MinterEllison-Gold Coast In-house Counsel CPD Seminar

28 September 2017

Presented by: Lindsey Alford, Barrister-at-Law, and Probity Auditor and Advisor[1]

Contracting with Government:

- ***Innovative procurement methodology and projects;***
- ***synergistic application of probity to non-standard procurement methods;***
- ***Case studies on market-led proposals by State Government.***

Preamble

Corporations and businesses are seeking to do business with Government and assessing opportunities arising from the government's commitment to $40 billion of infrastructure over the next four financial years.[2]

Private corporations are alert to the government's establishment of the statutory body providing independent expert strategic advice on infrastructure, *Building Queensland*. Under the *Building Queensland Act 2015.* Building Queensland provides an independent strategic recommendation to government of infrastructure proposals under development by Queensland Government Agencies, including departments, Government Owned Corporations and nominated Statutory Authorities.

Through a three-phase Business Case process, the most compelling infrastructure proposals are recommended. The most recent Infrastructure Pipeline Report has a table of 35 major proposals each with a capital value of between $50-$100 million in varying Business Case phases.[3]

In this paper "innovative procurement methodology" refers to project delivery by "Public-Private Partnerships" (PPP) and unsolicited bids or "Market-led Proposals" (MLP). This paper will put those procurement methods in a context where business can be gained

[1] I acknowledge that sections of this paper are drawn from the text of a paper that my colleague Joseph Manner and I delivered to a Legalwise Seminar on 14 June 2017, *titled Contracting with Government Owned Corporations (GOC): Chinese Walls and Conflicts*

[2] Department of Housing and Public Works, 1 September 2017, *Backing Queensland Jobs* and Department of Infrastructure, Local Government and Planning, *State Infrastructure Plan Part B: Program-2017 update*

[3] Building Queensland, *Infrastructure Pipeline Report, June 2017*,p 12

without compromising the Government's primary responsibility to act in the "public interest". "Alliance Contracting" is only briefly dealt with in this paper.

Project delivery by relying on private equity as in Public- Private Partnerships or Market-led Proposals will lead to a conflict in underlying accountabilities. The philosophy of "being one team" for project delivery, perhaps including the sharing of "pain and gain", as against an arms-length relationship between government and tenderer[4], highlights additional governance risks. While public officials are tasked with the goal of meeting the public interest as effectively as possible, the private sector holds a greater economic focus, with a need to maximise company profits and subsequently shareholder dividends.

Thus, the Public/Private team venture has an inherent conflict of interest which requires probity oversight and supervision, not just up to the awarding of a 'partner' with government to undertake a project; but then as a probity advisor/auditor to a party (or both parties) in that partnership (the government through the delivery Agency and the private Operator/Franchisee company)". The probity advisor/auditor then oversees the process of the letting of the major components by the private enterprise partner.

Innovative project procurement evidences the extensive and self-evident potential for conflicts of interest whereby there will inevitably be extensive involvement of industry/corporate entities and individuals, including consultants and advisors, with present and former connections to other stakeholders, the Departments, the proponent Contractors/consortia members and the consultants or consultants in consortia.

This early and proactive involvement of a Probity Auditor and Advisor and then the continuing vigorous probity oversight was demonstrated in the successful augmentation of the existing Public Private Partnership Deed, followed by the construction of the now almost completed Gold Coast Light Rail System Stage 2. I, and my colleague Joseph Manner, provided those probity services. This example will be described later in this paper. See **Synergistic Probity Application in practice (an actual case study)** at a later section.

The term "synergistic application of probity" oversight states a principle that I am firmly committed to. That is, I can validate that probity observance and optimal commercial results

[4] "tender" and "tendering are used as general terms here and are intended to include invitations in the nature of a request for tender (RFT), request for proposal (RFP), request for expression of interest (EOI), seeking to establish a standing offer arrangement (SOA) or other similar competitive process; and in my opinion government inviting private sector participation by means of a PPP or MLP Proposals.

are not opposing but rather synergistic concepts, particularly as regards major “innovative” procurements. An example is the Gold Coast Light Rail System Stage 2. This involved the construction of a probity framework which did not impede, but rather facilitated, progress by all parties to an optimal outcome.

The Probity Advisory role revolves around the definition and establishment of a project’s procurement framework and the probity protocols and conduct, reviewing the evaluation process and providing guidance on probity issues as and when they arise. This is a proactive and pre-emptory role designed to protect the project’s integrity. The Probity Advisor effectively implements necessary advices and actions as and when such matters arise, to minimise disruption to project procurement timetables and achieve prompt resolution of issues to facilitate the process. This has resulted in the maintenance of critical schedules whilst upholding a confident adherence to all probity requirements, and is particularly evident in our recent oversight of the Gold Coast Light Rail Stage 2 procurement, whereby, despite the complexity and extremely high volume of probity requirements, the passage of the project proceeded without disruption. See **Synergistic Probity Application in practice** at a later section.

My experience with Alliance Contracting alerted me to the conclusion that a Probity Advisor should be retained after the Alliance is consummated, and during the design and construction period to advise the “Alliance Leadership Board” independently as to the project management of the process of the letting of the various sub-contracts (often in terms of millions of dollars) project managed by the private enterprise partner solely.

As from 1 July 2017 the government has “opened the door” much wider to seeking unsolicited bids, or Market- led Proposals (MLP’s) for private corporations to develop commercial/community infrastructure. Please see the later section on **Market-led proposals case studies**

Introduction

The legal practitioner appreciates that "Government" as a client, or as principal to a contract, may be a budget sector Agency, commonly described as departments, a Government Owned Corporation or a Government Statutory Body.[5]

At the core of any government process of procurement of goods or services by contract, or letting government contracts for infrastructure or construction, is probity. Probity requires the application of procedural fairness, and may be defined as the *"evidence of ethical behaviour in a particular process."*[6] It is based on principles of impartiality, transparency, credibility and confidentiality; in essence, probity means acting with integrity.

Legal practitioners working in business and for corporations appreciate the procurement policies and legislative requirements which are common to Government. For businesses seeking to contract with the State of Queensland a brief description of the legislative and policy framework by which the State is bound in the awarding of a contract of works, a services contract, or supply of goods, from an external business/contractor, is a starting point.

Agencies, GOCs and Statutory Bodies are bound by a regulatory framework that includes the *Financial Accountability Act* 2009 (FA Act) the Queensland *Government Owned Corporations Act 1993*, the federal *Corporations Act 2001* and the *Code of practice for government-owned corporations' financial arrangements*. The code outlines approval requirements and guidelines within which GOCs must operate in entering into financial arrangements. Contracts are such financial arrangements. The *Statutory Bodies Financial Arrangements Act* 1982 (SBFA Act) provides general borrowing and investment powers to statutory bodies if these are not contained in the body's enabling legislation.

