



**Government
of South Australia**

State Procurement
Board

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Probity and Ethical Procurement Guideline

Version	1.4
Date Issued	August 2019
Review Date	August 2020
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Overview

This guideline provides information and practical advice regarding probity and the ethical procurement of goods and services. It provides an understanding of:

- what ethical procurement and probity is
- how this relates to government procurement
- how to manage and prevent unethical procurement practices
- the commitment to ethical behaviour by government
- expectations on suppliers regarding ethical procurement
- key probity considerations in procurement
- the use of probity plans, probity advisors and auditors.

This guideline also includes a process to assist public authorities identify, investigate, address and report unethical or fraudulent procurement practices.

Scope

This guideline applies to all procurements undertaken by public authorities.

What is Ethical Procurement?

Ethics are the principles or values that guide people in all aspects of their work. Ethical procurement relates to the conduct of government employees (and/or representatives) in undertaking and managing procurement. For example, ethical procurement practices may broadly include:

- security and confidentiality of information
- fairness and impartiality to all parties
- appropriately competitive processes
- process consistency and transparency
- avoiding and/or managing conflicts of interest (actual or perceived)
- compliance with legislative obligations and government policies.

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.

This requirement is reflected in the State Procurement Board (Board) standard contract documents and is discussed later in this guideline.

What is Probity?

Probity is the 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 aims to maintain the integrity of the public sector by minimising conflicts and problems and by avoiding improper practices (actual or perceived).

Probity relies on transparency and honesty in the procurement process. In a general sense, probity means a process that is able to withstand internal and external scrutiny. Procurement processes and procedures must be clear, open, well understood, communicated and applied

equally to all parties to ensure purchasers and suppliers are able to deal with each other on the basis of mutual trust and respect.

The role of probity in the selection process is also outlined in the Board's *Supplier Selection Policy*.

How Does Probity and Ethics Relate to Government Procurement?

The *State Procurement Act 2004* (the Act) outlines the framework under which the procurement operations of public authorities is overseen. The object of the Act is to advance government priorities and objectives by a system of procurement for public authorities directed towards:

- a) obtaining value in the expenditure of public money
- b) providing for ethical and fair treatment of participants
- c) ensuring probity, accountability and transparency in procurement operations.

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*, emanating from the *Public Sector Act 2009*, identifies five values which are the foundation of ethical behaviour in the public sector. These values are:

- democratic values – helping the government, under the law, to serve the people of South Australia
- service, respect and courtesy – serving the people of South Australia
- honesty and integrity – acting at all times in such a way as to uphold the public trust
- accountability – holding ourselves accountable for everything we do
- professional conduct standards – exhibiting the highest standards of professional conduct.

The South Australian Government's *Better Customer Charter for Business* sets out what suppliers can expect when they participate in Government procurement processes. The Charter sets out expectations in key areas of:

- fairness and respect
- clear information
- good practice
- certainty and confidence.

Implementing good probity and ethical practices in procurement will:

- ensure the achievement of value for money
- reduce the risk to the Government in terms of legal and/or financial loss
- provide potential suppliers with the confidence that they will be treated fairly.

Ethical Procurement Requirements

In undertaking and managing procurement, government employees and/or representatives (including contractors) must comply with the highest standards of ethical procurement and probity in every aspect of the procurement.

SA Government employees undertaking procurements must ensure that they adhere to the Code of Ethics for the South Australian Public Sector.

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 have broad application to the procurement process:

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

Standards of behaviour are required for those employees undertaking a procurement process. These include but are not limited to the following:

Confidentiality

- Measures are in place to manage the security and confidentiality of documents, submissions and commercial information (including emails and electronic documents).
- Confidentiality agreements are formalised prior to commencement of the process for all external participants including advisors/consultants.
- Measures are in place to protect the competitive position and intellectual property of bidders and the commercial interests of government.
- Employees maintain the integrity and security of official information for which they are responsible.

Conflicts of Interest

- Where possible, any actual, potential or perceived conflict of interest is identified and managed at the beginning of the procurement process.
- Conflicts of interests that arise during the procurement process are managed effectively.
- Employees do not make improper use of their position or make improper use of commercial information gained through a procurement process.

