



PROBITY IN PROCUREMENT GUIDELINES

UNIVERSITY OF SOUTH AUSTRALIA

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DOCUMENT CONTROL SHEET

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Revision History

<u>Revision</u>	<u>Date</u>	<u>Name</u>	<u>Description of Revisions</u>
1.0	18 June 2013		Approved by Chief Financial Officer
1.1	11 December 2013	Daren Murphy	Incorporated comments by COO
1.2	6 April 2020	Daren Murphy	Updated for new Academic Structure

Cross References

Procedures: [Procurement Handbook](#)

Forms:
RFT template
Probity Risk Assessment template
Probity Plan template
Ethical Clearance Form
Conflicts of Interest Register
Confidentiality Agreement
Tender Evaluation Report template

Guidelines: [Code of Ethical Conduct](#)
[Gifts and Small Incentives for Employees Guidelines](#)
[Legislated and Ethical Responsibilities of Staff](#)



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1 Preamble

These guidelines cover issues of probity that relate directly to engagement with potential, prospective or actual suppliers, before, during and after any procurement-related activity.

These guidelines support, but do not include, market engagement, procurement and contract management processes, and therefore need to be considered in conjunction with other University policies, procedures and guidelines.

2 Application

These guidelines relate to the activities of all University personnel (including staff, contractors, consultants, advisers and agents) engaged in either the communication with, or the evaluation, selection, appointment or management of, existing or potential Tenderers and Suppliers to the University.

3 Definitions

<i>Contract & Tender Panel</i>	A panel comprising staff, contractors and advisers who will specify the requirements, evaluate tenders and recommend the selection of one or more Tenderers. Note: this definition includes any panel assembled in support of the end-to-end procurement process.
<i>Probity Advisor</i>	A role - which is generally independent of the Contract & Tender Panel - which monitors and reports on compliance with probity procedures throughout the planning, running and completion of the procurement process.
<i>Probity Auditor</i>	A role which is appointed to undertake an independent review of the procurement process, when the process - or specific stages of the process - have been completed.
<i>Probity Plan</i>	A document used to identify and manage probity risks throughout the procurement exercise.
<i>Probity Risk Assessment</i>	The process of assessing risks associated with the potential for and consequences of unethical behaviour in a procurement exercise.
<i>Probity Risk Profile</i>	The risk profile of a procurement exercise that informs the extent to which probity assurance arrangements are warranted.
<i>Sensitive Information</i>	Private, confidential or commercially-sensitive information.
<i>Supplier</i>	A third-party provider of goods and/or services to the University.
<i>Tenderer</i>	A prospective Supplier that is participating in a procurement process to provide goods and/or services to the University.
<i>University</i>	University of South Australia.
<i>University Representatives</i>	Staff, contractors, consultants, advisers, agents or any other persons that have ostensible authority to represent the University in any engagement with or selection of existing or potential Tenderers and Suppliers.



4 Guideline Objectives

PROBITY MANAGEMENT

Probity is an important consideration in any engagement with suppliers whether it involves market engagement and research, competitive tendering, negotiations with a single supplier, or the on-going management of incumbent suppliers.

These guidelines are designed to:

- a) assist staff involved in procurement, contract management and/or general supplier engagement processes with understanding the major principles involved; and
- b) provide staff with a framework for establishing appropriate risk-based assurance arrangements that are commensurate with the value, complexity, and sensitivity associated with each particular procurement-related activity.

5 Key Considerations

RELEVANCE OF PROBITY IN PROCUREMENT

The University is a statutory body established under the *University of South Australia Act 1991*. It is accountable to a large number of stakeholders, including the South Australian Parliament. Performance of the University's statutory functions involves the expenditure of funds including procurement of goods and services from third-party providers.

WHAT IS PROBITY?

Probity is often defined as integrity, uprightness, and honesty; and can often be used to mean good process.

Application of probity principles to any procurement process helps to ensure that a fair and robust process is undertaken and as a consequence minimises potential liability if the process outcome is challenged.

WHAT IS NOT PROBITY?

Probity is concerned with the quality of the 'process' of conducting procurement activities. It is not concerned so much with the quality of the 'decision' achieving the practical outcome (for example, the supply of services). Adhering to sound probity processes does not:

- a) guarantee the best outcomes; or
- b) determine whether the evaluation criteria are going to be the right criteria to assess whether or not the requirement will be met.

If the procurement process has clear objectives and a sound methodology to achieve those objectives (in particular, a clear statement of the University's requirements and, where applicable, targeted evaluation criteria against which tenders are to be assessed), the adherence to sound probity principles and processes can assist in obtaining the desired outcome.



6 The Importance of Probity Management

PUBLIC SCRUTINY

For the University, as a statutory body, management of probity-related issues in its procurement processes is important. There is considerable public and private scrutiny of statutory bodies for several reasons:

- a) increased concern with ethics and accountability in public life;
- b) increased media, parliamentary and court scrutiny; and
- c) increased time and resources required from third party providers in formulating and submitting tenders, leading to demands for increased accountability and transparency in procurement processes.

