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Topic:

Case study analyses to avoid a repetition of past problems

- ***Experiences with tendering and contracts in government departments***
- ***Practice and procedure for government owned corporations (GOCS)***
- ***Probity, disclosure and ethics when engaging with the private sector***
- ***Expectations and issues of concern with disaster recovery contracts is Queensland.***

Introduction

Thank you to the Queensland Law Society for inviting me to speak today. As both a practicing lawyer and a probity auditor/advisor, my goal is to give you an insight into how the government lawyer can assist his department or agency to avert risk and avoid legal confrontation in the procurement of goods and services irrespective of the urgency or other imperatives placed upon the officers of his department or agency.

At the outset I recognise the contribution my legal practitioner colleague Eden Bird has made in the research for and drafting of this paper.

Post-disaster tenders will follow the same general procedures as all government tendering in Queensland, with a few exceptions. The exceptions are special procedures put in place by the Queensland Reconstruction Authority, which Ian Briggs has already discussed, and Greg Smyth will expand on, and accordingly this paper will focus on the universal requirements common to all tendering, and look at some examples from past experience.

Briefly, I will address four areas in this paper:

1. Tendering practice and procedure for government departments and government owned corporations (the term 'government agencies' will be used to describe the two collectively);
2. Probity, disclosure, and ethics when engaging with the private sector;
3. Experiences with tendering and contracts in government agencies; and
4. Expectations and issues of concern regarding disaster recovery contracts in Queensland.

Practice and procedure for government agencies

The legal and probity requirements for government owned corporations (GOC's) generally do not differ from those for Queensland Government departments.

In particular, the *State Procurement Policy*, administered by the Queensland Government Chief Procurement Office (QGCPO) applies to a number of GOCs listed in Schedule F of the *Policy*, namely energy companies, ports authorities, Queensland Rail, Queensland Investment Corporation, and SunWater.

The main effects of the *Policy* are summarised at paragraph 3.1, namely to require agencies to:

- *advance the priorities of the Government*
- *achieve value for money*
- *ensure probity and accountability for outcomes.*

The latter requirement rolls in the separate responsibilities created by other legislation, including the *Financial Accountability Act 2009*, *Financial and Performance Management Standard 2009*, and *Public Sector Ethics Act 1994*.

The *State Procurement Policy* refers to the idea of 'probity' alongside 'accountability'. The term 'probity' is synonymous with 'integrity' or 'honesty', and in practice it draws in a number of related concepts. The *Policy* refers to four precepts:[1]

- *fairness and impartiality*
- *transparency of process*
- *confidentiality and security of information and materials*
- *effective management of conflicts of interest*

Each of these requirements appears straightforward, yet is capable of presenting a broad range of consideration and challenges.

It is noteworthy that the new Schedule E to the *State Procurement Policy* creates a disclosure requirement after the completion of a procurement process. The new Schedule commenced in April 2011, and requires the publication of results of procurement processes valued at more than $10 million on the eTender website within 60 days of a contract being awarded. The details to be provided include the number of offers sought, evaluation criteria and weightings, form of contract, deliverables, contract milestones, and contract performance management mechanisms.

A range of other legislation also creates responsibilities or duties bearing on the procurement and disposal activities of government agencies, including:

- *Crime and Misconduct Act 2001*
- *Criminal Code 1899*
- *Fair Trading Act 1989*
- *Information Privacy Act 2009*
- *Right to Information Act 2009*

In relation to local councils, the *City of Brisbane Act 2010* and the *Local Government Act 2009* are relevant.

[1] At p 32.

More generally, legislation such as the Australian Consumer Law regime embodied in the *Commercial and Consumer Act 2010* and the *Fair Trading Act 1989* will affect government procurement that occurs in the course of 'carrying on a business'.[2]

A critical concept in the law of tendering, which many of you will be familiar with, is the 'process contract'. Following the authority of *Hughes Aircraft Systems International v Airservices Australia*, it has been recognised that requests for tender may constitute contractual offers, accepted by tenderers upon the submission of a conforming tender, at which time the agency will be contractually bound to observe the procedures outlined in the tender, and behave in good faith toward the tenderers.[3]

The law in relation to process contracts is far from settled, with no decisions of the High Court or even an intermediate appellate court on the topic. Divergent approaches have been taken by various courts, in relation to a range of different causes of action raised by aggrieved tenderers.[4]

Discussing the complexities of the law of process contracts is beyond the scope of this presentation. A forthcoming paper in the *Australian Law Journal*, titled *Tendering for Government Business: process contracts, good faith, fair dealing, and probity*, written by myself and my colleague Mr. Eden Bird, explores the current state of the law. In the meantime, I shall endeavour to provide a practical approach which conforms to any of the possible interpretations of the authorities.

