

3.13 ETHICS IN PROCUREMENT

INTRODUCTION

- 1 This chapter applies to all procurement undertaken in Defence and the Defence Materiel Organisation (DMO).
- 2 This chapter provides guidance and advice on ethics related requirements for procurement officers when undertaking procurement, including:
 - the legislative and policy framework;
 - probity; and
 - conflict of interest.

MANDATORY POLICY

- Procurement officers must comply with the *Financial Management and Accountability Act 1997 (Cth)*, the *Financial Management and Accountability Regulations 1997 (Cth)*, the APS Values and APS Code of Conduct set out in sections 10 and 13 respectively of the *Public Service Act 1999 (Cth)* and the *Commonwealth Procurement Guidelines (CPGs)* when undertaking procurement activities.
- Procurement officers must comply with Defence Chief Executive Instruction (CEI) 6.2 (Defence officers) or DMO CEI 6.2 (DMO officers) and Defence Instruction (General) - *PERS 25-6 Conflicts of Interest and Acceptance of Offers of Gifts and Hospitality* when dealing with gifts and hospitality from suppliers and contractors.
- Procurement officers must comply with Defence Instruction (General) - *PERS 25-4 Notification of Post Separation Employment* and Defence Instruction (General) - *PERS 25-6- Conflicts of Interest and Acceptance of Offers of Gifts and Hospitality* when dealing with issues relating to post separation employment.
- DMO personnel must also comply with the Defence Material Instruction (Personnel Management) - *001 Dealing with Conflict of Interest in the Workplace* when managing conflict of interest issues that arise in the course of employment.
- Defence employees must always behave ethically and fairly throughout the procurement process. Defence employees exercising delegations must conduct due diligence to ensure that the requirements of ethics and fairness have been applied during the procurement process.
- Procurement officers must consider developing a legal process or probity plan for any complex or strategic procurement activity.

OPERATIONAL GUIDANCE

LEGISLATIVE AND POLICY FRAMEWORK

Legislation

- 3 Paragraph 6.17 of the CPGs states that “ethics are moral boundaries or values within which officials work. Ethical behaviour encompasses the concepts of honesty, integrity, probity, diligence, fairness, trust, respect and consistency. Ethical behaviour identifies and avoids conflicts of interest, and does not make improper use of an individual’s position”. Defence

employees must always behave ethically and fairly throughout the procurement process and comply with all Commonwealth legislation and policy. A procurement conducted in an ethical manner enables purchasers and potential suppliers to deal with each other with mutual trust and respect.

4 The legislative requirements for procurement officers to act ethically when undertaking procurement activities stem from two main sources: the *Public Service Act 1999 (Cth)* (Public Service Act) and the *Financial Management and Accountability Act 1997 (Cth)* (FMA Act).

5 When conducting procurement activities, Procurement officers must comply with the APS Values (section 10) and Code of Conduct (section 13) of the Public Service Act including subsections:

Section 10 – APS Values.

- (d) the APS has the highest ethical standards; and
- (e) the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public.

Section 13 – APS Code of Conduct

- 1) An APS employee must behave honestly and with integrity in the course of APS employment;
- (7) An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment;
- (8) An APS employee must use Commonwealth resources in a proper manner;
- (10) An APS employee must not make improper use of:
 - (a) inside information; or
 - (b) the employee’s duties, status, power or authority,in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person; and
- (11) An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.

6 The concept of ethical behaviour is reinforced in Section 44 of the FMA Act and Regulation 9 of the *Financial Management and Accountability Regulations 1997* (FMAR). In particular, section 44 of the FMA Act requires the Chief Executive to manage Defence in a way that promotes proper use of Commonwealth resources, where ‘Proper use’ is defined as an efficient, effective and ethical use that is not inconsistent with the policies of the Commonwealth.

Government Policy

7 In addition to the above legislative requirements to behave ethically, the two primary documents outlining Government policy on conducting procurement in an ethical manner are the CPGs and the Department of Finance and Deregulation’s Financial Management Guidance No. 14 - *Guidance on Ethics and Probity in Government Procurement* - January 2005 (FMG 14).

8 To ensure compliance with these policies, Defence employees should:

- recognise and deal with any conflicts of interest, including perceived, potential and/or actual;
- deal with suppliers and potential suppliers equitably;
- consider seeking advice where probity issues arise;

- comply with all duties and obligations, including Defence's rules and policies in relation to gifts or hospitality, post-employment separation and sponsorship, the information privacy principles of the *Privacy Act 1988 (Cth)*, the security provisions of the *Crimes Act 1914 (Cth)* and the Public Service Act Section 13;
- not seek or accept personal benefit when dealing with suppliers;
- not seek to benefit from supplier practices that may be dishonest, unethical or unsafe;
- always consider accountability and transparency throughout the procurement process; and
- be scrupulous in their use of public property.

