

## Probity and Ethical Procurement Guideline

### Purpose

This Guideline provides information and practical advice regarding probity and the ethical procurement of good and services.<sup>1</sup>

### What is Probity, Accountability, Transparency and Ethical Procurement?

**Probity** is the act of being fair and equitable. To display probity is to show evidence of ethical behaviour commonly associated with the practice of adopting and following well-considered procedures and processes to ensure that procurement decisions are fair, transparent and defensible. Probity relies on accountability and transparency in the procurement process.

**Accountability** means that public officers are responsible for the actions and decisions that they take in relation to the procurement process and outcomes.<sup>2</sup>

**Transparency** involves public authorities taking steps to enable appropriate scrutiny of their procurement activity.<sup>3</sup>

**Ethical Procurement** relates to the ethical conduct of government employees (and/or representatives) in undertaking and managing procurement. Ethical Procurement also concerns the expectation by government that suppliers ensure ethical practices in the conduct of their business and the actions of key providers in their supply chain.

### How do Probity and Ethics Relate to Government Procurement?

Maintaining probity, accountability and transparency is a key principle of procurement. Procurement activities should be undertaken in a manner that ensures:

- probity is upheld at every stage;
- appropriate record keeping is maintained and auditable;
- conflicts of interest are identified and appropriately managed;
- confidential information is kept confidential;
- there is transparency in decision-making; and
- public officers are kept accountable for their actions.

Implementing good probity and ethical practices in procurement will:

- improve the likelihood that value for money and good public outcomes will be obtained;
- reduce financial and legal risk to the government; and
- provide potential suppliers with the confidence that they will be treated fairly.

<sup>1</sup> Including the disposal of goods

<sup>2</sup> 'Commonwealth Procurement Rules', Commonwealth of Australia 2019 (Department of Finance).

<sup>3</sup> Ibid.

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Considering probity issues within procurement should be standardised wherever possible in the interests of achieving consistency in decision making.

### The Code of Ethics

The South Australian community places significant trust in the public sector to be ethical, honest, diligent and fair in its dealings and operations.

The [Code of Ethics for the South Australian Public Sector \(Code of Ethics\)](#), is a code of conduct for the purposes of the [Public Sector Act 2009](#), and identifies four values which are the foundation of public service:

- **Democracy** - It is the role of the public sector to support the government of the day, under law and the Constitution, in achieving the common good, primarily by providing services to the community. An emerging feature of South Australia's democracy is a higher level of collaboration between the public sector and the community in the design and delivery of services and the involvement of people in decisions that affect their lives.
- **Impartiality** - Public sector employees must be detached from political influence and the influence of partisan interests within the community. Instead, public sector employees must rely on evidence to provide objective advice to government and implement directions promptly and thoroughly.
- **Accountability** - Within a broad system of accountability under which ministers are accountable to Parliament, public sector employees are accountable for exercising their delegated authority and for performing their role within the values and standards of conduct outlined in the Code.
- **Diversity** - The South Australian public sector should be as diverse as the community it serves. The views and experiences of all people should be respected, regardless of nationality, gender, cultural or social background, sexuality, religion, age, or physical or intellectual ability.

### Ethical Standards

Government employees and/or representatives must adhere to the [Code of Ethics](#) and comply with the highest standards of ethical procurement when undertaking procurement activities.

The Code of Ethics identifies professional conduct standards that are binding on all public sector employees (employees). The following standards from the Code of Ethics apply to the procurement process:

- handling official information;
- use of government/public resources;
- conflicts of interest;
- acceptance of gifts and benefits; and
- reporting unethical behaviour.

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Ethical procurement principles affirm that employees are to perform their role in a fair, professional and proper manner.

Government employees including Chief Executives should also familiarise themselves with any specific requirements of the [Public Sector \(Honesty and Accountability\) Act 1995](#) as well as the [Public Corporations Act 1993](#) (if applicable).

The following should be applied to every procurement:

### Conflicts of Interest:

- Any actual, perceived or potential conflicts of interest identified before, during, or at the conclusion of a procurement process, is documented and managed effectively.
- Conflict of interest declarations for all participants (i.e. public authority employees, project advisers/consultants and probity advisers) is completed prior to commencing a procurement evaluation process, even where there are no conflicts to declare.
- Employees do not make improper use of their position or make improper use of commercial information gained through a procurement process.
- Employees strive to avoid actual, or perceived, conflict of interest, or undue influence.