Financial Accountability Act 2009

The financial powers of government departments are determined by the FA Act. Pursuant to section 61(a) of the FA Act.:

> "61 Functions of accountable officers and statutory bodies
>
> Accountable officers and statutory bodies have the following functions—

[5] Government may also establish a "special purpose vehicle" for a specific purpose such as the delivery of infrastructure to projects. Such a corporation is not included in under the definition of a Government-Owned Corporation.

[6] Guidance on Ethics and Probity in Government Procurement (2005) Financial Management Guidance No 14, Department of Finance (Cwth).

(a) to achieve reasonable value for money by ensuring the operations of the department or statutory body are carried out efficiently, effectively and economically"

For contractors, or legal representatives of contractors, and procurement managers and legal advisers to Government the conduct and behaviour when endeavouring to seek a contract of works, a services contract, or supply of goods, does not vary from the strict requirements previously set down in the *State Procurement Policy* - June 2013, notwithstanding a change in drafting of the present *Queensland Procurement Policy 2017,* effective from 1 September 2017 (the Policy).

Queensland Procurement Policy 2017

The *Queensland Procurement Policy* [8] is subordinate legislation by cabinet minute and is a compliance document by virtue of the *Financial Management and Performance Standard* 2009. It is "mandated for application to budget sector agencies, government-owned corporations, statutory bodies and special purpose vehicles".

The Queensland government is committed to the six principles of government Procurement[9]. Principle 3 concerns the probity, integrity, accountability and transparency required to withstand public scrutiny and preserve confidence in the procurement process. Of note is the Policy reference that a balance is to be struck between observing the probity of the process relative to value and risk, such that probity does not become an unjustifiable barrier to achieving better outcomes. My comments on the commitment to synergistic outcomes puts my position on assisting outcomes not impeding them. This directive must be read in conjunction with the *Financial and Performance Management Standard 2009*, section 19 (FP MS) and the guide *Procurement guidance: Planning for significant procurement*:

> **"**The Queensland Government is committed to transparent, accountable procurement processes which ensure that all potential suppliers are given fair and equitable treatment. It is especially important for suppliers to perceive that government procurement takes place in a genuine, open and transparent environment.

[8] Department of Housing and Public works, 1 September 2017, page 1
[9] Ref Qld Procurement Policy, http://www.hpw.qld.gov.au/SiteCollectionDocuments/QLDProcurementPolicy.pdf

> Agencies must ensure that systems, policies and procedures are established that are able to withstand public scrutiny and which preserve private and public sector confidence in the procurement process."

The Jobs for Queensland dictum creates new ground in that it is a policy incorporated into the new *Queensland Procurement Policy 2017*. That policy carries with it a government objective to deliver up to 30% weighting in the application of a "local benefits test" and introduces a new "socially responsible" guideline for proponents/ suppliers to reach. The detailed policy surrounding these new requirements is not spelt out. Therefore, challenging benchmarks must be incorporated into the founding documentation in the EOI and RFT process, or in the documentation presented to government for a private sector/public project. It will be necessary for the definition's to be new principles. As an advisor this challenge must be met. A expert Probity Advisor will be expected to provide guidance.

Importance for private-sector businesses

For contractors or businesses, or legal representatives of contractors or corporations, and procurement managers and legal advisers to Agencies, GOCs or Statutory Bodies, the conduct and behaviour when endeavouring to seek, or be awarded, a contract of works, a services contract, or supply of goods, to initiate a market-led proposal, or to seek to "partner" with government, does not vary from the strict requirements set down in the Policy.

If seeking contracts from government, the strictures as to behaviour and conduct must accord with the ethical principles as cited in the *Public Service Ethics Act*, section 4,[10] and restated in section 7 of the FPMS with the additional requirement: "(d) includes establishing a performance management system, a risk management system and an internal control structure."

Corporations/ businesses/contractors are advised to use the Policy as the yardstick, and for "innovative" proposals have a matching risk management and internal control structure centred on a probity plan and protocols, and management of conflicts of interest.

All tenders or proposals that are " innovative" received by Government will be evaluated, and scrutinised as to the conduct of officers, consultants, proponents and proponent's

representatives with regard to the following applicable State and Federal Legislation, and state policy,

Financial Accountability Act 2009;

Financial and Performance Management Standard 2009;

Australian Consumer Law (Cth);

---

[10] Section 4-Ethics principles-of the *Public Sector Ethics Act 1994, "are* declared to be fundamental to good public administration" and s. 4 (2) are listed:

The ***ethics principles*** are—

- integrity and impartiality
- promoting the public good
- commitment to the system of government
- accountability and transparency.

Corporations Act 2001 (Cth);
Crime & Corruption Act 2001;
Section 4, The Public Service Act 2008;
The Public Sector Ethics Act 1994;
Managing Conflicts of Interest in the Public Sector Guidelines

This transparency is consistent with the full gamut of probity principles by which government, including a GOC or Statutory Body, must abide. A loss from an offence or corrupt conduct by a public official may be an offence under the *Criminal Code* and it is referable to the Crime and Corruption Commission.[11] Section 15, the *Crime and Corruption Act* 2001-Corrupt Conduct-also applies to the conduct of officers, as if they were public officials, in GOC's.[12]

More so, the conduct and behaviour of the tenderer business/company and its staff, advisors and consultants are to all intents and purposes to mirror that conduct expected when dealing with, and tendering to, a government department. I reiterate Corporations/ businesses/contractors are advised to implement a matching risk management and internal control structure centred on a probity plan and protocols, and management of conflicts of interest.

Legal practitioners are aware that documents (for example Expression of Interest, Invitation to Offer, Request for Proposal, Request for Tender, or similar) warn of unacceptable behaviour or conduct (collusion, breach of confidentiality, improper influence et cetera). Also deeds of Confidentiality and Disclosure of Conflicts of Interest will be required.

The Legitimate Expectations [13]of the private sector contractor & protecting the contractor when Tendering and/or Proposing and Negotiating a project with Government

[11] Section 21-Loss from offence or corrupt conduct-s. 21, *Financial and Performance Management Standard* 2009
[12] Section 156, *Government Owed Corporations Act* 1993
[13] *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558; 76 FCR 151 at 190.

The Law of Contract and the onus on government to be the "moral exemplar", to act in good faith and comply with the legal principle to abide by the "Process Contract"[14] protects the contractor when tendering. Making innovative proposals seeking to contract with government is consistent with "tendering".

The Process Contract, Good Faith, Procedural Fairness, Legitimate Expectations, in Government Tendering

The doctrine of 'good faith' in contracts in Australian law emerged following the decision of the New South Wales Court of Appeal in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*[15]. The case was argued and decided on the principles generally governing commercial contracts, with no reference to the fact that the proprietor of the works was a public body.