Information on conflict of interest is outlined in more detail below.

Gifts/Hospitality

- Employees will not, for themselves or others, seek or accept gifts or benefits that could be reasonably perceived as influencing them.
- Employees must strive to avoid actual, or perceptions of, conflict of interest, or of undue influence.
- Offers of gifts during the assessment of offers or other commercial decision-making must be refused, noted and reported to the chair of the procurement process.

Process Integrity

- Clear procedures are established, understood, communicated and observed from the outset.
- Suppliers are treated consistently, fairly and equitably, and with respect, in accordance with documented processes and procedures.
- Fair competition between suppliers is used to achieve best value for money, giving due regard to the Government's environmental, economic and social policies and the aspirations, expectations and needs of the South Australian community.
- Decisions are based on an objective evaluation of the total offering in terms of value for money.
- Appropriate documentation regarding decision making and reasoning is maintained.
- Decisions made can be justified upon review or audit.

Individual Accountability

- Employees responsible for various elements of the procurement (e.g. technical advice, communications with suppliers, opening of bids etc.) are clearly defined.
- Employees accountable for making decisions at various stages are clearly defined.
- Separation of duties and responsibilities exists where required.

Communication and Information Management

- All communications and receipt/dissemination of information is directed through the responsible employee.
- Communications/notifications are provided in the same timeframe and in the same manner to procurement process participants and to stakeholders as appropriate.
- Electronic records management processes are in place including storage of data and protection from unauthorised access in accordance with Premier and Cabinet Circular *PC030 Protective Security Policy Framework*.
- All stakeholders (including suppliers) have equal opportunity to access information in accordance with the requirements of the *Freedom of Information Act 1991* and the Department of the Premier and Cabinet Circular *PC027 Disclosure of Government Contracts*.

Managing Conflicts of Interest

A conflict of interest is a situation (actual, perceived or potential) where a personal, family or business relationship or interest has the potential to unfairly affect or influence the proper outcome of a decision or process.

Ethical procurement principles affirm that public officials are not to benefit personally from procurement decisions and must perform their role in a fair, professional and proper manner. They are not to make improper use of their position or of commercial information gained.

For example, a conflict of interest could arise where a person who, as a member of a procurement evaluation team, stands to gain financially through their part ownership in a company that is being considered for a large contract. Note that this conflict should be of a material nature and may sometimes be appropriate to simply declare the interest, as in the case where the person has a minor shareholding in a company (either directly or through a superannuation fund). This is deemed unlikely to affect proceedings or impact on the decision making process.

Not all interests have a financial component. Examples include family or social relationships that may influence a person's judgment or decision or having a strongly held personal view or conviction on an issue that is being considered.

Managers and other leaders must ensure that all employees involved in a procurement process understand their obligation to declare a conflict of interest. They should be provided a copy of the Government's *Code of Ethics for the South Australian Public Sector* and the Board's *Probity and Ethical Procurement Guideline*.

Any actual, potential or perceived conflict of interest must be identified and managed at the beginning of the procurement process. All participants in the procurement evaluation process (for example, public authority employees, project consultants, probity advisers) must complete a conflict of interest declaration and confidentiality agreement which is to be kept by the chair of the assessment panel.

It is not improper per se, for a person to have a conflict of interest, however if they are involved in any aspect of the procurement process, they must declare any actual or potential conflict of interest in the written declaration.

Effective management strategies must be implemented to resolve the situation and may include:

- the person being removed from involvement in the procurement process or any aspect of the process that they have a conflict with
- the person removing the interest
- restricting the involvement of the person to certain parts of the procurement process, for example, in writing the specifications but not being involved further in the decision making process
- engaging or recruiting an independent person to oversee the process
- monitoring the impact of the conflict of interest as the process develops.

Ethical Procurement – Suppliers

Public authorities must not seek to benefit from supplier practices that may be dishonest, unethical or unsafe.

Suppliers to the South Australian Government are required to maintain ethical practices in their dealings with Government.

