



fact sheet

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Probity and process issues for property and infrastructure projects

This fact sheet provides Commonwealth agencies with some tips on probity and process issues for property and infrastructure projects.

The Commonwealth Procurement Rules (CPRs) apply

It is important to remember that the CPRs do apply to the acquisition of real property (eg leases or freehold land) and related contracts such as fit-out, project management and construction contracts. All of these procurements have to be run so that they comply with the CPRs—including, for example, the requirement to obtain value for money.

Some procurements will also be required to comply with the additional rules for procurements at or above the relevant procurement threshold in Division 2 of the CPRs (which generally require an open tender to be conducted) but some will not. Each project needs to be looked at on its merits.

Do the CPRs apply if an agent is conducting the procurement for the agency?

When an agent conducts a procurement for the agency (eg procuring new premises), the procurement has to comply with the CPRs and other Commonwealth requirements.

If using an agent or property manager, it is important to ensure they understand that Commonwealth agencies are not private organisations, therefore:

- Commonwealth procurement policies and procedures, including probity principles, must be followed and reflected in the request documents
- the documented tender process must be followed
- the tender outcome must demonstrate value for money.

What Commonwealth requirements apply?

The requirements that might need to be complied with in planning and implementing the procurement or preparing request (eg RFT) and contract documents include:

- the CPRs and the agency's internal policies and procedures (see AGS Fact Sheet No. 7: *Commonwealth Procurement Rules* (December 2014))
- the *Lands Acquisitions Act 1989* (see AGS Fact Sheet No. 3: *Lands Acquisition Act 1989* (August 2011))

Key probity and process principles

- act with fairness and impartiality: treat parties equitably
- make sure the process is consistent and transparent
- use an appropriately competitive process
- ensure security and confidentiality
- identify and manage conflicts of interest (actual or perceived)
- comply with legislative and policy obligations
- establish and maintain a clear audit trail.

- the *Environment Protection and Biodiversity Conservation Act 1999* (see AGS Legal Briefing No. 82: *Commonwealth environment and heritage law* (4 June 2007))
- the Australian Government procurement policies that apply for the purposes of sections 15 and 21 of the *Public Governance, Performance and Accountability Act 2013* (Cth).

Policies that may apply

Depending on the project, relevant policies might include:

- | | |
|---|--|
| • Commonwealth Property Management Guidelines | • Workplace Gender Equality |
| • Public Works Committee Requirements | • Australian Industry Participation Plan |
| • Energy efficiency in Government operations: 'Green lease' schedules | • National Public Private Partnership Guidelines |
| • National Code of Practice for the Building and Construction Industry and WHS Accreditation Scheme | • Indigenous Opportunities Policy. |
- These lists are not comprehensive. See the Department of Finance, table 1 '[Procurement Connected Policies](#)' for more details.

Process tips for property and infrastructure projects

- Start with request documents (eg RFT) and contracts that comply with Commonwealth requirements:
 - standard documents used by agents or property managers for private clients are unlikely to satisfy these requirements
 - Commonwealth legal and policy requirements will impact both on the tender conditions and on the draft contract
 - the contract will usually need to pass some Commonwealth requirements through from the head contractor to subcontractors
 - AGS can assist in developing RFT and contract documents which comply with Commonwealth requirements.
- Carefully consider the process you propose to follow and make sure the process is described accurately in the request document (eg RFT) and follow it. For example:
 - If the RFT says that tenders must be lodged by a particular time and date, as required if the additional rules for procurements at or above the relevant procurement threshold in Division 2 of the CPRs apply, you cannot accept a tender lodged after that date (unless lateness is solely due to agency mishandling). This date can be extended if it is done before Closing Time. If the deadline is extended, then it must be extended for all tenderers. In addition, any extension period should be of sufficient length to ensure that all potential tenderers are equally advantaged.
 - If the RFT says that X, Y and Z evaluation criteria will be used then these should be used.
- Think carefully about the agency's requirements and even more carefully about what should be mandatory – if something is mandatory then the agency may not be able to accept a tender that does not meet that requirement. For example:
 - If the RFT says that properties outside of the CBD will not be considered, the agency may not be able to accept a tender of a property in the suburbs. Contrast this with a tender that says the agency would prefer a property in or near the CBD.
 - If the RFT says the project manager must have a particular qualification or certification, the person who otherwise has the best proposal may not be able to be considered if they do not hold that qualification or certification (even if they are in the process of getting it).
 - Remember that mandatory requirements in an RFT such as page/word limits can sometimes be difficult to manage in practice.