PUBLIC CONFIDENCE

Effective management of probity leads to greater confidence in the University's processes. As a consequence Suppliers are likely to be more willing to invest the time and resources associated with participating in University procurement processes, therefore resulting in better and more competitive tenders.

In addition the implementation of an effective probity process in support of an impartial, open and competitive tendering process supports defensible decisions which are less likely to be challenged.

VALUE FOR MONEY

The University has a responsibility to obtain value-for-money in all of its commercial dealings, and to be able to demonstrate such to its financial stakeholders.

LITIGATION

A failure to appropriately manage probity in procurement may leave the process open to challenge or public criticism. Defending challenges is time-consuming, costly, personally-destructive for those involved, can undermine public confidence and affect reputations, and acts as a distraction from the University's core function.

Any challenge (whether or not ultimately successful) is negative and involves consequences for the University, senior management and potentially for staff and advisers generally.

7 Legal Framework Summary

The failure to manage a procurement process in accordance with probity principles can leave the process open to legal challenge.

A number of legal avenues are available to disgruntled Tenderers to challenge the tender process. Understanding the legal framework may assist University Representatives in understanding why probity is so important and where procurement processes may go awry.

Successful legal action by a disgruntled Tenderer may result in monetary penalties (for the University and those individuals involved in any contraventions), prosecution for criminal offences (a breach of some of the legislation listed below constitutes an offence), adverse publicity orders and Court orders requiring the University to refrain from or undertake particular actions (for example, re-commencing the tender process). Those legal avenues principally include:

- a) a contract claim, for example, if the process for conducting the tender is set out in a contract between the University and Tenderers, and the University breaches its obligations under that contract;
- b) misrepresentation claims, including for misleading or deceptive conduct under the Competition and Consumer Act 2010 (Cth) (the 'CCA') or the Fair Trading Act 1987 (SA);
- c) negligent misstatement claims;
- d) estoppel claims, for example, that due to its conduct, the University should not be allowed to rely on its strict legal rights or to assert a state of affairs which is contrary to the Tenderer's position; and
- e) challenges based on the application of administrative law, such as an alleged lack of procedural fairness by the University in conducting the tender.

The University is also subject to the following legislation under which its procurement processes may be challenged or scrutinised:

- a) the Freedom of Information Act 1991 (SA), under which disgruntled Tenderers may attempt to obtain documents relevant to a procurement process;
- b) the Whistleblowers Protection Act 1993 (SA), which facilitates the disclosure, in the public interest, of mismanagement, irregular or unauthorised use of public money, or illegal conduct by the University;
- c) the Public Finance and Audit Act 1987 (SA), which empowers the South Australian Auditor-General to investigate certain matters in relation to the University which may include its procurement processes; and
- d) the CCA, which empowers the Australian Competition and Consumer Commission to investigate breaches of the CCA by the University and/or its employees, and establishes individual liability and criminal penalties for some types of anti-competitive conduct.

8 Probity Assurance

PROBITY ARRANGEMENTS

For each procurement exercise, the Contract & Tender Panel should assess the extent to which probity assurance is needed by considering the procurement risks against the robustness of the project governance arrangements and procurement processes.

For higher value or risk projects, the appointment of internal staff to advise the project on probity matters is not normally considered appropriate as they may be perceived as lacking total independence; however, the appointment of an external adviser will add to the cost of a project.

For minor or routine procurements, it may be prudent for probity to be assured using only the University's existing review processes. However, as procurement projects increase in complexity, value or risk, it may become necessary to appoint a probity practitioner to provide a greater level of assurance.

The probity practitioner is independent to the procurement process and does not influence the evaluation. They are also not responsible for advising on the legal issues that arise from the conduct of the procurement process.

PROBITY ADVISOR VS PROBITY AUDITOR

Depending upon the level of assurance needed, a probity practitioner may be actively engaged throughout the procurement (as *Probity Advisor*), or they may be restricted to observing and reviewing the process (as *Probity Auditor*).

A *Probity Advisor* has an active involvement during the planning and execution of a procurement to ensure that the tender, evaluation and selection processes are defensible and conducted in a fair and unbiased manner. They will usually be required to provide advice on the conduct of a procurement process, ensuring that:

- a) the procurement process is conducted fairly; and
- b) tenders are evaluated in accordance with the stated criteria.

A Probity Advisor will normally advise and report to the Project Sponsor(s) and may attend and monitor Contract & Tender Panel meetings. The Probity Advisor may also be required to advise on the composition of the Contract & Tender Panel and any evaluation sub-teams to ensure that there are no conflicts of interest and that they contain the necessary skills.

A *Probity Auditor*, however, is generally only engaged after the process, or a specific stage(s) of the process, has been completed to undertake an independent 'audit' of the procurement process. For this reason, a Probity Auditor has less active involvement in the procurement process than a Probity Advisor and a Probity Auditor's report is generally used in support of the Contract & Tender Panel's recommendation.