The relevant concept from the judgment in *Renard* is summarised in a passage from the reasons of Priestley JA (at 268):

> "The ideas of unconscionability, unfairness and lack of good faith have a great deal in common. The result is that people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations."

As is the case throughout *Renard*, the quoted passage speaks in terms of general commercial contracts, not specifically government contracts. Furthermore, Priestley JA decided the case on other grounds, and the other judges' reasons did not refer to good faith, but only a requirement upon the government officers to exercise the powers under the contract in a reasonable manner.[16]

---

[14] The concept of the process contract was introduced into the Australian law by the 1997 decision of Finn J in the Federal Court of Australia in *Hughes Aircraft Systems International v Airservices Australia*(1997) 76 FCR 151 at 191. It is recognised, in some form, by the common law of the United Kingdom, Canada, and New Zealand.

[15] (1992) 26 NSWLR 234

[16] Though see the discussion in Wallwork A, *"A requirement of good faith in construction contracts?"* (2004) Building and Construction Law Journal 257 at 265-6, where a number of authorities are discussed which either dispute the existence of a distinction between good faith and reasonableness, or actually consider reasonableness to be a more stringent standard.

The statement made by Priestley JA in *Renard* is cited by Finn J in *Hughes Aircraft Systems International v Airservices Australia*,[17] and is an important starting point for the decision in the Hughes case, which became a watershed in introducing probity concepts into Australian law.

I quote from Alford L and Bird E[18]:

> "The facts of *Hughes* are complex. Hughes was a tenderer for a large project involving upgrading air traffic control systems. Airsystems Australia was the successor of the Civil Aviation Authority (**CAA**), a government business enterprise overseeing the tender process. An initial tender process, with six selected tenderers, had resulted in a short-list consisting of Hughes and one other tenderer, Thompson. Ultimately Thompson was successful, but the tender process was subsequently determined to be *"unsound and unfair"* in a review directed by the responsible Minister.
>
> A second request for tender was issued to Hughes and Thompson *only*, with certain selection criteria as well as the general tender process described in correspondence. A representation was made that an independent auditor would supervise the tender process, and would ensure both that the proper procedures were followed, and that the process was conducted fairly.
>
> Finn J summarises the complaints of Hughes into *"seven distinct rubrics"* (at 177-8) which may be further simplified for present purposes:

1. *Evaluation and selection failures*: the CAA failed to evaluate the tenders in accordance with the methodology and priorities set out in correspondence and the RFT;
2. *Political interference*: the CAA took account of the communications made by or on behalf of responsible Commonwealth ministers or else treated those communications as directions to the CAA board;
3. *Audit failure*: the CAA failed to contract an independent auditor to verify, and failed to ensure that the auditor verified, that the tender process procedures were followed and that the evaluation was conducted fairly;
4. *Improper interests and affiliations*: the CAA allowed a board member, itself and the responsible Department to have improper interests in, or affiliations with, Thomson or the Thomson bid;
5. *Breach of confidence*: the CAA did not ensure strict confidentiality was maintained in respect of the tenders and permitted disclosure both of Hughes' tender information to Thomson, and of Hughes' and Thomson's tender information to the Department and the responsible Minister;
6. *Price reduction/unacceptable variation*: The CAA took account of a price reduction by Thomson and a variation to its tender, submitted after the final submission of tender materials;
7. *Fair dealing*: the CAA failed to conduct the tender evaluation fairly and in a manner that would ensure equal opportunity to Hughes and Thomson. For practical purposes the conduct relied upon to make this out is all of the particular actions and events that found the previous six complaints.

[17] (1997) 76 FCR 151 at 191

[18] Alford L and Bird E, *Tendering for government business: Process contracts, good faith, fair dealing, and probity*, (2011) 85 ALJ 678, at 681, cited in Seddon N*, Government Contracts Federal, State and Local*, 5th edition, Federation press, 2013, page 334

> Hughes' primary causes of action were for breach of contract and violations of the *Trade Practices Act*, with negligence at common law, and equitable estoppel as essentially coextensive alternative claims.
>
> Hughes successfully argued that the request for tender and surrounding correspondence constituted a 'process contract' between the CAA and Hughes, governing conduct during the tender process, up to the formation of the primary contract for the work the subject of the tender. "

Accordingly, the Federal Court held in *Hughes* that, in relation to an accepted tender Invitation that:

> "Objectively viewed the circumstances were redolent of a contractual intent on the part of the parties concerned. I cannot accept that a mere invitation to treat was being proffered by the [inviting government entity]. It was taking positive steps to procure the participation of the tenderers in a competitive [tender]. Integral to that was the prescription of a tender process acceptable to them. While I need not necessarily go so far as to suggest of tender procedures generally that "the integrity of the bidding system must be protected where under the law of contract it is possible so to do"….the circumstances here were ones in which it properly can be said the parties, by agreement, had used contract to protect "the integrity of the bidding system"[19]

And further, reconfirming the process contract and implying a term of "fair dealing" into the process contract principally on the basis that the entity inviting tender was a government body…..

> "I have found that the processes leading to the award of the [tendered] contract were governed by a process contract, the principal terms of which were contained in the [tender request]. I also have found it to be an implied term of that contract that (inter alia) the [the inviting government entity] would conduct its tender evaluation fairly. I have determined as well that a term should be implied as a matter of law into a tender process contract with a public body (such as this was) that that body will deal fairly with a tenderer in the performance of its contract. Accordingly I have made such an implication into the [tender request]".[20]

And further as regards the implied term of fair dealing….

---

[19] *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558; 76 FCR 151 at 184.
[20] Ibid at 177.

> "[the tender] is one in which I am prepared to find that, as a matter of law, a duty to deal fairly in the performance on the contracts I have found should be implied into those contracts. Irrespective of what should be taken to have been the intentions of the parties, both the type (or class) of contract and the relationship of the parties were such as gave the tenderers the right to expect, and the CAA the obligation to exhibit, fair dealing in the performance of the contract".[21]

Such was the implication of fairness that the Court described this as the guiding paradigm of the conduct within the context of the contract stating that "fairness in process and dealing was the *a priori* of this business relationship".[22] His Honour, in delivering the judgement extrapolated upon the "special" place occupied by the Government in its dealings with private enterprise. To wit, his Honour stated that:

> "In differing ways these instances reflect policies in the law, albeit in specific contexts, (a) of protecting the reasonable expectations of those dealing with public bodies; (b) of ensuring that the powers possessed by a public body, "whether conferred by statute or by contract", are exercised "for the public good" and (c) of *requiring such bodies to act as 'moral exemplars': government and its agencies should lead by example*….These policies I consider to be important in the present matter."[23]

Indeed the "special overlay" of Government behaving as the "moral exemplar" in contractual relations is well established and derives from the government's unique position based upon democratic appointment, and subsistence upon public monies.