### Confidentiality:

- Measures are in place to manage the security and confidentiality of documents (including emails and electronic documents).
- Confidentiality agreements for all participants (i.e. public authority employees, project advisers/consultants and probity advisers) are completed prior to commencing a procurement evaluation process.
- Measures are in place to protect the competitive position and intellectual property of bidders and the commercial interests of government.
- Measures are in place to prevent unauthorised access to, and divulging of, commercial-in-confidence information (except where allowed for by government policy or legislation).

### Gifts/Hospitality:

- Employees do not, for themselves or others, seek or accept gifts or benefits that could be reasonably perceived as influencing them.
- Offers of gifts during the evaluation process or other point in the decision-making process are refused, documented and reported to the Chair of the evaluation panel.

Government employees should familiarise themselves with the requirements of the [Guideline of the Commissioner for Public Sector Employment – Gifts and Benefits](#), the [Code of Ethics](#), and any further gifts and benefits guidance provided by the public authority.

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### Information and Records Management:

- Accurate records are kept for all stages of the procurement process including planning, sourcing and contract management.
- Relevant communication with suppliers is documented, including both written communications and verbal discussions.
- Decision making needs to be documented, including the process followed to arrive at that decision.
- Electronic records management processes are in place including storage of data and protection from unauthorised access in accordance with [PC030 Protective Security Policy Framework](#).

### Process Integrity:

- Clear procedures are established, understood, communicated and observed.
- Suppliers are treated equitably and with respect.
- Decisions are based on a pre-approved, fair and objective evaluation.
- Appropriate documentation regarding decision making and reasoning is maintained.
- Decisions made are documented and justified.

### Reporting Unethical Procurement Practices

All employees are required, under the [Code of Ethics](#), to report to an appropriate authority workplace behaviour that a reasonable person would suspect violates any law or represents corrupt conduct, mismanagement of public resources, is a danger to public health or safety or to the environment or amounts to misconduct.

### Managing Conflicts of Interest

A conflict of interest is a situation (actual, perceived or potential) where a personal, family,<sup>4</sup> associate,<sup>5</sup> or business relationship or other interest (e.g. in the capacity of a board or committee member of a third party) has a risk of unfairly influencing the proper outcome of a decision or process.

It is common for conflicts of interest to arise from time to time. However, it is important that a government employee or representative involved in any aspect of the procurement process declares in full and accurately any actual or potential conflict of interest in a written declaration. Persons with an actual, perceived or potential conflict of interest should consider not:

- being involved in developing the evaluation plan;
- participating in the evaluation process; or
- being an approver during the procurement process

<sup>4</sup> In accordance with the meaning for Spouse, Domestic Partner, and Relative in the [Public Sector \(Honesty and Accountability\) Act 1995](#)

<sup>5</sup> In accordance with the meaning for Associate in the [Public Sector \(Honesty and Accountability\) Act 1995](#)

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of a related procurement activity.

Any actual or potential conflict of interest that has a risk of unfairly influencing the proper outcome of a decision or process, should be identified and managed in accordance with the [Code of Ethics](#). Conflicts of interest should be identified and managed at the beginning of the procurement process, where possible.

### Independent Commissioner Against Corruption Act 2012 (SA)

The [Independent Commissioner Against Corruption Act 2012 \(SA\)](#) (ICAC Act) and [Directions and Guidelines](#) issued by the ICAC, stipulate obligations<sup>6</sup> of public authorities and public officers in relation to matters which are reasonably suspected of involving corruption, misconduct or maladministration in public administration.

Under the ICAC Act 'public officers' include<sup>7</sup>:

- members of the South Australian Parliament
- public service employees
- contractors performing work for a public authority or the Crown.

**Corruption in public administration** is the term used within the ICAC Act to describe a number of offences. Corruption generally involves criminal behaviour by a public officer while acting in their capacity as a public officer and may include theft, bribery, assault or abuse of public office. Complaints or reports which raise potential issues of corruption will be investigated by the Commissioner or referred to the South Australia Police or another law enforcement agency for investigation.<sup>8</sup>

**Misconduct in public administration** means the contravention of a code of conduct by a public officer that constitutes a ground for disciplinary action, or other misconduct of a public officer. The conduct must involve the public officer acting in their capacity as a public officer.<sup>9</sup>

**Maladministration in public administration** involves the conduct of a public officer or the practice, policy and procedure of a public authority that results in an irregular or unauthorised use of public money, the substantial mismanagement of public resources, or the substantial mismanagement in the performance of official functions. Maladministration is often associated with poor governance,<sup>10</sup> and includes conduct resulting from impropriety, incompetence or negligence.