Probity, disclosure, and ethics when engaging with the private sector

The authorities and literature regarding government tenders frequently refer to individuals described as 'probity auditors' or, sometimes, 'probity advisors' (for convenience the term 'auditor' will be used as a catch-all). The role of probity auditors is to be an independent supervisor of tender processes for procurements that are large, complex, high-profile, sensitive, or controversial.

The *State Procurement Policy* clause 9.3 mandates that an auditor be engaged for procurements of more than $10 million, or $100 million in the case of construction contracts. However, there is always a discretion to engage an auditor for smaller procurements. The QGCPO is in the process of establishing a whole-of-government probity services provider panel.

Additionally, the growth in the public sector of privatisation, contracting out, private financing arrangements and project delivery by early contractor involvement, "alliance contracts" and private/ public partnerships requires a greater need for probity auditing as one aspect of contract management.

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[2] Although most tendering activity will not meet this definition: see *J S McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419; *Corrections Corporation of Australia Pty Ltd v Commonwealth* (2000) 104 FCR 448 at [15];

[3] (1997) 146 ALR 1.

[4] See, eg, Dalcon Constructions Pty Ltd v State Housing Commission (1998) 14 BCLC 477; Cubic Transportation Systems Inc v State of New South Wales [2002] NSWSC 656; *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211; Ipex ITG Pty Ltd (in liq) v State of Victoria [2010] VSC 480.

In general, the probity auditor oversees the course of inviting tenders or proposals, and of the evaluation thereof, to ensure that these processes are conducted in accordance with probity principles, and relevant documentation. This typically includes not only the document creating the process,[5] but also an evaluation plan, to be used by the agency's staff in assessing proposals, and ideally also a probity plan to guide the staff throughout the process. The latter documents provide a roadmap on issues such as confidentiality of information and conflicts of interest, which are also within the domain of the auditor.

As agency or contractor staff is introduced to the process, they are 'inducted' in probity principles and protocols by the probity auditor. All agency staff, consultants, and 'imbedded consultants' or 'outsourced advisors' involved in a process should be required to sign confidentiality declarations from the outset. As well as creating clear legal requirements, these assist in focusing the participants' minds on correct behaviour, what information is likely to be confidential, and helps avoid mistakes.

The probity auditor is not a member of the tender evaluation panel, although he or she should be present at meetings thereof. While remunerated by the government agency, the auditor is not an employee or agent of the government, and must be sensitive to the concerns and issues raised by the tenderers, as well as the agency.

Frequently probity auditors are experienced professionals such as lawyers, accountants, or engineers. They need to be experienced in contractual matters, to be in tune with the expectations of acceptable behaviour in the public sector and to have a refined sense of judgement on commercial and ethical issues.

In the event that the probity auditor is a lawyer, he or she is not contracted to provide legal advice. However, there will often be an overlap between legal and probity issues, and the auditor will often need to work with the agency's legal team to prevent or resolve problems. If involved in a process from the outset, the feedback of an experienced probity auditor in relation to tender documents and evaluation plans may prove invaluable in avoiding problems before they arise.

The supplier

The requirement of fairness and impartiality may be regarded in part as a 'motherhood statement' and is part coextensive with the need for transparency, and the avoidance of conflicts of interest. However, the idea of a 'fair' process goes further, and regard should be had to community expectations of how a government agency best conducts itself in the expenditure of public money.

The requirement of transparency does not go so far as to deprive an agency of its capacity to bargain, but nonetheless a far greater degree of candour and disclosure to potential suppliers is required relative to the private sector. A clear, auditable written record is essential, and communications on any matter of importance with tenderers ought to be undertaken in writing where possible. Minutes of discussions, meetings, and even important telephone calls should be kept. As well as providing

[5] Such as a request for tender (RFT), request for proposals (RFP), or a document seeking expressions of interest (EOI).

accountability to the public, these mechanisms enhance an agency's internal accountability, and accountability to Parliament, and ought to be standard in any case.