The process contract is also described in the most recent texts[24] as "a pre-award" contract in government tenders. As with any contract, the rules are to be found in the contract (the request for tender document). There may be of course unexpressed rules such as the implied duty to act in good faith. Seddon states:

> "The fact that a process of negotiation is contemplated by the rules does not of itself indicate that there is no intention to create a pre-award contract. There can be enough obligations on each party in such a process to provide the subject matter of a contract.

---

[21] Ibid at 193.
[22] *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558; 76 FCR 151 at 190.
[23] Ibid at 197.
[24] Seddon N, *Government Contracts Federal, State and Local*, 5th edition, 2013, The Federation Press, page 360

> Nor does the inclusion of a clause that states that the government is not obliged to award the contract to the lowest or any tender indicate a lack of intention to contract."[25]

Australian courts are comfortable with the notion that government representations and promises may give rise to "legitimate expectations" drawing the implication of procedural fairness. "Starting with its decision in Kioa[26] the High Court's extensive test for the implication of procedural fairness indicates that the crucial question is likely to be that of the content of the duty to accord procedural fairness"[27]. Case law has supported that there is an obligation for a government decision maker to accord procedural fairness to tenderers or potential tenderers.[28]

Similarly, in *Ipex ITG Pty Ltd (in liq) v Victoria*,[29] a process contract was found to exist notwithstanding the presence of a range of disclaimers.[30] Sifris J found that sections of the document, which was essentially a request for proposal, were *"promissory in nature, to abide by a process particularly in relation to the evaluation of tenders"*.[31]

Sifris J noted that (at [42]):

> "A review of the authorities suggests that courts are more willing to find process contracts as governing the relationship of the parties pre-award in cases where a timeline and detailed process, including evaluation criteria, are set out in such a way that suggests that an obligation (promissory in nature) to follow such timeline and process has been incurred."

The decision of Sifris J in *Ipex* was affirmed in 2012 in *Wagdy Hanna & Associates Pty Ltd v National Library of Australia.*[32] In that case, Refshauge ACJ found that a process contract could be implied based on the RFT including detailed processes, rules and selection criteria which indicated that the government body had accepted promissory obligations towards the tenderer.[33]

Accountable public officers remain accountable for procurements delivered on their behalf by a provider external to their agencies (a business/consultant/contractor) including, for example

---

[25] Ibid at page 361
[26] Kioa V West (1985) 159 CLR 550 at 582, 584
[27] Alistair Abadee, *Keeping Government Accountable for its Promises-The Role of Administrative Law*, Australia Journal of Administrative Law, Volume 5, August 1998, p 198
[28] see *Haoucher v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 648 at 653-Deane J,
[29] [2010] VSC 480.
[30] Regrettably the text is not extracted and therefore one cannot assess how wide such provisions were.
[31] At [44]-[46].
[32] [2012] ACTSC 126.
[33] (2012) 24(9)

those delivered by a legal advisor or technical/professional services providers, or under corporate partnership agreements. They are obliged to disclose conflicts of interest and/or perceived conflicts of interest.

Unlike the “innovative procurement methods” we are discussing, an earlier essential direction was contained in the previous State Procurement Plan:

> “Agencies should use open offer processes where possible. Limited and selective offer processes may be used where the Significant Procurement Plan demonstrates that this is the appropriate strategy. Limited and selective offer processes must not be used for the purposes of avoiding competition.”

The issues causing potential conflicts of interest

When doing business with the public sector, the *Managing Conflicts of Interest in the Public Sector Guidelines* (the Guidelines) will also be relevant. These Guidelines assist public bodies, and the private sector, in developing effective policies and procedures for managing conflicts of interests.

The possibility of conflict of interest, and conflict of duty arises particularly in the instances of staff of the Agency, GOC or Statutory Body having worked for interested parties in a tender, for instance the tenderer company (the business/contractor or consultants advising the tenderer). The equation can be reversed in that a representative of the tenderer/proponent must also disclose whether they have had associations in the past or present which could well be considered a conflict of interest, or compromise a transparent transaction. Both sides of the participants in the process contract need to make disclosures relevant to these following categories:

> “The following are guidelines as to matters which may amount to conflicts of interest (or matters which might be perceived as conflicts of interests) and includes associations and other interests that should be disclosed for the sake of transparency, completeness and prudence. Please note that:
>
> 1. “close relatives” includes your spouse, children, step-children, siblings, parents, parents-in-law and cousins;
> 2. Your interest or association with a tenderer may exist either directly or indirectly through a company, trust, self-managed superannuation fund or other entity.

(interests held through retail or industry type superannuation funds or managed funds need not be disclosed)

3. You are not required to make enquiries of close relatives as to their associations or interests, however, associations or interests of which you are currently aware or of which you subsequently become aware, should be disclosed.

4. Associations or interests you (including your close relatives) may have with or in a Tenderer and which should be disclosed include :

   (a) any share holding or other equity held in any of the Tenderers (including, if you have a self managed super fund, any shareholding or equity held by the fund*) or do you owe or are you owed money by any of the Tenderers; (*ignore interests held in retail funds)

   (b) engagement by any of the Tenderers in the past 4 years as an employee, contractor or consultant;

   (c) a commercial customer of, or a commercial supplier to, any of the Tenderers in the past 12 months;

   (d) regular contact with any of the Tenderers in the past 12 months (include contact in your official capacity and social contact with Tenderers' managers or senior employees;

   (e) involvement or association with any business or other activity of any of the Tenderers which could be reasonably considered to constitute a conflict of interest if any such association was to become public knowledge;

   (f) attendance at any formal or social activities or functions as a guest of any of the Tenderers in the past 12 months; and/or

   (g) receipt of any gifts or benefits from (or provided on behalf of) any of the Tenderers in the past 12 months, or any substantial gifts or benefits prior to that.

5. Brief details only need be provided and, if required, the Probity Auditor may seek further details or clarification." [34]

[34] Guidelines pursuant to clause 2 of the Confidentiality and Conflicts Declaration, Argus Probity and Procurement Pty Ltd

Conflict of interest is not always easy to ascertain. The 'interest' may be purely emotional, rather than financial. A conflict of interest arises when a person has an affiliation that might be seen to prejudice his or her impartiality.