Government procurement inherently represents some level of risk of reportable behaviour or conduct as defined above. It is therefore important for public authorities and employees to be aware of their obligations under the ICAC Act and

<sup>6</sup> Public authorities and public officers must report to the Office for Public Integrity all matters reasonably suspected on involving corruption, or serious or systemic misconduct or maladministration in South Australian public administration.

<sup>7</sup> Note: not an exhaustive list

<sup>8</sup> <https://icac.sa.gov.au/glossary>

<sup>9</sup> ibid

<sup>10</sup> ibid

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how they relate to procurement. Further information and guidance regarding ICAC obligations can be found at: [www.icac.sa.gov.au](http://www.icac.sa.gov.au).

### Probity Advisors and Probity Auditors

#### Probity Advisors

If required, the use of a probity advisor may be considered for complex and strategic procurements. A probity advisor works independently and actively with the public authority to ensure key probity issues are considered and actioned before and during the procurement process.

Probity advisors can make important recommendations about additional or different steps that the public authority can take to remedy or mitigate a probity issue.

Specific responsibilities may include:

- advice regarding probity within procurement processes and methodology;
- develop and implement a probity plan;
- monitor and support probity quality control and compliance with procedures;
- attend and advise at evaluation panel meetings; and
- project representative and liaison for probity auditors, if applicable.

Note: It is not appropriate for the probity advisor to take on the role of probity auditor in the same procurement process to which they have provided probity advice.

#### Probity Auditors

A probity auditor is different to a probity advisor. The use of a probity auditor may be considered for complex and strategic procurements where appropriate.

Probity auditors are not actively involved in the procurement process itself but are an independent auditor who reviews and express an opinion about whether the process has complied with probity principles. They are not necessarily procurement experts but maintain a specific focus on probity itself.

The appointment of a probity auditor can provide reassurance to stakeholders of the fairness and legitimacy of the procurement process and can minimise the potential for litigation or supplier complaints.

Accordingly, a probity auditor:

- has a completely independent role and provides an independent report attesting to the fairness of the process;
- normally reports to senior stakeholders/executives outside the evaluation and procurement process; and
- typically establishes an audit plan to test compliance of the evaluation process with the evaluation plan, and applicable policy and guidelines.

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Specific responsibilities may include:

- establish an audit testing program on identified criteria;
- review the probity plan;
- monitor/review probity application and compliance against prescribed practices and policy;
- provide independent scrutiny of the procurement process; and
- conduct a probity appraisal upon project completion and prepare a report.

### When a Probity Advisor or Probity Auditor is required

A number of factors should be considered in determining the need for probity expertise when undertaking procurement. These include:

- project value in financial terms;
- level of risk and complexity associated with the procurement;
- overall significance of the procurement;
- high degree of public interest in the procurement;
- level and type of industry engagement and/or co-design;
- politically sensitive issues;
- conflict of interest possibilities;
- project integrity and the possibility of being subject to scrutiny; and
- volatile market conditions and potential supplier disharmony.

### Probity Plans

A probity plan sets out the steps and processes to be implemented to ensure market engagement is conducted in a fair and ethical matter. A probity plan should be used for complex and strategic procurements and is a useful source of reference that helps to ensure that probity issues are considered throughout the procurement process. The plan is best customised for individual procurements and, in general, should detail the expectations and manner in which a procurement is undertaken.

Probity plans should consider the following:

- consistent management of timeframes, deadlines and extensions;
- uniform access to information for all potential suppliers;
- all evaluation panel members are familiar with relevant documentation and policies;
- the process for identifying and dealing with actual, potential and perceived conflicts of interest;
- identifying and handling confidential and/or sensitive information;
- the need for confidentiality agreements with all parties;
- the evaluation plan including evaluation methodology, criteria and assessment measures; and
- assessing the need for a probity advisor and/or probity auditor.