, upon its request, be provided with a written explanation of the reasons for the entity's decision.

Agencies should have procedures in place to promptly and adequately investigate and respond to complaints. For written complaints, the CPGs require that, in the first instance, the team involved with the procurement deal with the complaint. The team's response should outline the issue that has been raised, what has been examined and an assessment of the complaint. The

response should also inform the tenderer of their options, in case they remain dissatisfied with the entity's response.

If the tenderer subsequently lodges a request for a further examination of the issue, the entity should undertake a prompt internal independent review. This should be conducted by officials who were not involved in the procurement but who have experience with procurement processes.

**5.2  
Probity  
Guidance:**  
Issues to consider  
in a Probity Plan

## Fairness and impartiality

Debriefing tenderers is an important part of the procurement process and, when done well, benefits both parties. A successful debrief is one that provides feedback to tenderers about the areas where they were more or less competitive. This information can provide potential suppliers with a better understanding of the Government's procurement processes and assist them to prepare submissions for future procurements. Constructive feedback provides the market with greater confidence in the fairness of a procurement process.

It is also in the entity's interests to answer relevant questions about the procurement process to the satisfaction of unsuccessful tenderers before other, often more expensive, disputes arise including Freedom of Information requests and litigation. However, in responding to any questions or complaints, an entity must not disclose the details of other tender responses to an unsuccessful tenderer. Where an unsuccessful tenderer seeks information regarding the successful tender(s), this information should be limited to the information publicly disclosed.

Entities should be mindful that contractors may be hesitant to lodge complaints because of concerns about the impact this may have on future procurements. In the interest of fairness and open and effective competition, it is important that the existence of a complaint does not prejudice a supplier's participation in future procurement activities.

Potential suppliers have recourse to the Commonwealth Ombudsman who has extensive powers to investigate a range of administrative matters including procurement related complaints. The Ombudsman has the authority to make recommendations regarding the procurement process and related decisions, but cannot overturn an entity's decision or specifically direct an agency to do so. Potential suppliers may also seek redress through the courts.

It is better practice, where a complaint is referred to an external body, that the entity concerned co-operate fully with any external review or action that may arise as a result of such a referral.

**5.3  
Procurement  
Task:**  
Report publicly

## Report publicly

Once a tender process is complete and a contract has been awarded, entities need to ensure that obligations to report contractual information are met.

There are a range of reporting requirements and obligations applicable to Australian Government entities undertaking contracting activities. These requirements are generally more detailed for FMA Act agencies than for CAC Act bodies. It is important that entities involved in contracting are aware of, and comply with, these reporting requirements.

The main requirements for AusTender, the *Senate Order on Departmental and Agency Contracts* (the Senate Order), and Annual Reports are outlined below.

## AusTender

AusTender requirements for all FMA Act agencies and relevant CAC Act bodies in relation to 'covered' procurements include:

- publishing details in AusTender of Commonwealth contracts and agency agreements (including standing offer arrangements and amendments to these arrangements) valued at or over the reporting threshold.

For FMA agencies, the contract reporting criteria threshold is:

- \$10 000.

For relevant CAC Act bodies, the contract reporting criteria thresholds are above:

- \$400 000 for procurements other than procurement of construction services; or
- \$9 million for procurements of construction services.

FMA Act Agencies have additional reporting responsibilities and are required to identify on AusTender whether a contract includes confidentiality provisions. Agencies must separately identify whether the requirements are to maintain the confidentiality of:

- contract clauses or other information contained in the contract (such as a description of methodology to be used by a contractor which reveals confidential intellectual property); and
- information obtained or generated as a result of performance of the contract (such as a consultancy report which contains information that is protected since its disclosure would be contrary to the public interest).

## The Senate Order

The Senate Order requires Ministers to table letters in the Parliament advising that each of the FMA Act agencies which they administer had placed a list of contracts on the Internet at the start of the Spring and Autumn sittings of the Parliament.

The list of contracts is to include a list of all contracts entered into by an agency which had not been fully performed, or which had been entered into in the last twelve months and which provided for consideration to the value of \$100 000 or more.

In addition, the list of contracts is required to indicate, amongst other things, whether any of the contracts listed contained confidentiality provisions and, if so, the reason for them.

## Requirements for Annual Reports

The *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* states that annual reports for FMA Act agencies must include a summary statement outlining:

- the number of new consultancy services contracts let during the year;
- the total actual expenditure on all new consultancy services let during the year;
- the number of ongoing consultancy services contracts active during the reporting year; and
- the total actual expenditure in the reporting year on the ongoing consultancy contracts.

More detailed information is required for individual consultancy contracts valued at \$10 000 or more. This information can be provided in an appendix to the Annual Report or through the Internet.

### 5.3 Probity Guidance:

Issues to consider  
in a Probity Plan

## Consistency and transparency of process

Potential suppliers should be made aware that their tender information may become publicly available. For example, it could be subject to an application under the Freedom of Information Act, or through the Administrative Appeals Tribunal.

The Auditor-General, the Ombudsman and Parliamentary committees may access and publish any information they wish under their statutory powers and functions. For these reasons, agencies should avoid giving potential suppliers absolute assurances about the confidentiality to be accorded to the information they provide and inform potential suppliers about the access and reporting rights of these bodies.