An actual conflict of interest is defined as "where an officer is in a position to be influenced by their private interests when doing their job"; "private interests are those interests that can bring either benefits or disadvantage to the officer or to others whom the officer may wish to benefit or disadvantage".[35]

Box and Forde[36] also cite the joint publication between the Queensland Crime and Misconduct Commission (CMC) and the Independent Commission Against Corruption (ICAC) in New South Wales, providing guidelines targeted at prevention and management of conflicts of interest in the public sector, referring to a principle which all public officials should keep in mind when dealing with tenders and purchasing transactions:

> "Conflicts of interest arise when public officials are influenced, or appear to be influenced, by personal interests when doing their job. Public officials should not personally benefit from decisions involving expenditure of public money. Anyone who may have a connection with any of the bidders and may stand to gain from the outcome should not be involved in the evaluation and selection process in a way that allows them to affect the outcome.
>
> A personal conflict of interest can be easily identified when financial gain is or may be involved. This includes a public official accepting gifts, hospitality or benefits from a bidder, or owning share in a company bidding to provide services to their organisation."[37]

Furthermore, the *Better Purchasing Guide* titled *Ethics, Probity and Accountability in Procurement*[38] makes similar observations about the procurement process:

> **"***Consistency and continuity of process*

[35] Queensland Government, Department of Public Works, Crime & Misconduct Commission, October 2006, pages 9 and 10.

[36] Box, J E and Forde, M W, *Probity and Managing Procurement: How to Avoid Corrupting the Process*, LexisNexis Butterworths, Australia, 2007

[37] Citing Independent Commission Against Corruption (ICAC), *Contracting for Services: the Probity Perspective: a Corruption Prevention Project,* May 1995, page 12. See also *Public Sector Ethics Act 1994 (Qld)* S9.

[38] Queensland Government, Department of Public Works, Crime & Misconduct Commission, October 2006.

Application of the principles of competitive neutrality and equity requires that all offerors be given the same access to commercial information and the same guidance and instructions on the conduct of the offer process.

Offering procedures and evaluation processes should be applied consistently so as to prevent any actual or perceived discrimination. Consistency of this kind can best be maintained where clear procedures are documented in advance, where staff are fully briefed, and where there is a strong measure of continuity in the personnel who make up the procurement/project team and its advisors.

Communication with offerors

The public bodies have clear protocols established for meetings with offerors to ensure a uniform approach that sends the same messages to all participants. Best practice procurement uses detailed meeting agendas and authorises particular procurement personnel to speak on specific subjects. Similarly, procedures should be in place to ensure that written communications with offerors are prepared and signed off at an appropriately senior level."[39]

Evaluating tenders: value for money

Value for money is one of the fundamental principles of probity. It should be noted however that value for money equates to the most advantageous outcome for the offeror and this may not always be the tender with the lowest cost or the highest price."

In the normal course Government agencies must ensure that the market has been adequately canvassed prior to entering into any agreements. But not in dealing with innovative project procurement methods.

Methods for avoiding conflicts and protecting the process

It is when a conflict of interest has been ignored, improperly acted on, or has influenced actions or decision making, that the conduct (not the conflict itself) could be seen as misconduct, abuse of office or even corruption."[40]

---

[39] Queensland Government, Department of Public Works, Crime & Misconduct Commission, October 2006, p 15.

[40] Queensland Government, Department of Public Works, Crime and Misconduct Commission, October 2006 *Better Purchasing Guide titled Ethics, Probity and Accountability in Procurement*, page 10.

Both businesses/contractors, as well as the public body, can implement a Conflict Management Plan with the following recommended features;

Complete on its face (without the need to refer to extrinsic documents or discussions);

Specific in listing the situations in which conflict or potential conflict would be considered to arise;

Clear steps to be taken in the event of each conflict;

Compliance with the plan would be demonstrable, and record-keeping and reporting protocols would be in place;

A protocol for the reporting of conflicts not anticipated by the plan would be in place, and for the authorisation of the Directors to proceed in such cases; and

Undertakings, or declarations should be sought from evaluating officers and advisors including external consultants as to avoiding conflicts of interest and upholding confidentiality.

Take this example of “familial” conflict of interest. In my practice as a Probity Auditor I advised on a scenario where the wife of the Project Director for a procurement project commenced employment with a company which was a market leader in the field, and was expected to tender. The Project Director was not an employee of the government agency, but a consultant employed by the agency to manage the process. The wife was not employed in a capacity likely to bring her in contact with the tender process, but did report directly to the manager known to be the bid leader on behalf of that company. There was no identifiable risk of misuse of confidential information. The Project Director had disclosed his wife’s new employment and had withdrawn from being a member of any evaluation panels in relation to the project, but wished to remain in his overall commanding position.

Nonetheless, it was recommended that the Project Director be replaced by his consulting firm employer, and quarantined via ‘Chinese walls’ from the tender process even within his consulting firm. Why? The Project Director indirectly gained a financial benefit through his wife’s continued employment by her company. The fortunes of that company in Queensland

would have been improved by winning the sizeable tender. As such, there was a potential for bias or the perception of bias if the Project Director continued to act.

Information barriers, or Chinese walls

Information barriers, or Chinese walls should be implemented to safeguard from the leakage of confidential and commercial information which could advantage one contractor/tenderer above another or be argued to influence or prejudice an evaluating officer, adviser or consultant.

Erecting "Chinese walls" is also described as "Ring fencing" as well as "communication barriers".

McVea describes a Chinese wall [41]as follows:

> "The term 'Chinese Wall' refers to a self-enforced informational barrier consisting of systematic, as opposed to *ad hoc*, procedural and structural arrangements. These arrangements are designed to stem the flow of knowledge ... between different divisions within a multi-capacity financial intermediary with conflicting interests and obligations."

Generally seen in law firms, a Chinese wall is effective in segregating confidential information (including paper records and secure password access to data and Internet communication) and will be required in these innovative procurements. " Information Barriers, or Chinese Walls, are to be implemented for information which may be considered confidential in nature, specifically for the relationships existing between Evaluation Panel and project team members, their respective employers and the private sector or suppliers– the project contractors.

Government officers involved in assessing and awarding the tender, in-house and external consultants, and stakeholders of Local Government and other stakeholders all have an

[41] McVea, V., *Financial Conglomerates and the Chinese Wall*, Clarendon Press, Oxford, 1993, p 123 cited in Box, J.E. & Forde DCJ, M.W., *Probity and Managing Procurement: How to Avoid Corrupting the Process*, LexisNexis Butterworths, Australia, 2007, p 72.
[41] *Information Barrier Guidelines*, Law Institute Victoria and Law Society NSW, adopted by the Queensland Law Society, March, 2006.

obligation regarding disclosure of conflicts of interest. I recommend procedures to the private sector proponent which mirror the transparency required by Government agencies.

Although developed specifically for legal environments, the Law Society Guidelines[42] are useful in developing strategies to prevent the leak of confidential information and introduce a Probity/Conflict Management Plan of specific mechanisms to address potential conflicts.

