

Guide to Ensuring Probity in Procurement

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What is probity?

For the purposes of public sector procurement, probity means acting according to strong moral principles of honesty and decency and complying with (and being able to demonstrate compliance to) all required probity principles, guidelines and requirements.

Probity makes good business sense as it ensures the integrity of procurement decisions. It cannot guarantee though, that issues will not arise in relation to the management of the process or that the final outcome will not be contested. In that respect, probity is not an optional extra in the management of public sector procurement.

There must always be probity in the management of public sector procurement. What changes is the addition of probity measures to facilitate management of high probity risk, the method by which probity procedures, policies and guidelines are implemented, and compliance with those monitored and reported.

Why is probity necessary?

Probity is necessary to ensure that expenditure of public sector funds is carried out in accordance with Government requirements and regulatory expectations; such as achieving value for money and ensuring that government funds are expended in an economical, efficient and effective manner.

The public sector is not only responsible for the outcomes it achieves, but how it achieves those outcomes. Ensuring appropriate probity arrangements provides assurance to various sectors of Government and the taxpayer that government funds have been expended to achieve the best possible outcome using equitable and measurable processes.

Who does probity?

There is an important distinction to be made between who "does" probity and who is responsible for the probity of a process.

Organisations can manage the probity of their procurement activities by applying internal expertise and/or engaging an external probity consultant as a probity advisor or probity auditor according to the requirements of the procurement.

In all cases, individuals whose primary role is to deliver probity services must have either completed Government mandated probity training or be able to demonstrate a high level of skill and knowledge in the probity area.

In all cases, "Probity" is the responsibility of the senior officer responsible for the procurement. The engagement of external probity advisors and/or auditors does not transfer this responsibility for probity to them and away from the health service.

The implementation of an appropriate governance framework ensures the identification of those responsible for undertaking probity related tasks in procurement processes, and those who are accountable for ensuring compliance with all relevant probity requirements.

What is a Probity Practitioner?

The term Probity Practitioner is usually applied to an individual who has specialised probity skills and knowledge, and/or whose main work responsibilities involve undertaking or managing probity activities. A

Probity Practitioner can be an employee of a health service/government department/ agency, or an external contractor/consultant appointed to carry out a probity role.

The most important requirement is that there must be separation between an internal Probity Practitioner and the actual procurement activity. For example, an internal Probity Advisor should report separately to the senior officer responsible for a procurement process but should not have a direct line management relationship with this same senior officer.

What is a Probity Advisor?

A Probity Advisor maybe an external consultant engaged to work in a procurement team under the direction of project management or similarly qualified advisor (e.g., legal officer). Typically, a Probity Advisor will provide advice on the establishment of probity arrangements in a procurement process and will assist in preparing documentation such as Procurement Conduct Plans, information management protocols and providing input to the development of market documents such as Invitations to Supply or Expression of Interest etc. A Probity Advisor cannot sign-off a procurement process for the purposes of providing independent assurance, as they would be signing-off on their own work.

What is a Probity Auditor?

A Probity Auditor may be an external consultant or similarly qualified person, who reviews procurement processes to provide independent, external, assurance that the process has complied in all material aspects with all relevant procurement policies, procedures and guidance. A Probity Auditor is independent of the procurement team, does not work under the direction of any person associated with the procurement process that they will audit, and typically reports at a high level within a health service, government department or agency.

Probity Advisor versus Auditor

There may be situations, such as in the case of high risk, high profile, and/or high value procurements where it will be necessary to engage a Probity Advisor and a Probity Auditor. These must be sourced from different organisations and consideration should be given to early engagement at the planning phase.

Probity principles for procurement processes

The organisation must ensure that it establishes appropriately designed procedures and systems in order to demonstrate that it has adhered to the following government probity principles and HSV Purchasing Policies:

- Accountability of the participants and transparency of the procurement processes
- Fairness and impartiality in carrying out the procurement related processes
- Management of actual, potential and perceived conflicts of interest
- Maintenance of confidentiality and security of documentation and information
- Attainment of value for money under the prevailing circumstances
- Establish a complaints process.

When to engage an external Probity Advisor and/or Auditor and what are the reasons to do so?

The decision to engage an external probity advisor and/or auditor should be made after due consideration of the procurement probity risks and identification of the governance requirements for the procurement. There are many factors to consider in measuring probity risk. HSV has developed a risk assessment tool which includes a range of potential probity risk factors.

Risk Analysis Tool

For more information about risk analysis refer to the Risk Analysis Tool, found available on the HSV website.

Measuring probity risk requires qualitative assessment of a range of risk factors; with any combination of factors potentially creating high probity risk. Some of these may be able to be mitigated, however some may not.

The extent and nature of probity risk, that can only be partly mitigated, will be a factor in deciding how much specialist assistance is required to manage probity of the procurement. For example, an organisation with high levels of probity risk and no staff with specialist probity skills may need to engage a probity advisor to work as part of the procurement team.