The requirement of confidentiality bears not only on the agency's own internal materials, but also documents supplied to the agency by proponents or tenderers in the course of seeking to win business. Even indirect and inadvertent disclosure of commercial-in-confidence information such as pricing structures supplied by a tenderer to another party may have serious consequences. By a breach of the general law duty of confidence, the agency risks future dealings by losing the confidence of tenderers.

The electronic storage and transmission of information creates particular challenges for information security. A clear framework for agency staff is needed, defining who needs to know what, and information should not be distributed other than in accordance with the framework. Confidential information should not be stored on laptops, portable hard drives, or memory sticks where avoidable. Emailed documents should be password protected, and CC-ing documents to unnecessary recipients avoided.

Finally, the management of conflicts of interest is critical to achieving the best outcome from a procurement process, avoiding corruption, and maintaining a good public perception of the agency. Even a single scandal will be detrimental to this perception, and an ultimate finding that the process was proper overall may not entirely erase the stigma. The use of panels of decision-makers, rather than individuals, goes some way towards further managing this risk, but it must be remembered that a conflicted individual may influence a panel.

Public Private Partnerships

As previously stated, there is an increasing trend in government to join with commerce ("Public Private Partnerships", "Alliance Contracts") for procurement and project delivery, which introduces a greater necessity for probity guidelines at the outset of the relationship and probity scrutiny during the course of the relationship.[6] I advocate a 'whole of project' approach to probity scrutiny.

The increasing occurrence of Public Private Partnerships can lead to a conflict in underlying accountabilities. The philosophy of "being one team" for project delivery, including the sharing of "pain and gain", as against an arms-length relationship between government and contracted tenderer, highlights additional governance risks. While public officials are tasked with the goal of meeting the public interest as effectively as possible, the private sector holds a greater economic focus, with a need to maximise company profits and subsequently shareholder dividends.

Thus, the Public/Private team venture has an inherent conflict of interest which, in my view, requires probity supervision, not just up to the awarding of a 'partner' with government to undertake a project; but then as an advisor to the "Alliance Leadership Team" to oversee the process of the letting of the various sub-contracts (often in terms of millions of dollars) project managed by the private enterprise partner.

[6] Alford LC, 2009. *Current considerations in relation to land acquisition, alliance contracting between government and private enterprise and public-private partnerships*

As an example I undertook an “audit” into the letting of a major sub-contract by an alliance, on request by the Government partner. These were my conclusions:

> *I have formed the preliminary view:*
>
> *a. that the Procurement Management Plan is inadequate in its definitions and process for probity, and the process of transparent evaluation of tender bids;*
> *b. that the process of this evaluation and recommendation of subcontractor does not meet the criteria of "open and effective competition";*
> *c. that the manner in which this tender, was evaluated, essentially placing the burden on a single officer, without the benefit of a structured panel, representing all parties to the Alliance, was seriously flawed;*
> *d. that the manner in which the (successful) subcontractor tenderer was treated gives rise to the impression of unequal treatment of tenderers, and perceived, if not actual, bias.*
>
> *…*
>
> *It is my opinion that any breach of the transparent assessment in the evaluation on these … criteria constitutes a departure from process, and brings into focus whether the Alliance is in breach of the "process contract" with all three tenderers.*
>
> *Importantly, in terms of probity and process the Alliance Manager, through the Alliance Procurement Manager, was obliged to accord with the* ***Principles governing the making of contracts****, spelled out at section 481 of the Local Government Act 1993. This section is stipulated as a Reference Document at clause 19 of the Purchasing Management Plan.*

These conclusions speak for themselves as to the inadequacy of the probity procedures adopted in tis instance once the Alliance Manager role had been awarded.

As well, government agencies are increasingly relying on ‘contract employees’ or outsourcing where confidential information, intellectual property and decision making are ‘shared’ (for example the construction and ICT sectors). It is my experience that, despite the publicity given to probity issues, the decisions of the Courts, and conduct of enquiries in the Crime and Misconduct Commission, there remains ignorance as to proper process, and a tendency to try to circumvent it. Most importantly, levels of knowledge are incomplete and subtle issues are not appreciated.

On occasion, a party may be in consortia in two bids, a ‘contract employee’ may have previously been employed in the specific area of work with a tenderer, or most likely consultants may have a business association with the agency in the first instance, previously or currently with Contractors in the tender bid. It will be necessary to have certain industry participants/companies and/or consultants institute “Chinese

walls" [7]between their personnel at head and local office, and from information flow from the tenders. The probity auditor can assist the agency lawyer generally with the scope of these undertakings by agency contracted in-house consultants, engaged external consultants, and the private companies involved.