PROBITY FINDINGS

In the event that the Probity Advisor / Probity Auditor reports any matters to the Project Sponsor that could negatively impact the perception or effectiveness of a procurement process, the Project Sponsor should immediately communicate the findings to the Chief Operating Officer, for the appropriate management response, whilst ensuring that the Chief Financial Officer is included in the communication.

9 Probity Planning

PROBITY RISK ASSESSMENT

To establish the appropriate method of ensuring probity, the Contract & Tender Panel should assess the level of probity risk involved by completing a Probity Risk Assessment during the planning stage of a procurement exercise.



A Probity Risk Assessment will be influenced by a range of internal and external factors. Key considerations include:

- a) any history of controversy or litigation;
- b) the extent and nature of any conflicts of interest;
- c) the total contract value;
- d) the extent to which the requirement is complex, unusual or contentious;
- e) the market being prone to grievances (e.g. due to fierce competition or commercial secrets);
- f) the proposed sourcing process; and
- g) the skills and/or experience of the Contract & Tender Panel / project team.

PROBITY RISK PROFILE

A Probity Risk Assessment is used to build a Probity Risk Profile, which is based on an overall judgement of the probity risks. This assists the Contract & Tender Panel with establishing probity assurance arrangements that are commensurate with the value, complexity and sensitivity associated with a particular procurement, such as whether it is necessary to appoint a probity practitioner, and whether they should be external to the University.

The greater the value, complexity and sensitivity of a given requirement, the more likely that an unethical procurement exercise will have adverse consequences. As this risk increases, the Contract & Tender Panel will need to implement mitigation strategies that are proportionate to the nature, size and risk profile of the particular procurement. Examples of these are set out in **Table 1** below.

Table 1: Example Probity Risks and Mitigating Assurance

Probity Risk Profile	Example Probity Risks	Suggested Probity Assurance Actions
Low	<ul style="list-style-type: none"> No known conflicts of interest Total contract value <\$5m Competitive sourcing process Stable market conditions Clearly defined requirement Suitable breadth and depth of skills and experience needed to clearly articulate the requirement and evaluate tenders in accordance with due process 	<ul style="list-style-type: none"> All probity principles are considered and implemented, where appropriate Consider appointing an internal <i>Probity Auditor</i> (e.g. an officer in the Strategic Procurement Team or Finance Unit)
Medium	<ul style="list-style-type: none"> Mitigated conflicts of interest Non-competed process (single tender activity) where total contract value exceeds \$200k Competed process where total contract value exceeds \$5m Requirement is novel or complex Incumbent supplier not invited Contract & Tender Panel lacks the skills or experience to run the procurement 	<ul style="list-style-type: none"> All probity principles are considered and the rationale for adoption/rejection documented Appoint internal <i>Probity Advisor</i>, or external <i>Probity Auditor</i>
High	<ul style="list-style-type: none"> Unmitigated conflicts of interest History of litigation or an aggrieved market Requirement is contentious Non-competed process where contract value exceeds \$5m Competed process for <i>non-capital purchases</i> where contract value exceeds \$20m All procurements for <i>capital purchases</i> where contract value exceeds \$100m 	<ul style="list-style-type: none"> All probity principles are adhered to Appoint external <i>Probity Advisor</i>

PROBITY PLAN

Having conducted the Probity Risk Assessment and considered the mitigation strategies, the Contract & Tender Panel should prepare a documented plan, consistent with the Probity Plan template, that identifies and manages the probity risks which led to the probity arrangements, such as:

- what actions will be taken to ensure Tenderers are treated equitable (e.g. the tender submission procedure and composition of the Contract & Tender Panel);
- procedures for managing potential, perceived or actual conflicts of interest;
- procedures for securing Sensitive Information; and
- how probity will be assured (i.e. Probity Advisor or Probity Auditor).

The Probity Plan should be customised to suit the requirement, remaining commensurate with the Probity Risk Profile for each procurement exercise.



10 Probity and Tendering: Key Responsibilities

Some key probity responsibilities relevant to the procurement of goods and services are included below. University Representatives need to be aware of these responsibilities prior to engaging in a procurement process.

MAINTAIN A SECURE ENVIRONMENT

- Those with access to the University's Sensitive Information should be required to provide an appropriate confidentiality undertaking.
- Sensitive Information should be stored securely.
- Access to Sensitive Information should be restricted and recorded (such that an audit trails shows who has had access and when).
- Sensitive Information should not be moved from the secure environment unless absolutely necessary and only when appropriate controls are implemented.
- Sensitive Information should be identifiable (e.g. marked as 'confidential').
- Sensitive Information pertaining to the tenders or the process should not be discussed with persons who do not have a genuine business reason to know (e.g. they are not specifically engaged on the Contract & Tender Panel, or involved in the decision-making process), including other University personnel.
- Release of Sensitive Information to advisers or Tenderers should be tightly managed and controlled.
- Privacy requirements in relation to any personal information contained in the documentation must be met.
- There should be procedures in place to prevent, as far as practicable, and manage any breaches of confidentiality and privacy.