PROBITY

- 9 The fundamental way in which Defence implements and monitors ethics in procurement is through probity, meaning "good process". A good tender process is one in which clear procedures, consistent with Commonwealth legislation, policies and principles and the legitimate interests of tenderers, are established, understood and observed from start to finish. All potential tenderers are to be treated equitably in accordance with these procedures.
- 10 There are four essential principles to promoting probity which should be considered throughout the whole tendering process:
- value for money;
 - impartiality and fairness;
 - dealing with conflicts of interest; and
 - transparency and accountability.
- 11 Accurate record keeping is an important part of ensuring transparency and accountability. Procurement officers should ensure the tendering process is well documented. Decisions should be made in a clear, open and transparent manner which enables them to be understood and defended. For more information on Defence record keeping policy, refer to chapters 5.1 and 5.4 and POLMAN 3.

Legal Process and Probity Plans and Probity Briefings

- 12 Procurement officers must consider developing a legal process or probity plan for any complex or strategic procurement
- 13 Prior to undertaking any complex or strategic procurement tender evaluation, all officers involved in the tender evaluation should be briefed on their probity obligations in accordance with the probity plan.

Use of Legal Process / Probity Advisers and Auditors

- 14 The terms legal process adviser and probity adviser are often used interchangeably. However, a key difference is that a legal process adviser is engaged to provide legal advice on the development and implementation of the procurement process in addition to the more usual 'probity' advice provided by a probity adviser about the conduct of the procurement process. An advantage of a legal process adviser can be that legal professional privilege is maintained in the advice provided by the legal adviser. In the rest of this chapter, the term '**probity adviser**' is used to denote both a legal process adviser and a probity adviser.
- 15 Probity advisers and probity auditors perform different functions. Depending on the particular procurement activity, it may be appropriate to engage either or both.
- 16 Probity advisers provide independent advice and assistance during a procurement process. They are normally engaged at the beginning of the procurement process. A probity auditor is independent of the procurement process and is engaged to review a procurement activity at a

particular point in the process (eg at the completion of the tender evaluation) to verify whether the processes undertaken were consistent with the legal process and probity framework put in place to govern the procurement.

- 17 It is important for procurement officers to ensure that the roles of a probity adviser and probity auditor are clear and that there is no duplication between the services provided.
- 18 Obtaining probity advice or conducting a probity audit should not be confused with obtaining legal advice. Both legal and probity advice may be required in relation to a procurement activity.

Probity Advisers

- 19 Probity advisers can provide the following services:
- legal process and probity advice on tender planning, request, evaluation, negotiation and recommendation processes and assistance to comply with the CPGs and Defence procurement policy;
 - provision of advice/briefs to the procurement teams on ‘probity principles’;
 - advice and/or assistance in the preparation of a legal process or probity plan (although responsibility for compliance with and the outcomes from the plan still rests with the project team manager);
 - advice and assistance on the development of conflict of interest and confidentiality declarations;
 - advice and/or assistance with procedures to ensure probity, for example processes dealing with communications with tenderers and third parties, information security, confidentiality, conflicts of interest, records and information management, setting up data facilities etc. Whenever possible, probity procedures already established by other projects should be reused in order to avoid developing new documentation and to encourage continuous improvement;
 - advice on tender documentation, tender evaluation documentation and any probity issues that may arise during the tender process; and
 - advice on the ‘robustness’ of the final recommendation process and report.
- 20 Procurement officers may seek legal process or probity advice and engage a probity adviser prior to conducting the following procurement activities:
- where an offer definition or other risk reduction process is being used to assist in making a source selection decision in a procurement;
 - for projects using the project alliancing/alliance contracting methodology; and
 - where parallel negotiations will be conducted with two or more tenderers.
- 21 Legal process or probity advice may also be useful in other circumstances, including where:
- the integrity of the procurement process may be questioned;
 - there has been a history of controversy and litigation;
 - the project is politically sensitive and vulnerable to controversy;
 - the nature of the market place makes tenderer grievances more likely;
 - it is an innovative project where tenderers are likely to be concerned about protecting their intellectual property;
 - the project is highly complex;
 - a sole source acquisition strategy is being used; and

- an in-house option tender is being considered.
- 22 The probity adviser cannot perform probity auditing services for the same procurement activity. This would be a conflict of interest because normally part of the work undertaken by the probity auditor would be to audit the activities of the probity adviser.