### 5.4 Procurement Task:

Monitor conflicts  
of interest during  
transition

## Monitor conflicts of interest during transition

Dealing with conflict of interest is an integral part of establishing an ethical culture in both the public and private sector and should be considered during the preparation of contracts. Contracts and Memoranda of Understanding between providers and government agencies should include provisions and/or clauses covering conflicts of interest. These clauses typically require all personnel involved in providing services to sign conflict of interest declarations.

In some circumstances it may be appropriate to require suppliers of services to the Australian Government to develop a fraud control plan in line with the *Commonwealths Fraud Control Guidelines*. These guidelines are designed to ensure that outsourcing does not compromise an entity's fraud control arrangements.

### 5.4 Probity Guidance:

Issues to consider  
in a Probity Plan

## Identification and management of actual and perceived conflicts of interest

The transition from one provider to another can involve, among other tasks, briefing the new contractor on the requirements placed on them as suppliers to the Australian Government.

It may also be prudent to undertake investigations to ensure that the new contractor (including its employees, sub-contractors or agents) is not in a position where their business, or personal interests, could conflict with those of the incumbent supplier.

## 5.5 Procurement Task:

### Monitor security and confidentiality for transition

## Monitor security and confidentiality for transition

### Security

In planning for the transition from one provider to another, agencies should consider security and confidentiality arrangements for:

- the handover of documents from the contracting team to the management team within the entity that will manage the contract; and
- managing the transfer of intellectual property assets for incoming/outgoing suppliers (any intellectual property of a contractor may need to be protected as *Commercial-In-Confidence*).

Part F: Security Framework for Procurement of The *Protective Security Manual* identifies security requirements when entering a contract including:

- agencies must ensure that contracted service providers are fully aware of the agency's security policy and guidelines;
- agencies must be able to carry out an examination of the contractor's security procedures; and
- access must be permitted for a security risk review to evaluate the contractor's security procedures.

The *Protective Security Manual* also requires that appropriate security procedures, based on the nature of the function and the classification of the information, need to be negotiated with the contractor and settled before finalising the contract.

### Confidentiality

Following the evaluation process, agencies may need to assess a potential supplier's claims to confidentiality and determine whether the information should be treated as confidential. It is up to entities to explicitly consider these on a case by case basis.

FMG No. 3 *Guidance on Confidentiality in Procurement*, provides examples of information that would normally be considered confidential and includes:

- internal costing information or information about profit margins;
- proprietary information, for example information about how a particular technical or business solution is to be provided;
- pricing structures (where this information would reveal whether a potential supplier was making a profit or loss on the supply of a particular good or service);
- artistic, literary or cultural secrets. These may include photo shoots, historic manuscripts or secret Indigenous culture; and
- intellectual property including trade secrets and other intellectual property matters where they relate to a potential supplier's competitive position.

Examples of information that would not normally be considered confidential include:

- performance and financial guarantees;
- indemnities;
- the price of an individual item, or groups of items;
- rebate, liquidated damages and service credits;
- performance measures;
- clauses which describe how intellectual property rights are to be dealt with; and
- payment arrangements.

If the agency decides that contract related information should be kept confidential, appropriate confidentiality clauses should be included in the contract. The reasons for agreeing to any specific confidentiality provisions should be documented. Documenting decisions about the treatment of confidentiality issues will assist agencies to report procurement decisions in line with FMG No. 15: *Guidance on Procurement Publishing Obligations*.

Where a contractor collects and handles personal information on behalf of an agency, *Privacy Obligations for Commonwealth Contracts* deals with the obligation of agencies and contractors under the *Privacy Act 1988*.

### Storing Records

Documentation relating to a procurement must be retained for a period of three years or for a longer period if required by legislation or other reason for a specific procurement. An entity's record keeping procedures should take into account the security classifications of procurement documentation. *The Archives Act 1983* sets out requirements in relation to Commonwealth records, including dealings with, and access to, such records.

#### 5.5 Probity Guidance: Issues to consider in a Probity Plan

### Appropriate security and confidentiality arrangements

When outsourcing, or contracting out a function, entities remain responsible for the efficient and secure performance of that function. The transition stage of a contract can involve dealing with the hand-over of intellectual property, the transfer of confidential information, the ongoing maintenance of physical security, and briefing the new contractor on Australian Government requirements for Commonwealth security and confidentiality. These matters need to be carefully managed, by the entity and the outgoing contractor during the transition to a new contractor.

The *Privacy Act* protects personal information held by the Australian Government and certain private entities. The Act contains specific provisions dealing with the protection of personal information by agencies and by 'Commonwealth Service Providers'. These provisions require Commonwealth Service Providers to behave as if they are an agency when dealing with personal information. The *Privacy Act* also requires agencies to include certain clauses in contracts with Commonwealth Service Providers to ensure these requirements are met.



# Selected References and Further Information

## **Australian National Audit Office:** **<http://www.anao.gov.au>**

ANAO Better Practice Guide, *Developing and Managing Contracts – Getting the Right Outcome, Paying the Right Price*, February 2007.

ANAO report No. 43, 2006–07, *Managing Security Issues in Procurement and Contracting*.

ANAO report No. 21, 2006–07, *Implementation of the revised Commonwealth Procurement Guidelines*.

ANAO report No. 5, 2006–07, *The Senate Order of the Departmental and Agency Contracts*.

ANAO report No. 57, 2004–05, *Purchasing Procedures and Practices*.

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