Whilst instances where probity principles are ignored or are circumvented to achieve the 'right result' are not common, they unfortunately do still occur. In some cases, agencies are just not 'business ready', despite publishing good Codes of Conduct, Codes of Practice, and Procurement Policies.

Relevant stakeholders are not well grounded in applicable laws and regulations, and policies and procedure which are required to be adhered to in government privatisations, tendering and contracting processes. Often in GOC's external consultants are engaged to "manage" a procurement process. Often I have found a lack of appreciation of the probity requirements of a government agency, by the consultant.

It is efficacious for the government agency to engage a probity auditor as early as possible in the procurement process, to receive advice as to the formation of all underpinning documents. It is also my experience that quality training is a major antidote to these problems.

Experiences with tendering and contracts in government agencies

The theory of probity appears straightforward, although the endless range of scenarios thrown up by tender processes means that the practice is more challenging. The following are a number of scenarios that I've encountered in my duties as a probity auditor:

Familial conflict of interest

I recently advised on a scenario where the wife of the Project Director for a procurement project commenced employment with a company which was a market leader in the field, and was expected to tender. The Project Director was not an employee of the government agency, but a consultant employed by the agency to manage the process. The wife was not employed in a capacity likely to bring her in contact with the tender process, but did report directly to the manager known to be the bid leader on behalf of that company. There was no identifiable risk of misuse of confidential information. The Project Director had already decided against being a member of any evaluation panels in relation to the project, but wished to remain in his overall commanding position.

Nonetheless, it was recommended that the Project Director be replaced by his consulting firm employer, and quarantined via 'Chinese walls' from the tender process within his consulting firm. The Project Director indirectly gained a financial

[7] The term "Chinese Wall" refers to a self-enforced informational barrier consisting of systematic, as opposed to *ad hoc*, procedural and structural arrangements. These arrangements are designed to stem the flow of knowledge (in particular, unpublished price sensitive knowledge) between different divisions within a multi-capacity financial intermediary with conflicting interests and obligations: H McVea, *Financial Conglomerates and the Chinese Wall*, Clarendon Press, Oxford, 1993, p123

benefit through his wife's continued employment by her company. The fortunes of that company in Queensland would have been improved by winning the sizeable tender. As such, there was a potential for bias or the perception of bias if the Project Director continued to act.

Managing perceived conflict of interest or bias

Conflict of interest is not always easy to ascertain. The 'interest' may be purely emotional, rather than financial. One case that is memorable involved an infrastructure tender, where a tenderer raised a complaint about an expert advisor to the project officer. The advisor had previously worked with the tenderer, but had left amidst a falling-out.

The tenderer believed that the expert may have 'rigged' the weighting of selection criteria in a way that was objectively defensible, but nonetheless disadvantaged the tenderer. As the motivation was unclear, and the criteria weighting was unusual but not beyond reasonableness, it was not possible to prove bias conclusively. Additionally, the expert was an advisor only to the selection panel, not a decision-maker. There was no suggestion that any of the decision-makers were complicit in any wrongdoing.

The complaint arose after the process was concluded but before the contract was awarded. As a cautionary measure, it was advised that the entire evaluation process be redone, with a completely new panel.

Direct financial gain

I conducted an interim audit regarding the use of public money to conduct a product trial, where a researcher was also a contract employee in another capacity and director of a company holding the patent for a device used in the trials. Issues of accountability in the use of public money to procure this research arose, as did the issue of conflict of interest. I recommended that the researcher take no further part in the trials, and that the control and carriage of the trials be handed over to a person with no direct or indirect financial interest, and no working association within the agency with that researcher. The agency was urged to consider relocating the trials to another location.

Preserving fairness and impartiality where project scope changes

Another serious challenge that can arise during a tender process is circumstances dictating a revision of the scope of the project. Two recent projects with which I have been involved presented this problem, and the approach taken in each was different.

The first involved a select tender to four companies that had been shortlisted following an EOI process. The tender was to be on a fully documented, lump sum basis for a large construction project.

All four tendered sums substantially exceeded the project budget. It was open to the tenderer at this stage to reject all the tenders, a right specifically reserved in the documentation. A new process could then have been undertaken with a revised scope, however this would have required additional cost and time.