CONDUCT A FAIR AND EQUITABLE PROCESS

- Treat all Tenderers and conduct the process fairly and equitably, consistent with the rules of natural justice and procedural fairness, including ensuring that all Tenderers are provided with access to the same information in order to prepare their tenders.
- Ensure that the need to avoid inherent bias in the process is taken into account when making decisions which may impact on the process, including decisions as to how to advertise and market the process, and timeframes.
- Ensure that the process is conducted in accordance with the process terms and conditions provided to Tenderers.
- Take reasonable steps to suppress collusive or anti-competitive behaviours among Tenderers when preparing tender responses.

ENSURE THE PROCESS IS OPEN AND TRANSPARENT

- Establish, promulgate and monitor compliance with all guidelines with respect to probity issues including conflicts of interest, confidentiality and fair dealing.

MINIMISE POTENTIAL LIABILITY

- Ensure effective contract risk management arrangements are in place.



MAINTAIN A CLEAR AUDIT TRAIL

- At the commencement of the process, clearly allocate responsibilities to parties engaged in the conduct of the process including reporting and recording obligations.
- Ensure the process is fully documented.
- Ensure all process and probity issues and actions taken to resolve such matters are fully documented.

11 Probity Principles

CONFIDENTIALITY AND SECURITY

Protection of Sensitive Information

The protection of Sensitive Information is an important probity requirement - it helps to keep the competitive position of Suppliers and the commercial interests of the University. It also has to be balanced with the needs of the University to meet any of its public accountability obligations.

In the tendering context, Sensitive Information usually includes tenders, all evaluation information (including information obtained during discussions and negotiations with Tenderers) and recommendations.

If potential Suppliers are not confident of the University's security processes they may be deterred from tendering or may reduce the information they provide in their tender response.

The effective management and recording of Sensitive Information is crucial to preserving confidentiality. It is important that procedures are adopted to oversee the protection of this information.

Obligations of a Contract & Tender Panel

University personnel involved in the preparation of the tender process and the receipt, evaluation and review of tenders, including discussions and negotiations with Tenderers leading to contract signature with the preferred Tenderer, need to be aware of their obligations to maintain the confidentiality and security of Sensitive Information.

Such obligations can be addressed in probity briefings to the Contract & Tender Panel, who should also be required to sign confidentiality undertakings specific to the procurement process, where deemed appropriate (note, this could be incorporated within the Ethical Clearance Form).

Security arrangements should deal with the security of both physical and electronically-held Sensitive Information. Sensitive Information should be easily identifiable (for example, separated from other material and be appropriately marked) and access to it restricted to only personnel who have given the required undertakings. Appropriate computer systems should be in place for the electronic storage and use of the electronic versions.



For each tender process, the University should consider implementing procedures such as:

- a) adopting a desk security and clean desk policy regarding Sensitive Information;
- b) locking Sensitive Information away;
- c) not removing Sensitive Information from controlled areas; and/or
- d) storing Sensitive Information in an electronic environment that is not accessible by other users.

Release of Sensitive Information to Advisers

These obligations need to extend not only to University staff, but contractors (such as advisers) engaged by the University who will have access to Sensitive Information in any given tender process.

Typically the terms of engagement of contractors oblige them and their employees and agents to maintain the confidentiality of Sensitive Information obtained during the performance of their contractual obligations. The terms of such contracts should be reviewed to determine whether the confidentiality provisions are appropriate for the tender process in which the contractor is to be employed by the University.

Contractors should be obliged to follow any University directions in respect of the handling of Sensitive Information during a specific tender process.

Release of Sensitive Information to Tenderers

If there is a need for Sensitive Information to be released to Tenderers, there should be procedures in place to manage the release. Tenderers should be obliged to execute appropriate confidentiality undertakings - in the form set out or consistent with the University's Confidentiality Agreement - which prohibit or limit disclosure of information, restrict copying, require that the information be used in a secure physical environment and govern the return or destruction of information once it is no longer needed.

It may be necessary for the University to obtain third-party consents for the release of Sensitive Information to Tenderers.

Release of Sensitive Information to the Decision Maker and other Stakeholders

There should be procedures in place to manage the release of Sensitive Information to the decision maker, the South Australian Parliament, any other government bodies or stakeholders, including Ministers to whom the University may need to release information, or any required disclosure in compliance with the University's obligations under the Freedom of Information Act 1991.

It may be useful to determine at the beginning of any specific tender process which, if any, stakeholder groups may have a need to review the documentation.

Privacy

University Representatives must be familiar with privacy requirements; particularly when the procurement process involves members of the Contract & Tender Panel or Tenderers collecting or accessing personal information concerning the University's employees or students. For example, if Tenderers are invited to undertake due diligence on, or otherwise inspect, University records to assist with their tender preparation.



