



Probity in procurement

Probity, Procurement and Tendering Article Series

How to ensure probity throughout the procurement process

In our previous articles in this series on the tender process we have discussed various risks that can be managed by an observation of probity principles. In this article we provide a checklist of tasks that should be considered when developing a probity plan for a procurement.

In our last article of this series to be released next week, we will be discussing contract negotiation during the procurement process.

The objectives of a local government procurement policy are generally to advance the local government's priorities, achieve value for money, and ensure probity and accountability for outcomes.

Probity requires the purchase to be conducted ethically, honestly, and with fairness to all participants. Accountability for outcomes is about being able to explain or account for how the purchase has achieved its anticipated outcomes.

Best practice in government procurement would see the development of a suitable probity plan, and for high value or complex procurement activities, the development of the plan well before the commencement of the procurement process, as well as the engagement of an external probity adviser.

The Plan

A Probity Plan is a written plan which sets out how to ensure probity throughout a procurement process. If the procurement is high value, complex or otherwise poses risk, Council should engage a probity adviser to prepare an appropriate Probity Plan and observe the process.

Below we summarise what the Probity Plan should include for each stage of the process.

Content to include in a Probity Plan

Budget approval – The Probity Plan should document that funds for the procurement have been secured, prior to any communication with the market.

Conflict of Interest declarations – The Probity Plan must require all procurement and evaluation officers as well as external advisers involved in the process to sign conflict of interest declarations. The Probity Plan should also set out how conflicts of interest must be disclosed, documented, and managed.

Confidentiality agreements – The Probity Plan must require all external parties involved in the process, such as consultants and experts, to sign confidentiality agreements at the outset of the procurement.

Confidentiality procedures – The Probity Plan must set out how confidential information is going to be protected, and managed and that it is only available to those that need it.

Probity Adviser – if a probity adviser is engaged for the procurement, the Probity Plan should clearly set out the contact details for the probity adviser.

Procurement method – The Probity Plan should identify the procurement method, that is, if a select tender, public tender or negotiations with a single supplier is required, and any other additional process to achieve the desired outcomes.

Evaluation committee – The Evaluation Committee and their positions must be identified in the Probity Plan. When selecting the Evaluation Committee ensure you have appropriately skilled and experienced representatives, including external expertise, to ensure an effective and proper

evaluation to achieve the desired outcomes.

Tenderers have access to the same information – The Probity Plan must set out how the same tender documents and all relevant information must be provided to all tenderers equally. Contact must only be made by tenderers with your nominated contact and the details recorded. Any information provided to one tenderer must be provided to all tenderers.

Tender briefings and site visits – The Probity Plan must require that Council records who attended tender briefings and site visits and the information provided and make it available to all tenderers. There should also be a process for how Council officers must conduct themselves at tender briefings and site visits to ensure that there are no perceived or actual biases, and to ensure the process does not result in any advantage to one tenderer or group of tenderers over another.

Notification of variations or changes – The Probity Plan must require evaluation criteria to be established and documented before releasing the tender and set out how the evaluation criteria should never be changed to give advantage to any tenderer or group or class of tenderers. All tenderers should have access to the same information, at the same time. If there must be changes, allow all tenderers the same time and opportunity to re-submit tenders.

Proprietary information – The Probity Plan must detail how proprietary information, particularly in relation to innovation or other proprietary information, must not be provided to other tenderers and must otherwise be protected. Tenderers must have confidence in your processes, which requires dealing with this issue in tender documentation.

Process for receipt, recording and acknowledgement of tenders – this process must be documented in the Probity Plan, and no tenders should be read prior to the close of tenders. A register of tenders lodged must be kept.

Same approach to, and basis of, evaluation – tenders must be evaluated against the evaluation criteria, with each evaluation committee member adopting the same approach and methodology. Detailed reasons for scoring and selection of the preferred tenderer must be clear and recorded.

Negotiations – The Probity Plan must set out the process for negotiations with shortlisted or the preferred tenderer only. Ensure an agenda, and that interview questions are prepared and asked of all shortlisted respondents, with a record kept.

Notification of shortlisted and successful/unsuccessful tenderers – The Probity Plan should include a process for how Council is to notify shortlisted and successful/unsuccessful tenderers. Council must ensure the same information is provided to all respondents except matters specific to an individual respondent. Ensure the same time is made available to shortlisted respondents for interviews, presentations, or to provide further material and information.