Instead, a workshop was held with the three tenderers whose bids were closest to the project budget to investigate areas for possible savings. The agency then sought Post Tender Addenda in relation to the revised scope from all three tenderers. On the basis of these bids on the Addenda, best and final offers were sought from two tenderers. The contract agreed upon was a Construction Management contract in lieu of a Lump Sum contract, in view of documentation which had to follow the revised scope. The entire process was overseen by me, and subsequently audited by report to the agency for compliance with probity standards.

Change of scope – a different approach

A second situation concerned the removal of approximately 1/3rd of the value of a project, in respect of which tenders had already been entered, on account of a budget decision, as well as other changes to the project.

Of the five tenderers, all large international companies, three had been shortlisted, and one company was 'head and shoulders' above the others. The agency wished to invite a revised tender on the new project scope from the preferred tenderer only, and negotiate in relation to this. This appeared to be strictly permissible under the terms of the request for proposals, which was not framed as a process contract.

While no detriment may have been occasioned by such an approach to the agency's ability to obtain value for money, or award the project to the most qualified tenderer, the probity principles of transparency and fairness may have been violated.

The time and resources required for a new process to be undertaken were not justified, or for Addenda to be sought along the lines of the above scenario. As such, the tender process was terminated without result, and the agency then opted for a sole-source procurement on 'public interest' grounds. The rationale for doing so was clearly documented and signed off. While the outcome was effectively the same as if a modified tender had been sought from one tenderer only, the transparency and accountability of the process, and reasoning behind the decision-makers' actions, was clearer.

Expectations and issues of concern with disaster recovery contracts in Queensland

Inevitably, the present circumstances in post-flood and cyclone Queensland are leading to increased procurement by government of a range of goods and services. This begs the question, of how to maintain probity in the letting and awarding of contracts with the understanding that there is increased urgency for work to commence because of the reconstruction.

It must be said firstly that, while the scale and scope of procurements being made may be out of the ordinary, the mere fact of procurements being made under time pressure is not in itself unusual. Accordingly, I would suggest that the skills and knowledge to deal with the situation certainly exist within government agencies, and the natural disasters ought not be used as an excuse for sloppy or substandard procurement processes.

The further observation should be made that haste is certainly not necessarily the enemy of probity. A more streamlined procedure than is ordinarily used will meet probity requirements, as per the *State Procurement Policy*, if it is properly documented and carried out in accordance with those documents. Initiate a planned approach to each tender document, focussing on outcomes rather than process.

Put bluntly, I am of the view that it is all about taking care of the drafting of the initial document with a stipulated set of rules and principles. There is a sound argument that irrespective of whether a probity auditor is appointed or not, if a set of documents contains explicit rules and protocols in relation to behaviour and probity, at least there is a benchmark from which executive government, without an independent advisor (if one is considered unnecessary) can determine the rectitude of behaviour. Each tenderer or proponent is on clear notice as to the behaviour expected in the process.

I can point you to numbers of these protocols and in fact very explicit RFT, RFP and EoI documents where the rules and principles are very clearly stated. The probity principles should be integrated into documents in an actionable and auditable manner.

If each "emergency" tender offer contained very explicit protocols, then if required a probity auditor can react later; that is by reviewing the matter during the letting process or in fact after the letting process is concluded (e.g. during the construction period) were there to be a question raised. The probity auditor could make a meaningful evaluation, as the protocol was explicitly spelled out in the tender documents, and recommend the necessary discipline or actions to be undertaken by the principal.

The agency issuing a tender ought to consider using fewer evaluation criteria, or simpler criteria, to reduce both the time needed for tenderers to reply, and for the panel to evaluate the tenders. As long as all tenderers are treated equally, the process is not less valid simply because it is less detailed or complicated. Irrespective of urgency a panel of at least two should be charged with evaluation and those recommendations vetted by a further independent officer.

Similarly, circumstances where an EOI followed by an RFT or RFP would ordinarily be used might be condensed by moving straight to the second phase. Alternatively, select tendering from already approved preferred suppliers might be used, where an RFT to the market at large would be preferable under normal circumstances. Where appropriate, sole-source procurement on public interest grounds may be employed.

To the extent that modifying the approach to be taken in these ways could provide an outcome that falls short of the optimal price for goods or services, it should be recognised that part of the value for money equation is inevitably the ability to make the procurement in the timeframe required.