Competitive neutrality is a government dictum. The management of competitive neutrality policy is described as:

> *"The implementation of competitive neutrality policy arrangements is intended to remove resource allocation distortions arising out of public ownership of significant business activities and to improve competitive processes. Where competitive neutrality arrangements are not in place, resource allocation distortions occur because prices charged by significant government businesses need not fully reflect resource cost. Consequently, this can distort decisions on production and consumption, for example where to purchase goods and services, and the mix of goods and services provided by the government sector can also distort investment and other decisions of private sector competitors.… Competitive neutrality requires that governments should not use their legislative or fiscal powers to advantage their own businesses over the private sector."*[43]

Improper Conduct-the Contractor/Tenderers Risk

Contractors/tenderers who seek to gain preferential treatment or engage in collusion take a considerable risk. A cautionary tale may be seen in *ACCC v TF Woollam & Son Pty Ltd*[44].In this case Logan J found that TF Woollam & Son Pty Ltd, JM Kelly (Project Builders) Pty Ltd and Carmichael Builders Pty Ltd, three mid-tier Queensland building contractors (and two of their executives as 'accessories') had been involved in cover pricing across four project tenders to government agencies, having been so invited to tender as pre-qualified contractors under the Capital Works Management Framework (CWMF), administered by the Department of Public Works.

[42] *Information Barrier Guidelines*, Law Institute Victoria and Law Society NSW, adopted by the Queensland Law Society, March, 2006.
[43] Australian Government, Competitive Neutrality Policy Statement, www.treasury.gov.au/275/PDF/cnps.pdf
[44] [2011] FCA 973.

Each was found guilty of fixing, controlling or maintaining prices and misleading and deceptive conduct, thus substantially lessening competition in breach of the *Trade Practices Act.* Each of the companies and the two executives were penalised with substantial monetary fines. The tenders let in 2005-2006 were valued from $1.37 million to $15.46 million.

Some examples of the erection of Chinese walls

On occasion, a contractor/tenderer may be in two bids; one in their own right and another in consortia. I dealt with such a particular instance. The tenderer/bidder had to give written undertakings and demonstrate that two separate internal bidding teams, unable to access each other's IT and financial, commercial or other considerations, in the independent bids, were instituted.

A 'contract employee' may have previously been employed in the specific area of work with a tenderer, or most likely consultants may have a business association with the agency/public body in the first instance, previously or currently with Contractors in the tender bid. Full disclosure of these interests, and written undertakings that the contract employee will keep the principal's information confidential.

Also it is not uncommon that a "contract employee" of the principal may be working in their particular area of expertise at the same time as their employers is bidding for other work with the principal. Again it will be necessary to have certain industry participants/companies and/or consultants institute Chinese walls between their personnel at head and local office, and from information flow, along with written undertakings. The Probity Auditor can assist the agency/principal's lawyer generally with the scope of these undertakings required from contracted in-house consultants, engaged external consultants, and the private companies involved.

Similarly, a major contractor may be the principal contractor undertaking a contract of work for stage 1 of an infrastructure project, working closely with the principal, its officers, and consultants, when tenders are called for the 2nd stage of the project. To insulate that contractor from any allegations that they would have a favoured position in the stage 2 bid, the contractor must establish a separate "bid project office and team", as must the principal, so during the course of the tender that particular contractor's bid team must be operating entirely outside of the information flow, and knowledge, of and with the principal, such as not to raise any allegations of bias or having an advantaged position. Such was the case on my recommendations as Probity Advisor to Stage 2 of the Gold Coast Light Rail system. Written

undertakings were also required.

Private sector businesses/contractors seeking contracts of works, service contracts, to supply goods or services, or to deal with land or other assets, of Statutory Bodies or GOCs must keep foremost in mind that that public body, its officers, employees, advisers (in-house or external) are obliged to act in the public interest. Should they engage in any conduct with those businesses/contractors that demonstrates otherwise, the penalties, up to and including imprisonment, are severe. For both parties.

Market-led proposals case studies

Legal practitioners involved with property, infrastructure, and development would have been cognisant of a very particular criteria-"uniqueness"- of the proposal to be met, and the previous 9 mandatory requirements are now broken into 2 stages to reduce the initial cost and burden of the prior omnibus submissions. See the old v new criteria schedule at the attachment.

Government is seeking private sector equity. It is my observation, and following discussion with some major contractors, that prior to the new and revised guidelines the government was reluctant to entertain any risk- sharing and insistent on the project being ' unique" i.e. "be unique in its ability to deliver a specific outcome and be unable to be replicated (or replicated swiftly) by a competitor". If not considered "unique" the government retained the right to use the project concept and business case to initiate it as a government project to the open market. The proponent was given a preference, but only if in the final evaluation their offering was market competitive and value for money. To date only one proposal reached Approved status, the Logan Enhancement Project ($512 million), and a handful of proposals have reached Stage 2, Detailed Proposal phase ($260 million)[45].

From 1 July 2017 however, the risk/cost allocation is couched in terms: "the proposed allocation of costs and risks between your entity/you and the government must be acceptable to the government" and further "be required to demonstrate significant benefits to the State, in proportion to the level of risk and cost taken on". Previously the definition was: [46] "demonstration that the proposed allocation of responsibility for project costs and risk is acceptable to the Government". Today: "proposals which seek government funding will be

[45] [45] Brisbane International Cruise terminal, Queensland Aquarium and Maritime Museum, Mt Cotton Driver Training Centre, and the Prince Charles Hospital Car Park

[46] Queensland Government, *Project Assessment Framework Guidelines for the assessment of market-led proposals,* July 2015, page 4

considered, however a successful MLP would generally be expected to present a 'low cost, low risk' proposition to government".[47]

I surmise that the private sector (infrastructure, construction, property development and associated professional consultancies) will be now greatly encouraged to present further proposals.

Probity and Market misgivings

The 'uniqueness' benchmark was the principal justification for project initiation outside of the market competitive tendering framework: "proposals that meet our criteria and are uniquely able to provide benefits to government and the community can be dealt with on an exclusive basis." [48] Now exclusivity, without uniqueness, and with the potential for some equity and risk sharing, belies the original context of government projects being undertaken outside the competitive process. In July 2015 the government stated:

> "Materiality should be considered on a case-by-case basis, taking into account the nature of the proposal and the expected benefits potentially available from conducting either a competitive or exclusive process. In this context, it is the Government's expectation that the granting of exclusive mandates would be the exception and that the normal course would be to test the market to achieve a demonstrable value for market outcome. Where proponents claim exceptions to this default position, such proposals will be considered and approved pursuant to these Guidelines."[49]

From July 2017 the government need only be satisfied that "no other proposal addressing the same need, or proposing a similar outcome, is under active consideration" and "the proposal is a genuine commercial proposition requiring the support of government."[50]

My misgivings are that the better resourced corporations in the relevant sectors and those corporations well-connected and networked through the infrastructure delivery Government Agencies, will research and confer with the various public providers, particularly health, transport, water, education and resources, and bring forward proposals already partly gestated within those public bodies, but in the new clothes of an MLP, as an unsolicited bid.