Finalise Probity Plan – confirm if any changes to your Probity Plan are required. Once the Probity Plan is finalised ensure that all evaluation committee and other relevant officers are familiar with and sign an acknowledgement that they have read and understood the relevant documents.

Probity process after finalising the Probity Plan

Preparing for the RFT

Probity briefing – probity, in particular conflicts, confidentiality and security protocols, must be explained to all officers and external personnel involved in the tender process.

Finalise RFT documents – ensure the tender documents are prepared to elicit the information necessary to evaluate tenders against the evaluation criteria, including how the contractor's performance will be measured. All legal issues, accountability, and intellectual property restrictions must be clearly set out. Evaluation criteria, the selection process, late and non-conforming tenders, conflicts of interest, and transitioning in and out are all matters that must be clearly set out. The evaluation criteria should ensure that Council can properly evaluate the response against the needs of the particular project, ensure an assessment of the sound contracting principles and ensure that any they are consistent with any mandatory criteria in Council's policies and procedures.

Advertising – check press or advertising, website registration information and arrangements, contact details, and the tender registration list.

Security – ensure documentary and electronic information is secure.

Probity review of preparing for the RFT stage – check that all requirements in the Probity Plan have been met and record the outcome.

During the RFT

Tender briefing and site visits – ensure compliance with the process for tender briefings and site visits in the Probity Plan.

All tenderers to receive the same information – ensure that all tenderers receive the same information at the same time during the RFT stage, in particular following tender briefings, site visits and any requests for clarification.

Compliance check against Tender Conditions – prepare a written report of any non-compliance issues and the outcome, such as late tenders.

Probity review of RFT stage – check that all requirements in the Probity Plan have been met and record the outcome.

After the RFT stage

Probity briefing prior to evaluation – Evaluation committee members should be briefed again prior to the evaluation of any responses. The evaluation committee members will be reminded of how the evaluation process is to occur and their probity obligations such as keeping information secure, not divulging information to others and disclosing any conflicts of interest.

Release of tenders – The tenders should keep secure and only be released to the evaluation committee members at the same time.

Evaluation – carry out the evaluation without unreasonable delay and as quickly as possible. Have a timetable and follow it.

Due diligence – perform due diligence on all shortlisted respondents. This should include corporate information, ownership, litigation, directors' profiles, and financial security and history. Reference checking procedures should be the same among all tenderers, with confidentiality maintained.

Stakeholder briefings – where required, ensure relevant stakeholders are advised of the likely outcome and that confidentiality and security are maintained.

Probity review of evaluation stage – check that all requirements in the Probity Plan have been met and record the outcome.

Evaluation Report – once the evaluation process is complete, prepare an evaluation report to justify the recommendation and ensure it is consistent with the evaluation process, with reasons for selecting and rejecting tenders.

Probity review of Evaluation Report – if engaged, the probity adviser will review the process and the draft evaluation report from a probity perspective and make any recommendations.

Probity Report – if engaged, the probity adviser will provide a report to advise if the recommendations of the committee are consistent with the evaluation and the documented process, whether it is defensible, and if there are any outstanding probity issues. The probity adviser will also provide their opinion as to whether there is any probity impediment to the relevant delegate acting on the recommendation of the evaluation committee.

Notification of successful/unsuccessful tenderers – the notification to the successful tenderer should note that acceptance is subject to the execution of a contract.

Debriefing unsuccessful tenderers – this should be done by the Evaluation Committee chairperson with at least one other officer present. A record of the meeting should be kept.

Contract transitioning and contract management – a transition and contract management plan should be prepared.

Document storage – a complete record of all material and all activities must be kept.

Conclusion

The above serves as a checklist of tasks in chronological order which can form the basis for a probity plan. Paul Muscat and Craig Tanzer are regularly engaged as probity advisers and auditors on high value for complex procurements and to provide probity advice. If you require a probity adviser for such a project or would like us to provide probity training to your officers, please contact Paul or Craig to discuss.

Keep an eye out for the fifth and final article in this Series, "Contract Negotiations" where we discuss contract negotiations with preferred tenderers, including the negotiation process and how the object of negotiation can be achieved i.e. a mutually acceptable contract with both parties achieving an outcome aligned with their needs. We will also discuss negotiation strategy and the negotiation plan.

If you require procurement and/or probity or contract training for your staff, assistance with the review of your procurement, tender and contract documentation, or advice on contract departures and negotiations please contact Paul to discuss your requirements.



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