The Board's standard contracts (as well as purchase orders used by public authorities) require suppliers to conduct themselves in a manner that does not invite, directly or indirectly, the purchaser's officers, employees or agents or any public sector employee to behave unethically, to prefer private interests over the purchaser's interests or to otherwise contravene the *Code of Ethics for the South Australian Public Sector*.

Suppliers are also obligated to advise if they have a conflict of interest in providing goods or services to the Government. The Board's standard market approach documents require that suppliers declare any actual or potential conflict of interest.

If the supplier fails to comply with this requirement, the purchaser may terminate the procurement.

Dealing with Unethical Procurement Practices

All public authorities are to be vigilant in identifying, investigating and addressing unusual, unethical or fraudulent 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.

In situations where significant/multiple suspected practices are identified, these must be reported to the Board, through the relevant public authority's senior procurement officer, Accredited Purchasing Unit or other appropriate body.

Practices to be reported to the Board are those that are:

- systemic;
- significant and cannot be resolved within an agency; or
- could have significant across government implications (e.g. across government contract or supplier issues).

A process for managing and communicating unethical procurement practices is provided in the Attachment.

Probity Advisors and Auditors

Probity Advisors

If required, the use of a probity advisor can be considered for higher risk and value procurements as appropriate. A probity advisor provides independent advice and works actively with the evaluation team to ensure key probity issues are considered and actioned during the procurement process.

Specific responsibilities include:

- advice regarding probity within procurement processes and methodology;
- development and implementation of a probity plan;
- probity quality control and compliance with procedures;
- probity facilitator and information source in decision making; 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

The use of a probity auditor may be considered for higher risk and higher value procurements as appropriate. Probity auditors are not actively involved in the procurement process itself but are appointed when an objective opinion on probity is sought via independent assessment. They are usually sourced from outside of the organisation and 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, particularly for higher risk and value procurements.

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
- typically establishes an audit plan to test compliance of the evaluation process with the evaluation plan, policy and guidelines.

Specific responsibilities 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
- conduct a probity appraisal upon completion of the project and prepare a report for management.

Probity compliance is reviewed in accordance with the audit plan and prescribed practices and may be reported either periodically or upon completion of a project.

It should be noted that the benefits of engaging probity expertise do not diminish the accountability designed into the process or the necessity to implement good business practices.

When a Probity Advisor or Auditor is Required

A number of issues relating to value, risk, complexity and sensitivity should be considered in determining the need for probity expertise when undertaking procurement. These include:

- project value in financial terms
- level of risk associated with the procurement
- overall significance and influence of the project
- politically sensitive issues
- conflict of interest possibilities
- project integrity and the possibility of being subject to scrutiny
- volatile market conditions and potential supplier disharmony.

Probity Plans

A probity plan should be used for higher value and risk 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 procurement projects and, in general, should detail the expectations and manner in which a procurement project is undertaken.

Plans should consider the following:

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

Consideration of probity issues within procurement should be standardised wherever possible in the interests of achieving uniformity and continual improvement.

Record keeping

Accurate records are to be kept for all stages of the procurement process. Decision making needs to be documented, including the process followed to arrive at that decision. Such documentation serves to provide enough information for audit or other review.

These records should include:

- details on specification development
- how criteria and weightings were decided
- the tender evaluation process, including the officers involved
- who gave approvals at sign-off points.

Officers should pay particular attention to documenting all relevant communication with prospective suppliers. This includes both written communications, along with appropriate records of relevant verbal discussions throughout the whole process (e.g. minutes of a meeting, file notes of telephone discussions). All verbal discussions should be recorded via a file note, and significant verbal discussions, which include any decisions, should be followed up in writing to confirm conversation.

Independent Commissioner Against Corruption Act 2012 (SA)

The *Independent Commissioner Against Corruption Act 2012* (SA) and 'Directions and Guidelines' issued by the Independent Commissioner Against Corruption, stipulate obligations (hereafter referred to as *ICAC obligations*) of public authorities and public officers in relation to matters which are reasonably suspected of involving corruption, misconduct or maladministration in public administration.