- If the RFT becomes inappropriate for the process, consider a formal amendment – you may need advice on whether or not you can amend the RFT.
- Consider carefully how you or your agents/managers will interact with tenderers during the tender process:
 - interactions need to be managed to ensure the probity principles are followed
 - telephone conversations with tenderers need to be dealt with in accordance with documented protocols
 - responses to questions should be in writing and distributed to all tenderers on a non-attributable basis. Occasionally circumstances may arise that require the response to be provided to only one tenderer (eg where to answer the question would reveal proprietary information of a tenderer or where the response clearly relates only to the tenderer) and these should be considered on a case by case basis.
- If meetings are planned with individual tenderers (as is often the case with larger projects), you will need to plan:
 - when meetings should be held (If it is for evaluation of the tender, it should be held after submission.)
 - the objective of the meeting and what matters should be covered
 - what information and feedback can be provided to tenderers (the same information or level of information should be provided to all tenderers to ensure a level playing field)
 - what probity protocols should apply to meetings.

Note: The National Public Private Partnership Guidelines contain some useful guidance on interactive meetings.

Probity dos and don'ts

Do

- ✓ be aware that probity issues can arise at any stage during the procurement

- ✓ remember that probity is as much about perception as reality
 - be conscious of how your acts/omissions could be misinterpreted

- ✓ if a conflict of interest arises, and if you are in doubt, declare it and seek guidance on how to manage it
 - check if team members, agents or advisers are acting for or have connections with a tenderer (even on unrelated matters) – if so, you have a potential conflict of interest which needs to be managed

- ✓ be aware of approaches from tenderers and their advisers seeking information about the procurement which is not in the public domain
 - consider creating a procurement-specific email address for queries (eg cleaning.rft@agency.gov.au)
 - consider an industry briefing to reinforce communication rules

- ✓ protect physical and electronic security of confidential information
 - how will you deal with landlords or contractors the agency is already involved with? You need to set up internal procedures to make sure they do not have an unfair advantage through day-to-day contact.

- ✓ if in any doubt, ask your procurement team or probity adviser for guidance.

Don't

- ✗ leave confidential information unattended at any time in public places, the car or a hotel room
- ✗ discuss the procurement process with people who are not involved with the procurement
- ✗ discuss the process in public places such as aircraft, airport lounges and cafés
- ✗ accept gifts or hospitality from potential tenderers unless first authorised and approved in accordance with established probity protocols
- ✗ allow tender clarifications to become negotiations or opportunities for bid repair
- ✗ negotiate with a tenderer before the evaluation is completed
- ✗ if a preferred tenderer has accepted contract terms, don't entertain negotiations on those terms unless better value for money can be obtained.

For more information contact one of our senior probity specialists:

CANBERRA

Adrian Snooks National Group Leader Commercial
T 02 6253 7192 | adrian.snooks@ags.gov.au

Linda Richardson PSM General Counsel Commercial
T 02 6253 7207 | linda.richardson@ags.gov.au

Andrew Miles Deputy General Counsel Commercial
T 02 6253 7100 | andrew.miles@ags.gov.au

Joanna Piva Senior Executive Lawyer
T 02 6253 7122 | joanna.piva@ags.gov.au

Lottie Flaherty Senior Lawyer
T 02 6253 7164 | lottie.flaherty@ags.gov.au

MELBOURNE

John Scala Chief Counsel Commercial
T 03 9242 1321 | john.scala@ags.gov.au

Paul Lang Deputy General Counsel Commercial
T 03 9242 1322 | paul.lang@ags.gov.au

Garth Cooke Senior Executive Lawyer
T 03 9242 1494 | garth.cooke@ags.gov.au

Kenneth Eagle Senior Executive Lawyer
T 03 9242 1290 | kenneth.eagle@ags.gov.au

Fiona Mackrell Senior Lawyer
T 03 9242 1292 | fiona.mackrell@ags.gov.au

SYDNEY

Simon Konecny Deputy General Counsel Commercial
T 02 9581 7585 | simon.konecny@ags.gov.au

Kate Brophy Senior Lawyer
T 02 9581 7678 | kate.brophy@ags.gov.au

PERTH

Scott Slater Senior Lawyer
T 08 9268 1144 | scott.slater@ags.gov.au

ADELAIDE

Alexandra Monk Senior Lawyer
T 08 8205 4210 | alexandra.monk@ags.gov.au

For further information see also:

ANAO Better Practice Guide *Fairness and transparency in purchasing decisions: Probity in Australian Government procurement* August 2007

This material was updated in February 2015. The legislation and policies referred to may have changed since that date.

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