These approaches can be augmented by the clear and explicit documentation, including the request for tender, tender evaluation plan, and any other protocols and procedures drafted for the process, calling on good precedents. There may be merit in sacrificing some flexibility for certainty, giving decision-makers a clear picture of how they must proceed.

I re-state: under such an approach, even if a probity advisor or auditor was not used throughout the process, a thorough review (or audit) after the fact could still assess whether probity was maintained, and appropriate action could be taken at that stage.

This is consonant with a general suggestion I wish to make, regarding the use of process contracts. It is my experience that many government lawyers seek to draft tender documents in a manner that attempts to avoid a process contract being formed.

Recently, I reviewed a clause as follows, in a document intended *not* to constitute a process contract (emphasis added):

No contractual relationship, other than arising out of these EOI Terms and Conditions, will arise between [the invitor] *and any Proponent or prospective proponent until a Project Agreement or another binding agreement has been executed by* [the invitor] *and the successful Proponent.*

The inescapable implication of that clause is that the EOI Terms and Conditions did themselves constitute a contractual relationship, and only circumstances external to those Terms and Conditions were excluded from consideration.

Contrast the following example:

By issuing this RFP, [the invitor] *is under no obligation (whether equitable or legal) to proceed either in whole or in part with the procurement of the goods and/or services to which the RFP relates.* [The invitor] *is not committed contractually or in any way to any person who may receive the RFP or submit a Proposal.*

In my view, this clause is effective in disclaiming the existence of a process contract. It is clear that there can be no agreement to be bound, an element which remains integral to finding the existence of a contract, even under the line of contract law authorities which move away from the offer/acceptance model.[8] At the same time, representations are made throughout the document as to the procedure to be followed, and as to adherence to a procurement manual. Notwithstanding the absence of a process contract, the clause would not have shielded the invitor from estoppel or misrepresentation claims if the prescribed procedure was departed from to a tenderer's detriment.

In view of this, and bearing in mind the potential for problems even in tender processes that are not expedited, I am of the view that government lawyers drafting tender documents ought to seriously consider 'grasping the nettle' of process contracts. By acknowledging that there is a clear process creating rights for the tenderers, but clearly defining and circumscribing the process and the rights, government agencies will create certainty and avoid surprises down the track.

Furthermore, public servants work in an environment where they are required to consider a wide range of policy and procedure documents, containing requirements ranging from the highly specific to very general 'motherhood' statements. If probity

[8] See, eg, *Hyatt Australia Ltd v LTCB Australia Ltd* [1996] 1 Qd R 260 at 264; *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32.

requirements are to be given appropriate primacy, there is real merit in specifically incorporating them into contracts in an auditable form.

As Adams J observes in *Cubic Transportation Systems Inc v State of New South Wales*: *"Aspirational statements may provide a warm inner glow but they are no substitute for unambiguous language targeted at actual risks with clearly stated consequences"*.[9]

Finally, the urgency of post-flood procurements should not impact on other parts of the probity equation. Procedures for security of documents, and the protection of confidential information ought not to be affected by an agency employing a quicker process. Nor should transparency be compromised, when keeping records of process is a general clerical requirement.

Conflicts of interest, an ever-present problem, will inevitably continue to arise. One approach which might be employed to save time is to mandate the removal of decision-makers who are potentially compromised as a cautionary measure. So, whereas under ordinary circumstances an investigation may be held and a probity advisor's view sought, at the present time it could be preferable to simply stand down the decision-maker if a credible suggestion of conflict arises, without an investigation (and without prejudice to that person).

In effect, this approach treats a suggested perception of conflict as a conflict, and accordingly eliminates both actual and perceived conflicts. Scenarios such as the one I described earlier regarding the perceived bias of the expert requiring a process to be redone are thus avoided.

Conclusion

Plan your tender process and probity protocols, insist your managers abide by them and have your tenderers on notice.

If it is advisable to appoint a probity auditor, do it early in the process. Choose a professional whose attention is to the team, and has a philosophy that the role is not to interfere with the client's business, but to facilitate the procurement process by creating an awareness of the meaning of, and need for probity, abiding by its principles, reacting responsibly to any issues as they arise and reaching a sensible solution to them during that process; not stalling the process. This is a proactive role designed to protect the project's integrity.

Each project has different issues and demands and the probity auditor seeks to ensure that the probity procedures respect the client's preferred procurement policies rather than seeking to impose unnecessarily rigid and inflexible rules and procedures.

Thank you.

Lindsey Alford
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[9] [2002] NSWSC 656 at [32].