---

[47] Department of the Treasury, *MLP Supplementary Guidance: Criteria for assessment*, July 2017, unpaginated
[48] The Hon. Curtis Pitt MP, Treasurer, July 2015, *Bringing Good Ideas to Life*, page 3
[49] Queensland Government, *Project Assessment Framework Guidelines for the assessment of market-led proposals,* July 2015, page 2
[50] Department of the Treasury, *MLP Supplementary Guidance: Criteria for assessment*, July 2017, unpaginated

This has the potential to disadvantage a broad section of the less resourced and less well-connected providers in the building, construction, development infrastructure sectors.

It is my opinion that unless very stringent probity controls are initiated at the administrative coalface within Building Queensland, the Treasury and Department of Infrastructure, Local Government and Planning who are administering and directing the major infrastructure pipeline, that projects could be approved without the necessary competitive proof of value for money, and an open and accessible marketplace for all providers.

Managing the 30% waiting to Queensland suppliers, the local benefits test, and the socially responsible guidelines in the Queensland Procurement Policy 2017 will require vigilance against bias on behalf of local and regional businesses.

For the in-house counsel, legal practitioners, and a project/procurement managers committed to the growth of their employer's corporations it is well understood that all avenues will be explored.

A Legal Practitioner's dilemma

Legal practitioners are involved in procurement management and contracts; particularly in tendering for government contracts. In the private sector a legal practitioner may be involved in opening negotiations for proposals with Government, in drafting proposals, drafting or settling contracts for the award of the contract or may be called upon as a probity advisor or auditor. Clearly, if the legal practitioner is involved in the tendering process as an advisor or auditor, it is important to avoid any conflict of interest. Chinese walls may well need to be erected within the Corporation.

Judge Forde, as he was then, wrote:

> "It is also important to define the role of the legal practitioner in any procurement transaction. It may be relevant to the professional indemnity cover depending on the extent of the cover and whether the practitioner is acting to prepare the contract, advising on problems which may arise in relation disclosing information to those wishing to tender or whether the practitioner is retained to audit the process. Questions of legal professional privilege may be defined by the nature of the role. This is particularly relevant to in-house counsel and whether there is the necessary professional detachment when giving the advice." (*Rich v Harrington* [2007] FCA 1987 per Branson J at [58]).[51]

[51] Michael Forde J*, The Role of Solicitors in Procurement Contracts and Management*, a paper presented to the seminar "probity and ethics in a tender and contracts", Queensland Law society, 9 October 2008

Forde further says: “with the ever increasing need for transparency, the firm which obtains the work should be subject to a procurement process supervised by an in-house team or, even better, an independent process audit.”[52] I can add, even more so in the case of in-house counsel who are part of the company/proponents team putting forward the proposal to government.

My recommendation is for an external professional to be engaged by the Corporation/business, as was the case with my appointment by GoldLinQ Pty Ltd, the Operator/Franchisee of the Gold Coast Light Rail System to create the necessary protocols from Board level to lower management, introduce the necessary probity culture, and sustain it. The earliest engagement will create the better environment from which government can take confidence as it must be seen in conducting business and the creation of contracts as the “moral exemplar”.[53]

Synergistic Probity Application in practice (an actual case study)

Lessons are learned from actual experience exemplifying a way forward when proposing to tender with, or propose to become a partner with government, or present a market-led proposal. I use the example of Stage 2 of the Gold Coast Light Rail System. This is presented as a guide to traverse those issues which in-house counsel and project/procurement managers will need to consider.

GoldLink Pty Ltd and Department of Transport and Main Roads-Gold Coast Light Rail System Stage 2

Client - GoldLinQ Pty Ltd and Queensland Government (represented by Department of Transport and Main Roads). Probity services were undertaken by way of a tripartite agreement.

Project Type

Public- Private Partnership (‘PPP’) between private industry proponent GoldLinQ Pty Ltd and the Queensland Government represented by the Department of Transport and Main Roads (DTMR), for the delivery of 7.3 km light rail extension from Gold Coast University Hospital to Helensvale prior to the 2018 Commonwealth Games.

Industry Type - Infrastructure (Rail)

Project Value - $420 Million

Key Personnel-Lindsey Alford and Joseph Manner

Project Elements

[52] Ibid
[53]

The delivery of Stage 2 of the Gold Coast Light Rail System by augmentation of a Public-Private Partnership, had the following elements: major civil works affecting existing transport network; rail line and electrification works; construction of rail station platforms and facilities; direct impact on neighbouring and surrounding community; purchase of rolling stock; operation and maintenance coordination with existing operator.

Probity Advisory and Auditing Services Performed

Acted as sole Probity Advisor to the Project, to the procurement of the Design and Construction contract for the delivery of Stage 2 of the Gold Coast Light Rail for GoldLinQ and the Queensland Government represented by DTMR;

Probity of entire procurement process end-to-end overseen and guided; from engagement with the Board of GoldLinQ Pty Ltd, initial engagement with the State, advising the Operator Franchisee Project Steering Control Group, as co-client, until the appointment of Preferred Tenderer and Contractual and Financial Close;

Appointment continued for the State in advising on the Augmentation of the existing PPP Deed and the approval of the Operator Franchisee Modification by the Cabinet Budget Review Committee (CB RC) and recommendation to Cabinet;

Probity Advisory incorporated all probity aspects of the procurement process including; drafting of the Probity Plan and Evaluation plans settlement of probity declarations and undertakings, settling Tender documents, probity inductions, probity oversight of the complete evaluation process, attendance and advice to all evaluation-related meetings and tenderer interaction/participation meetings (always attended by observers from the DTMR, and often by the corporate lawyers and representatives of the Public Utilities Providers), ad-hoc probity advice and audit in relation to specific probity issues.

Drafted and settled a Final Probity Report to GoldLinQ endorsing the recommendation of the preferred contractor, and a further comprehensive Probity Report to the State and the CBRC; each based upon the Probity Audit detailing and certifying the probity of the process;

Provided timely advice in relation to specific probity issues raised by both clients and by Argus Probity;

Assisted the appointed Procurement Manager consultant in security of documents, IT, monitoring the Data Room, and settled the Secure Server Protocol for Advisors.

Issues identified

This project was one of the largest current infrastructure projects in Queensland, and the first PPP Augmentation of its kind in Australia;
The project involved very complex interrelationships from Board Director level to current Contractors on Stage I, and professional consultants, and therefore Probity Advisory challenges; based upon the Public-Private Partnership structure, the corporation-government interface, and the conflicts of interest inherent in a project of this scale and configuration;
The project was one of the highest priority for the Queensland Government, with the requirement for project delivery overall ahead of the 2018 Commonwealth Games, and therefore required diligent and timely application to the tasks of Probity Advisory.