Corruption includes conduct that constitutes one of a number of offences, including bribery or corruption of public officers, threats or reprisals against public officers and abuse of public office. It includes any other offences committed by a current or former public officer while acting in his or her capacity (or former capacity) as a public officer.

Misconduct occurs when a public officer contravenes a Code of Conduct or is involved in any other misconduct while acting in his or her capacity as a public officer.

Maladministration includes irregular and unauthorised use of public money or substantial mismanagement of public resources. It also includes substantial mismanagement in or in

relation to the performance of official functions and conduct resulting from impropriety, incompetence or negligence.

Purchasing and procurement processes inherently represent some level of risk for involving those reportable actions as defined above. It is therefore important for both public officers and principal officers to be aware of *ICAC obligations* and how they relate to procurement.

Public Officers

Public officers (including persons performing contract work for a public authority or the Crown) who undertake purchasing and procurement activities should inform themselves of *ICAC obligations* including (but not necessarily limited to):

- reporting requirements regarding matters reasonably suspected to involve corruption, misconduct or maladministration
- confidentiality and the link to obligations under the *Whistleblowers Protection Act 1993* relating to matters suspected of involving corruption, misconduct or maladministration.

Public Authorities

Principal officers of public authorities are required to inform themselves of *ICAC obligations* including (but not necessarily limited to):

- reporting requirements regarding matters reasonably suspected to involve corruption, misconduct or maladministration
- ensuring that robust systems, policies, procedures and practices are in place, and understood by all public officers, in order to be able to comply with the directions and guidelines issued by the Commissioner and, in turn, prevent or minimise corruption
- confidentiality and the link to obligations under the *Whistleblowers Protection Act 1993* relating to matters suspected of involving corruption, misconduct or maladministration.

Principal officers should ensure prevention and minimisation strategies are in place specifically with regard to procurement processes and policies.

Further information regarding *ICAC obligations* can be found at: www.icac.sa.gov.au.

Further Information

State Procurement Board Secretariat
Phone: (08) 8226 5001
Email: stateprocurementboard@sa.gov.au
www.spb.sa.gov.au

Related Policies and Guidelines

Code of Ethics for the South Australian Public Sector
Better Customer Charter for Business
(http://economic.priorities.sa.gov.au/__data/assets/pdf_file/0014/8024/Better-Customer-Charter-.pdf)
Independent Commissioner Against Corruption Act 2014 (SA)
Public Sector Act 2009



Public Sector (Honesty and Accountability) Act 1995

Department of the Premier and Cabinet Circular PC027 Disclosure of Government Contracts

Department of the Premier and Cabinet Circular PC030 Protective Security Policy Framework

Attachment 1 Unethical Procurement Practices Communication Process

Public authorities are to investigate suspected, unethical practices and seek to resolve them immediately to protect the public interest in accordance with the governance arrangements of the public authority.

Where a public authority suspects that the practice is not isolated and becomes aware of further instances of suspected practices within its organisation, the public authority must urgently determine whether the incidents are localised or are symptomatic of more widespread practices.

If the practice is determined to be symptomatic of more widespread practices, the public authority must immediately advise the State Procurement Board (Board) whilst at the same time investigating the practice and providing a report to its chief executive on the outcomes of its investigations, and the actions and controls it has identified to remedy the suspect practice(s).

The chief executive of the public authority will provide a detailed report to the Board.

The Board will:

- determine if further investigation of the practice within the public authority is warranted; and
- assess whether the practice has potential across government implications.

If the Board assesses that there is a potential across government implication, then the following process is required.

1. The Chair shall write to all public authority chief executives and senior procurement officers to inform them of the issue and impending investigation and to seek information which may assist with the conduct of this investigation.
2. The Board will appoint an appropriate person or body to investigate the practice.
3. The investigator will examine the issue in detail including copies of correspondence, previous reports and other documentation provided and determine the appropriate course of action. The investigation may include discussions with the informing public authority and other parties that may have knowledge of the issue.
4. A final report will be presented to the Board with recommendations to address the practice.
5. The Chair will write to the public authorities once the investigation is complete and the report tabled, advising them of the outcome of the investigation.
6. The Board's policies and guidelines will be updated as appropriate, along with additional training being implemented if required.