A high value procurement attracting high levels of public interest and linked to the achievement of prominent policies and legislative obligations, may require a probity advisor to strengthen management of probity internally. It may also require a probity auditor who can provide assurance for the purposes of external accountability.

The engagement of specialist probity resources should strengthen the organisation's ability to better manage its probity risk. Bear in mind that engagement of external probity specialists does not transfer the responsibility for managing the probity of the process from the organisation to the specialist advisor or auditor.

How to monitor compliance with probity requirements and how to measure performance?

Compliance with probity requirements is measured by referral to the relevant probity policies, procedures and guidance that apply to the procurement. The choice of probity expertise for a project will be directly influenced by the outcome of a probity risk assessment process as this will indicate the level of probity management and sign-off that should be required. For example, a Probity Auditor provides the best level of independent assurance compared to that provided by an internal probity practitioner or a probity advisor.

Some examples of performance measurement criteria for monitoring the effectiveness of the probity requirements established for a project include the:

- Number of probity issues related to the design of the probity framework, that arise during the process
- Efficiency with which these issues are addressed
- Effectiveness of measures established to resolve issues
- Quality of information available to resolve probity related issues
- Ongoing reporting of probity activities and issues
- Ability of the probity requirements to withstand external scrutiny.

Accountability of the participants and transparency of the procurement processes

Effective project accountability and transparency is achieved by establishing a well-documented and robust decision making framework that:

- Establishes appropriate decision making processes for the project
- Is able to justify its use of public resources
- Provides a straight-forward information trail that facilitates management of communications with stakeholders and scrutiny of the project.

Fairness and impartiality in carrying out the procurement related process

A fair process is the cornerstone of best practice procurement. Probity in procurement embodies the fairness, impartiality and integrity of the process. Consistency in the treatment of, and interaction with, potential suppliers is important in ensuring probity standards are met.

Maintenance of confidentiality and security of documentation and information

Although accountability and transparency are fundamental to the work of public sector organisations and public officials, including health services there is some information that must be kept confidential, at least for a specified period of time, in order to protect the integrity of the process and give Respondents and corresponding suppliers the confidence to do business with government.

A significant amount of confidential information is likely to be generated during a procurement process. A potential risk to the procurement process is that there could be unauthorised access to confidential information.

If necessary to keep or create hard copy materials rigorous management of hard copy information is critical since this information is harder to track and can easily be lost, misplaced and/or leaked to, or accessed by unauthorised parties. Specific protocols for managing hard copy information include:

- Restricting the ability to download, print, and photocopy information
- Limiting the distribution of hard copy information
- Ensuring that members of the procurement team do not maintain personal files of procurement process information. For example, copies of draft evaluation reports, assessment notes, meeting notes
- Numbering or watermarking hard copies of confidential information
- Ensuring that hard copies of information provided at meetings is returned to the procurement team at the conclusion of meetings
- Ensuring that dissemination of procurement process information is limited to a single source
- Creating a register of hard copy information that is distributed to relevant parties.

Appropriate arrangements must be made to protect components of a proposal that are identified as commercial in confidence, confidential or comprising the intellectual property of the Respondent. If there are doubts about the confidentiality status of any information, then it should be referred to the Project Legal

Advisors or relevant advisor in the process/procedure. Any information that is deemed by the Project Legal Advisors to be confidential will be subject to restricted access.

The following items should be maintained as confidential:

- Contents of submissions from stakeholders and proposals of the respondents
- Confidential information produced as part of the evaluation process (e.g., meeting minutes, evaluation reports, reports etc.)
- Other information related to the process that is not publicly available
- Any information deemed to be confidential and not appropriate for general access.

Any information that could give any Respondent (s) an unfair advantage should be made publicly available to all participants.

Maintaining confidentiality through managing communications

Effective communication is critical to the success of a procurement process. Many different types of communication will occur throughout the process, and there may be probity risks associated with a range of those communications.

At all times, care should be taken to structure, manage and record communications in order to minimise probity risks arising. Key considerations include:

- **Authorisation Procedures:** should be established to ensure review and authorisation of draft documents/correspondence with respondents/tenderers, recognising the need to send consistent and internally agreed messages to all Respondents/tenderers
- **Contact points:** A small group of employees/advisers should be authorised to deal directly with Respondents/tenderers and key stakeholders. It is preferable to keep the number of authorised officers/advisors to a minimum. Under special circumstances, these employees/advisers may also be given the authority to delegate to others to communicate on specific matters which arise
- **Maintaining records:** Arrangements must be made for formal documentation of key discussions, including minutes which record the main points and substantive issues raised, in face to face meetings and telephone conversations. To this end, participants in meetings should be encouraged to only keep notes that reflect their personal action items and have the official minutes stand as the formal record of the meeting.