Whilst it is arguable that the University is not subject to the *Privacy Act 1988 (Cth)* ('Privacy Act') because it is not an 'agency' or 'organisation' within the meaning of that legislation, the University's Legislated and Ethical Responsibilities of Staff document confirms that "*while the University is not within the jurisdiction of the Privacy Act and is therefore not required to observe the Australian Privacy Principles it is recommended that all staff be aware of them. Use of these principles as a guide will ensure good business practices*".

The Office of the Information Commissioner has produced a set of guidelines to the Australian Privacy Principles which University Representatives should familiarise themselves with. Those guidelines are published at:

<https://www.oaic.gov.au/privacy/australian-privacy-principles/>

To minimise unnecessary disclosures of students' and employees' personal information, consider:

- a) de-identifying personal information where possible - for example, remove or 'black out' names, ages and addresses before providing the information to the Tenderer;
- b) only providing Tenderers with personal information, to the extent necessary for them to provide goods or services to the University, its employees and students; and
- c) making it clear to the Tenderer (preferably in writing) that the personal information must:
 - i. not be used for any other purpose (e.g. marketing, research etc.);
 - ii. be collected, stored, handled and disclosed by the Tenderer in accordance with their obligations under the Privacy Act, or other applicable State-based privacy legislation and principles; and
 - iii. be returned or destroyed, upon the University's request.

However, if the personal information of students or employees contains tax file number details, the University is **legally bound** to comply with the Tax File Number Guidelines published by the *Office of the Australian Information Commissioner* at:

<https://www.legislation.gov.au/Details/F2015L00249>

Breaches of Confidentiality and Privacy

In the event that there is an actual or suspected breach of confidentiality or privacy then staff must take immediate action to prevent any further breaches and draw such incidents to the attention of the relevant responsible manager (e.g. Project Sponsor, Director of Unit, Executive Dean or, as necessary, the applicable member of the Enterprise Leadership Team) who will instigate the appropriate management response.

Access to Sensitive Information

A record should be kept of those persons within the Contract & Tender Panel and any others who have access to Sensitive Information.



CONFLICTS OF INTEREST

Conflicts of Interest and Procurement

In the context of a procurement process, conflicts of interest arise when:

- a) University personnel, or their families or business associates, stand to gain a benefit or advantage (whether financial or non-financial) through any current or proposed future dealings or relationship with a potential supplier or any person or entity involved with a potential supplier; or
- b) there is any other reason why University personnel involved in the procurement or decision-making process may be tempted to deal with a potential supplier otherwise than in a fair and objective manner.

Conflicts of interest also exist if there is the potential for a conflict of interest to arise, or if it could be perceived that there is an actual or potential conflict of interest.

Some examples of conflicting interests include:

- a) any personal financial interest in the project;
- b) any immediate relatives, close friends or business associates with a financial interest in the project;
- c) any personal bias or inclination which would in any way affect an individual's decisions in relation to the project; or
- d) any personal obligation, allegiance or loyalty which would in any way affect an individual's decisions in relation to the project.

Summary of Main Conflict of Interest Principles

In summary, some of the major points which University Representatives should be aware of include:

- a) there is a difference between actual and potential conflicts or perceived conflicts but all of which may present problems and need to be declared, managed and resolved properly;
- b) conflicts need to be managed throughout the procurement process;
- c) it is not a matter of 'signing the undertaking and forgetting';
- d) University personnel must avoid situations where a conflict may arise; and
- e) University personnel must be aware of their contact with Tenderers, in any context.



Conflict of Interest Undertakings

Where competing interests and priorities exist (as they may in any procurement process), appropriate procedures must be adopted to minimise or avoid situations where conflicts could arise. These will typically include:

- a) conflicts of interest should be a standing agenda item at the beginning of all Contract & Tender Panel meetings held throughout the procurement process;
- b) all University Representatives should be required to give conflict of interest undertakings in respect of any tender process with which they are involved (even if general conflict of interest undertakings have been given at the commencement of employment or engagement at the University, personnel should give additional undertakings in respect of specific tender processes); and
- c) University Representatives involved in a procurement exercise are under a continuing obligation to declare any conflict of interest (actual or potential) as soon as one arises.

Conflict of Interest Guidelines

Interaction with Tenderers should be kept to a minimum as far as practicable, and ideally channelled through a single point of contact. This assists with ensuring that Tenderers receive the same or similar information (which relates also to fairness and equity) but it also reduces the risk for there to be a perceived conflict of interest.

Supplementary procedures and additional training or briefing of University Representatives may be required to ensure that any project-specific conflict of interest scenarios are understood.

Notification of Conflicts

In the event that a conflict of interest either could arise or has arisen, the affected person must immediately notify:

- a) the relevant responsible manager (e.g. Director of Unit, Executive Dean or, as necessary, the applicable member of the Enterprise Leadership Team); and
- b) the Project Sponsor.