Resolution Method

This undertaking by Argus Probity in relation to the project was to provide Probity Advice and Audit services, to the procurement throughout the following broad stages in the process:

Establishment of initial probity framework for the Private Partner including the initial Board Protocol and Probity Plan;

Probity oversight of the Expressions of Interest (EOI) process for the short listing of project tenderers to be invited to submit a Request for Tender (RFT) for the Design and Construct (D&C) Contract to deliver GCLR Stage 2; and

Probity oversight of the Request for Tender process for the recommendation of the preferred contractor to enter into the Design and Construct contract for the delivery of Stage 2.

Detail of Advice

GoldLinQ Pty Ltd as the Operator Franchisee is to build, operate and maintain Queensland's first Light Rail System, on the Gold Coast. GoldLinQ is a consortia of companies, and succeeded in its bid under a Public-Private Partnership tender process. GoldLinQ had completed Stage 1;

Argus Probity was appointed in 2014 to advise GoldLinQ as to a probity framework to facilitate negotiation with the Government to be appointed as preferred Franchise Operator for Stage 2 (the Northern Extension), targeted by Government for completion before the opening of the Commonwealth Games in 2018;

Argus Probity gave extensive advice and drafted a Board Probity Protocol to enable interim negotiations to continue between Government and the GoldLinQ Board for proving the merit of the consortia to continue on Stage 2;

Argus Probity advised the GoldLinQ Board which supported the recommendations, adopted the Board Probity Protocol, which established a Board Sub-Committee, which excluded a number of Board members who were conflicted due to representing contractors undertaking the civil and rail works and supply of trains in Stage I;

The GoldLinQ Board informed the Government of Argus Probity's independent advice to the Board. Argus Probity advised that the State could accept an initiative by the current Operator Franchisee (the Board) to negotiate a sole and selective tender for the construction and operation of Stage 2 of the Gold Coast Light Rail project, in accordance with a term of the current Project Deed. This was provided "in the public interest', and a transparent and open book Business Case supported the Value for Money criteria;

On 6th August 2015, the Government announced GoldLinQ could proceed with Stage 2. An EOI process ensued; followed by an RFT with 3 shortlisted tenderers;

On the Government's decision, under the Project Deed for GoldLinQ to undertake Stage 2 Argus Probity was also appointed by the Department of Transport and Main Roads as Probity Advisor. Argus Probity continued as Probity Advisors for both Upstream and Downstream Services in a tri-partite Agreement;

The 8 month EOI and RFT process was overseen by Argus Probity, concluded and the preferred contractor was announced in March 2016; and

Acted as sole Probity Advisor to the Operator Franchisee Initiated Modification Proposal Evaluation Panel drawn from senior officers of DTMR, Department of the Premier and Cabinet, Department of Infrastructure Local Government and Planning, and reported to the State Steering Committee, and the Cabinet Budget Review Committee (CBRC) for the Modification Proposal evaluation process.

Strengths

The Stage 2 procurement process itself, demonstrated Argus Probity' capacity to encompass each probity exigency in a complex and urgent procurement. The following specific procurement elements and phases.

Design and Construction Contract – Expressions of Interest Phase for co-clients;
Design and Construction Contract – Request for Tender Phase for co-clients;
Independent Verifier – Request for Tender Phase for DTMR; and
Operations and Maintenance (O & M) Contractor – Direct Negotiation Procurement for co-clients; and
Oversight for the State of the multiple departmental Evaluation Panel of the Modification of the Project Deed and report to the Steering Committee, and CBRC.

Argus Probity demonstrated timely, pragmatic, direct and focused advice to resolve issues promptly to keep to project timetables. All aspects of the Probity Service met strict timelines.

At the outset Argus Probity undertook the development and implementation of a Probity Plan complementing the Evaluation Plans and Procurement Plan, to apply from preparation of EOI and RFT documentation including during:

Short-listing of respondents for EOI phase;
Evaluation of proposals in response to the RFT; and
Selection of a proponent to deliver the requirements for the D&C contract (Stage 2)
Probity clearance of the appointment to Stage 2 of the O & M Contractor

Argus Probity undertook the Probity Audit and Advisory role in relation to the final stage of the Project's implementation being the process for the Operator Franchisee Modification of GCLR Project Deed for the DTMR representing the State.

This evaluation by the Queensland Government followed on directly from the GCLR Stage 2 procurement phase.

Argus Probity advised the State Government Evaluation Panel assessing the GoldLinQ formal submission, and reported to the Steering Committee comprised of the State Under Treasurer, Mr. Jim Murphy, the Director-General of the Department of Premier and Cabinet, Mr. David Stewart, and the Director-General of the Department of Transport and Main Roads, Mr. Neil Scales, to proceed to State Cabinet for formal ratification. Argus Probity's Probity Report across the entire project was accepted by the eminent Steering Committee for submission to the Cabinet Budget Review Committee (CBRC).

Unique Methodology

A tri-partite agreement formed prior to the procurement phase of the GCLR Stage 2 project between Argus Probity, GoldLinQ and the Queensland Government formed the basis of the

probity advice provided by Argus Probity as a conduit between the State and the Operator Franchisee.

TRI-PARTITE AGREEMENT - GOLDLINQ / STATE OF QLD (DTMR) / ARGUS PROBITY		
GOLDLINQ	**GOLDLINQ / STATE**	**STATE**
Board Advice	D&C Contractor Procurement (EOI and RFT)	Operator Franchisee Submission Evaluation
Board Protocol	KDR (O&M) Interface Deed	Independent Advice
State Negotiations and Submissions	Bombardier Transport Interface Deed	
Independent Advice	Independent Verifier and Certifier Appointment	
	Post Tender Negotiations	

Conclusion

Legal practitioners are at the centre of significant changes in policy stemming from the Jobs for Queenslanders directive, and changes flowing into the 2017 Queensland Procurement Policy, coupled with wider entry for the private sector to propose Market-led Proposals. The government is seeking Private-Public Partnership involvement, also in the proposed Cross River Rail project. More PPP's are likely given the demand for infrastructure, and the State budgetary restraints.

The interface with Government requires a skilled adherence to, and understanding of, Probity Principles in Government Procurement and contracting.

LINDSEY ALFORD

28 September 2017

For further information as to my speciality in practice please go to www.alfordbarrister.com.au.

Attachment

Market led proposals

Old criteria

All stages

1. Community need/ government priority
2. Vaiue for money
3. Uniqueness and intellectual property
4. Benefit of proponent's preliminary investment
5. Risk/cost allocation
6. Capacity and capability of proponent
7. Feasibility
8. Public interest and benefits to government
9. Competing proposals

New criteria as of July 2017

Stage 1 and pre-submission criteria

1. Community need/ government priority
2. Value for money
3. Justification for direct negotiation
4. Capacity and capability of proponent

Stage 2 - Assessment criteria

1. Community need/ government priority
2. Value for money
3. Justification for direct negotiation
4. Capacity and capability of proponent
5. Risk/cost allocation
6. Feasibility