General communications with the market

When interacting with the market seeking information and/or submissions, the following guidelines will apply:

- There must be consistent messages and information provided to the market and all respondents/tenderers must have the same opportunity to access information
- Any information that is not general public knowledge must only be communicated to respondents/tenderers if it is considered necessary.

Staff should direct respondents or their representatives requesting information to submit the request via the project email account.

Communication with media/special interest groups

Any requests for information from the media or special interest groups should be referred to the relevant accountable officer/delegate/ CE.

Identification and management of actual, potential and perceived conflicts of interest

Conflict of interest issues arise when individuals are influenced, may be influenced, or appear to be influenced by personal or other interests when carrying out their official duties and responsibilities, and the matter has not been addressed. Conflicts of interest can result in a lesser standard of service delivery, diminished value for money, and/or create the perception of such. Most importantly, they bring into question the integrity of the process and the ability to defend it should the process be contested.

Any individual employed or engaged by the health service has a responsibility to follow all policy and procedural requirements established for a procurement process to manage any conflict of interest. Each individual employee, contractor or consultant is responsible for disclosing their own interests where there is a possibility that such interests may conflict with their role in the Procurement activity/project.

The distinction between a real, perceived, and potential conflict of interest cannot be eliminated through a simple view that all conflicts are bad and of equal importance.

Rather, it is critical to ensure that a conflict of interest is identified and defined, and that its context in terms of process is understood, so that appropriate and relevant mechanisms can be established to address any issues that may arise as a result of that conflict of interest.

Examples of potential conflicts of interest:

- A partner, close family member or close friend, employed by a potential tenderer.
- A partner, family member or close friend who may gain financially from decisions made by the individual.
- Membership of a social, sporting, educational, political or special interest group, and/or membership of a family member or close friend; where the group may gain financially or otherwise by the individual's decisions.

Potential conflicts of interest

The above are examples only. There may be other factors that determine whether a real, potential or perceived conflict of interest may exist.

Table 1 provides an outline of key conflict of interest terminology.

Table 1: Key conflict of interest terminology

Term	Explanation
Actual conflict of interest	There is a real conflict between an employee's public duties and private interests.
Perceived conflict of interest	The public or a third party could form the view that an employee's private interests could improperly influence their decisions or actions, now or in the future.
Potential conflict of interest	An employee has private interests that could conflict with their public duties. This refers to circumstances where it is foreseeable that a conflict may arise in future and steps should be taken now to mitigate that future risk.
Personal Interest	Arises from the personal, professional or business interests of an individual, and may include the personal, professional or business interests of any individual or groups that

Term	Explanation
	person associates with, or any other associates or associated person with whom they have a direct connection.
Pecuniary (material) interest	A personal material financial interest that involves an actual or potential financial gain or loss, which may influence the individual's ability to execute their professional duties and responsibility without bias.
Non-pecuniary interests	Do not involve financial or any other gain for the individual but may create financial or other gain for people or a group identified as having an association with the individual. Where an individual's personal or family relationships, an association with a particular interest group or political group, or involvement in sporting, social or cultural activities may influence the individual's execution of their official duties in favour of these other interests.

Managing conflict of interest of Product

Reference Group members

In the case of procurements where product reference or other expert stakeholder groups are involved, it is necessary to ensure early identification of any conflicts of interest arising amongst members who have been included for their specialist knowledge, but who may be involved with respondents across a range of situations, for example as members of Advisory Boards or reference groups.

In some situations, these individuals may be acknowledged specialists in their field, and therefore may also be members of respondents' Advisory Boards. For example, Directors of Pharmacy who are members of Advisory Boards convened by pharmaceutical companies. In such cases, along with the obvious task of deciding if a conflict of interest exists, it would be important to consider mitigating factors such as:

- The extent of the commercial relationship (if any) between the individual Group member and the respondent
- The extent and nature of involvement of the Group member with the Advisory Board and the respondent
- The length of time over which such an involvement has existed
- The actual amount of influence that the Group member may have over evaluation outcomes
- Whether the Group member can easily be replaced by another Member with equal knowledge and standing in their specific field of expertise.

In cases where it is determined that Product Reference Group members must be included in the evaluation process, despite having a conflict of interest, it would be prudent to disclose the involvement of this individual in the market documentation and include clauses to the effect that in lodging a proposal, the respondent waives their rights to take action in relation to the participation of this individual. In such a case, it is important to seek legal advice to ensure the correct drafting of market documentation.

More information

Related documents and templates are available on the HSV website.

Disclaimer

The information presented in this document is general in nature and based on HealthShare Victoria's interpretation of the *Health Services Act 1988* (Vic) and any ancillary legislation and regulations in effect at the time, and should not be relied upon as legal advice. Please consider seeking professional and independent advice from your legal representative as to the applicability and suitability of this information and the legislation to your own business needs or circumstances.