The Project Sponsor is responsible for consulting with the Probity Advisor / Probity Auditor, where appointed, and communicating the conflict and proposed resolution or mitigating action to the Chief Financial Officer and the Manager: Procurement (see Conflicts Register below).

Should it not be possible to remove the conflict, the Chief Financial Officer will escalate the matter to the Chief Operating Officer.

In the event that a University Representative has a conflict of interest but is required to remain in the conflicted role, they should continue to declare the conflict at each project review (e.g. the commencement of Contract & Tender Panel meetings) until such time that the conflict has been removed.



Adviser Contracts

The University's advisers and contractors may be under additional contractual obligations with respect to conflicts of interest. All advisers and contractors should be required to immediately notify the University in writing of any conflict or potential conflict.

Conflicts Register

Projects should maintain a register of any declared conflicts of interest for the purpose of preserving a clear audit trail and to ensure the proper management of conflicts. The Project Sponsor (or the conflicted person in the absence of an appointed Project Manager) is responsible for notifying the Chief Financial Officer and Manager: Procurement of any and all conflicts, whether actual or potential, identified in the course of a procurement or supplier management process, together with all steps taken to resolve the conflicts of interest.

REQUEST FOR TENDER

Probity and the Request for Tender (RFT)

The underlying probity principle behind the RFT is that Tenderers should understand the basis upon which decisions will be made.

The RFT should set out, as far as reasonably practicable, the high-level criteria against which tenders are to be evaluated and the information (to be provided by Tenderers with their tender or sourced by the Contract & Tender Panel from third parties, such as commercial credit checks) which are to be considered by the Contract & Tender Panel.

If Tenderers are obliged to satisfy any mandatory criteria, such requirements should be clearly set out in the RFT. For example, a criterion might be that the Tenderer has a specific technical qualification or approval, such as a quality assurance rating.

The RFT should explain the approach that will be taken if a Tenderer fails to satisfy the mandatory criteria. For example, Tenderers may be excluded on the basis that their tender does not meet certain mandatory criteria, or Tenderers may be permitted to submit alternative non-compliant tenders providing that they also submit compliant tenders.

There should be consistency between the RFT and the internal tender process documentation (including evaluation plans, recommendation reports and similar) and the audit trail should evidence this.

RFT Information

It is important that the RFT requests sufficient information of a type that will permit a meaningful assessment and comparison of the tenders. It may also be necessary (particularly where the Tenderers may not be well known or the goods and services may be of a type that is new) to request information that will enable the University to assess the financial viability and general standing of the Tenderers by various probity and financial checks.



Probity and the Advertised RFT

An important part of meeting probity requirements is to follow the 'advertised' process (i.e. the process outlined to Tenderers whether in the initial advertisements, invitations to register interest, RFTs or any other correspondence or documentation). However, the tender process should also be flexible enough to ensure the University can achieve the best possible outcome.

Standard RFT Conditions Regarding Probity

The University's standard RFT conditions of tender should:

- a) reserve certain rights allowing the University to do certain things such as -
 - i. be flexible in its decisions regarding the conduct of the process (e.g. it may cease the process at any time, call for revised tenders or award any part, or the whole of, the tendered requirements),
 - ii. consider, or refuse to consider, any tender which does not conform or comply with the requirements, and
 - iii. alter the statement of requirement; and
- b) set out in general terms the evaluation process that will be adopted, but without being too prescriptive, thereby maintaining flexibility for the University.

Variant Tenders

At times, the University may offer Tenderers the opportunity to submit a variant tender - for example, in cases where the Tenderer believes they can offer a more efficient or effective way of achieving the required outcome. However, the comparison and evaluation of tenders requires a level playing field and variant tenders can be difficult to compare with standard tenders that comply with the RFT.

Tenderers should in the first instance be required to submit a compliant standard tender which provides that Tenderer's baseline response to the RFT. Where appropriate, Tenderers may be permitted to submit a 'variant' tender (which must be capable of being evaluated as a complete tender) on the basis of:

- a) a different allocation of risk; and/or
- b) an alternative technical proposal (e.g. a more innovative approach); and/or
- c) an alternative commercial model,

from that contained in their standard tender, which can then be measured against the baseline provided by their standard tender.

If variant tenders are permitted, the RFT should set out how variant tenders will be treated and assessed, including the University's right to reject any or all variant tenders. For example, the University may elect to only consider a variant tender from the highest ranking Tenderer.



RECEIPT OF TENDERS

Receipt and Opening of Tenders

The receipt and opening of tenders is an important part of the tender process at which probity needs to be considered. The RFT must be released to Tenderers on the same day and it must require all Tenderers to submit their tenders by a specified date and time at a specified address. All Tenderers must be treated equally and given equal time to respond to the tender.

Tenders must be delivered to a secure point in the University (preferably a locked tender box) prior to the closing time. The tender box must be opened and all tenders must be logged, catalogued and registered at that time to ensure that:

- a) there can be no issue as to when each tender was received and what was provided by each Tenderer which comprised its tender; and
- b) the tenders are secured to avoid them being lost or misplaced.

The RFT should also address whether tenders can also be submitted by facsimile, e-mail or other electronic means.

Late Tenders

The University policy is that late tenders will not be accepted unless the University resolves, in its absolute discretion, that to accept the late tender would not compromise the integrity of the tender process or give any Tenderer an unfair advantage. Late tenders not accepted are to be returned to the Tenderer unopened.

In making its decision, the University may consider the reasons for late lodgement, how late the tender was submitted, whether there had been any other late tenders or requests from other Tenderers for late submission that had been rejected.

The University should consider each late tender on the basis of each specific circumstance and consider whether accepting a late tender into the evaluation process is likely to provide the late Tenderer with an unfair advantage over other Tenderers who submitted their tenders on time.

For example, in many tender processes it would be unlikely that a Tenderer who submitted a tender ten minutes after the closing time would have gained an unfair advantage over those Tenderers who lodged their tenders prior to the closing time. It would however be necessary to consider each late tender on a case-by-case basis.

The final decision regarding the acceptance of a late tender rests with the Chief Operating Officer.

THE EVALUATION

Evaluation Plans

The tender evaluation plan should help ensure that there is a 'level playing field' for Tenderers, in that all tenders must be assessed against the same criteria, by persons qualified to make that assessment.



Drafting of Evaluation Plans

Internal evaluation plans containing the procedures to be adopted in respect of the receipt of tenders and providing clearly defined methodologies for the evaluation of tenders should be drafted and finalised prior to receipt of tenders.

Contract & Tender Panel

The Contract & Tender Panel should have the requisite skills to properly assess tenders, including from a financial, technical and commercial perspective. Contract & Tender Panel members are expected to:

- a) be open minded;
- b) act with integrity and honesty;
- c) be impartial and objective;
- d) act consistently and fairly to all Tenderers;
- e) be fully familiar with and apply the methods, protocols and criteria set for the tender process in accordance with plans; and
- f) make recommendations which reflect the outcome of the evaluation process.

The conduct of groups within the Contract & Tender Panel should be considered (for example those undertaking a technical assessment of offers and those engaged in the commercial assessment) and ideally be separated during the evaluation to ensure the maintenance of independent decision making within the Contract & Tender Panel.

Evaluation Methodologies

The evaluation methodologies adopted for the tender process must not result in an inherent bias toward the selection of one or more Tenderers (for example, this may be an issue if the tender process invited Tenderers to consider a range of proposals or options). The evaluation of tenders must be defensible from a probity perspective and undertaken consistently with the process outlined in the RFT documentation. There should be sufficient flexibility within the evaluation process to allow the evaluators to deal with issues which may arise during evaluation without the risk of breaching or not following due process.

The evaluation criteria should be carefully structured such that the University can evaluate and rank Tenderers on the basis of their capacity and capability to meet the University's requirement. The University may consider the use of an evaluation tool which may, for example, consist of attributing weighted scores to several of the criterion.

Consideration should be given to ensure that the proposed timetable for the evaluation process is not inherently unfair to Tenderers, especially if Tenderers are requested to respond to clarifications and requests for additional information.

The proposed decision-making process including the ultimate decision maker and their role in evaluation should be identified and consideration given to their ability to reject/ignore findings of the Contract & Tender Panel or to seek to amend the evaluation report.

Carrying out the Evaluation

Appropriate reporting processes should be established to confirm that compliance with the agreed evaluation methodology and tender conditions has been achieved and that the appropriate approval has been obtained in relation to compliance with these agreed processes.

The evaluation should be documented contemporaneously with the conduct of the evaluation process. The Contract & Tender Panel should ultimately produce an evaluation report, using the Tender Evaluation Report template, and should be required to provide a 'sign-off' addressing their participation in the process and in particular that the methodology has been complied with and that their reports have identified all relevant matters arising from the evaluation.

The Chair of the Contract & Tender Panel and any nominated Probity Advisor should be required to endorse the evaluation report before it is approved.

The documentation should be completed and approved prior to the short-listing of Tenderers or selection of a preferred Tenderer.

Amendment of Evaluation Criteria

If it becomes apparent during the conduct of a tender process that the evaluation criteria needs to be materially amended, and the RFT conditions of tender permits such amendment, all Tenderers must be given an equal opportunity to respond against the revised evaluation criteria.

COMMUNICATION

Contact with Tenderers

Contact with Tenderers may be required to request clarification or seek additional information from Tenderers, or during contract negotiations.

Protocols for Contact with Tenderers

To help ensure the fair and equitable treatment of Tenderers during the conduct of the tender process, protocols should be established for communications to ensure that information will not be provided to any Tenderer which:

- a) gives, or has the potential to give, an unfair advantage to that bidder;
- b) reveals proprietary or confidential information of another bidder; or
- c) unfairly disadvantages another bidder.

Protocols should also be adopted in contemplation of more formal communications with Tenderers, for example, any meetings, interviews, site visits and presentations. These protocols should outline at what stage of the tender process these meetings will occur and what constraints should be placed on the information provided at those meetings. These protocols should also document the procedures governing issue of clarifications by Tenderers to ensure that these do not amount to variations of their tenders.



Nominated Contacts

Contact with Tenderers should only occur through a nominated contact point. Having established this nominated contact point, consideration should be given as to what restrictions need to be placed on information given in response to Tenderers' enquiries.

Contact Documentation

Any communication with Tenderers should be documented with appropriate document management systems implemented. A formal record of all communications with Tenderers and their representatives and advisers should be maintained by the Contract & Tender Panel.

Meetings

All meetings with Tenderers should be conducted in accordance with the format, procedures and protocols established and agreed prior to the meeting and these should be consistent for all Tenderers.

Communication of Changes to Tender

If it becomes necessary to change the tender process or any of the tender process procedures, these changes should be promptly communicated to all Tenderers so as to minimise any potential detrimental outcomes for them. The ultimate strategy adopted depends on the degree of variation contemplated and should be assessed on a case by case basis.

NEGOTIATIONS

Negotiations

Negotiations with one or more Tenderers should only be conducted if the tender conditions contemplate that the University may undertake such negotiations.

Specification of Terms for Negotiation

In order to avoid any misunderstanding as to the nature and extent of any negotiations, the terms and conditions of the negotiations (including the proposed timeframe) should be provided, in writing, to the Tenderers invited to negotiate. Tenderers who agree to participate in the negotiations should confirm their acceptance in writing.

Purpose of Negotiations

The aim of the negotiations is to achieve the best possible result for the University, taking into account the needs of stakeholders and recognising that the successful Tenderer should be satisfied with the result as well. A successful Tenderer who feels put upon, taken advantage of or indirectly intimidated during the negotiations may be less likely to enter into a mutually satisfactory working relationship in undertaking its responsibilities under the resulting contract.



Conduct of Negotiations

A competitive situation should be maintained throughout negotiations. For example, the preferred Tenderer must not be given the impression that it is certain to proceed to contract as such an impression may undermine the University's negotiating effectiveness. It may also give rise to a claim for damages based on Estoppel or misrepresentation if the preferred Tenderer is ultimately not awarded the contract.

Negotiation of Changes to Tender

Of primary concern in relation to any negotiations is whether the negotiations give rise to an alteration of the basis on which Tenderers were required to submit their original tenders (for example a change to the tender specifications).

If negotiations result in a material change either to the Tenderer's bid or to the tender specifications or other requirements, the University should consider whether other Tenderers should have the opportunity to revise their tenders. Probity and legal advice should be sought if there is any doubt as to whether Tenderers should have the opportunity to revise their tenders in accordance with the revised specifications.

Documentation of Negotiations

A record of negotiations should be kept. In summary, the records should clearly show:

- a) the aim of the negotiations
- b) the plans followed
- c) a record of exchanges; and
- d) an evaluation and summary of the effectiveness and outcomes of the negotiations.

DOCUMENTATION

Purpose of Documentation

The entire procurement process should be documented to:

- a) demonstrate the objectivity and impartiality of the process;
- b) substantiate the recommendations of the Contract & Tender Panel; and
- c) to meet any of the University's own record keeping requirements.

The comprehensive documentation of the procurement process will assist the University in justifying the process in the event of public scrutiny, or challenge to the outcome. It also helps the Contract & Tender Panel in understanding their responsibilities and understanding the tender process generally. It helps to ensure that the process set out in the tender documentation is properly followed.



Documentation Process

The following procedures should be adopted:

- a) all meetings should be minuted;
- b) all decisions recorded;
- c) all contact with Tenderers noted and registered;
- d) all copies of correspondence regarding the tender process must be maintained;
and
- e) a register of any probity issues and conflicts of interest should be maintained.

The maintenance of such records should assist in identifying any deficiencies in the tender process which may be addressed prior to the tender process being completed and the recommendations being made. Consideration should also be given to documents that may be held by advisers and which may need to be collected prior to the disengagement of such advisers from the project.

TENDERER DEBRIEFING

Debriefs

Procedures should be adopted in respect of the debriefing of unsuccessful Tenderers. Any information provided to Tenderers must be consistent with the tender evaluation outcome.

It is important that a standard approach be taken in respect of debriefing. Tenderers should generally be verbally debriefed against the criteria against which they were assessed, although the briefing should be scripted and processes developed for dealing with Tenderer questions.

Generally, Tenderers should not be provided with information concerning other Tenderers, except for publicly available information and except in so far as comparative statements can be made without breaching confidentiality.

It is recommended that debriefings only be conducted at the conclusion of the tender process after the contract has been signed with the successful Tenderer. Debriefings should be attended by more than one member of the Contract & Tender Panel, and include the Finance Unit representative.