Probity Auditors

- 23 Probity auditors provide independent opinions on probity issues that arise during the tendering process and confirm, in writing, whether the concluded process has met all probity requirements. The audit findings are provided by the auditor in a written report, including any non compliance with probity requirements.
- 24 A probity auditor can be engaged to audit different stages of a procurement activity. For example, it may be appropriate to have a probity audit conducted prior to requests for tender being issued, before contracts are signed and at the end of the procurement activity.
- 25 A probity audit may be required where:
- concerns are raised about a procurement process by an aggrieved tenderer;
 - the integrity of the process has been questioned; or
 - there is political controversy surrounding the procurement activity.

Where to obtain probity adviser or probity auditor services

- 26 For preliminary probity advice, Defence procurement officers should contact the Office of the Inspector General and DMO procurement officers should contact the Office of Special Counsel.
- 27 Procurement officers seeking to engage a probity adviser for the life of the procurement process can also seek external probity advisers through various panels. In DMO, procurement officers should contact DMO Legal. Procurement officers in Defence Groups should contact Defence Legal or seek to access the Defence Support Group Consultancy Services Panel (Panel 2).
- 28 For probity auditing services, DMO procurement officers should contact DMO Legal in the first instance, and Defence procurement officers should contact the Office of the Inspector General and lodge a management task with the Assistant Secretary Management Audit (ASMA).
- 29 For more information on probity, refer to the [Australian National Audit Office's Better Practice Guide - Fairness and Transparency in Purchasing Decisions: Probity in Australian Government Procurement August 2007.](#)

CONFLICTS OF INTEREST

- 30 Conflicts of interest refers to any situation where there is, or may appear to be, a conflict between an employee's personal interests and their public duties and responsibilities that can prejudice their impartiality. Defence employees are expected to avoid, or take steps to avoid, any actual, potential or perceived conflicts of interest.
- 31 There are many kinds of conflicts of interest, but they can generally be categorised into the following:
- gifts and hospitality (including travel and accommodation);
 - holding interests or investments in companies, or their competitors, doing business with Defence;
 - post separation employment; and
 - sponsorship by private sector companies.

- 32 For further information on conflicts of interest, procurement officers should refer to FMG 14.
- 33 DMO personnel must comply with the Defence Material Instruction (Personnel Management) - *001 Dealing with Conflict of Interest in the Workplace* when managing conflict of interest issues that arise in the course of employment.

Gifts and Hospitality

- 34 Defence employees must not accept or solicit gifts, any benefits or hospitality for themselves or any other person or group. Offers of gifts, benefits or hospitality that could give rise to actual or perceived conflicts of interest should not be accepted. Any gifts, or offers of gifts should be reported on a relevant organisational gift register.
- 35 Procurement officers must comply with Defence Chief Executive Instruction (CEI) 6.2 (Defence officers) or DMO CEI 6.2 (DMO officers) and Defence Instructions (General) PERS 25-6 - *Conflicts of Interest and Acceptance of Offers of Gifts and Hospitality* when dealing with gifts and hospitality from suppliers and contractors.

Post Separation Employment

- 36 Defence employees wishing to take up employment with private sector organisations must consider whether there might be potential for a real or apparent conflict of interest. Where a conflict exists or is perceived to exist, Defence employees must fully inform Defence of the situation before accepting employment.
- 37 Procurement officers must comply with Defence Instruction (General) PERS 25-4 - *Notification of Post Separation Employment* and *Defence Instruction (General) PERS 25-6 Conflicts of Interest and Acceptance of Offers of Gifts and Hospitality* when dealing with issues relating to post separation employment.

Private Sector Sponsorship

- 38 Defence employees must not accept or seek sponsorship or commercial endorsement relating to events, functions, products or businesses when this could give rise to a perception of real or potential conflict of interest for Defence or another party.
- 39 Refer to Defence Instructions (General) PERS 25-6 - *Conflict of Interest and Acceptance of Offers of Gifts and Hospitality*, Defence CEI 2.12 – *Receiving and Providing Sponsorship* and to the *Ethics Matters* in the *Defence Resource Management Handbook* for more information.

KEY REFERENCES:

- *Public Service Act 1999 (Cth)*
- *Financial Management and Accountability Act 1997 (Cth)*
- *Financial Management and Accountability Regulations 1997 (Cth)*
- *Commonwealth Procurement Guidelines- December 2008*
- *DOFD Financial Management Guidance No. 14 Guidance on Ethics and Probity in Government Procurement January 2005*
- *Defence Chief Executive Instruction (CEI) 6.2 Receiving and Gifting Gifts*
- *Defence Chief Executive Instruction (CEI) 2.12 Receiving and Providing Sponsorship*
- *DMO Chief Executive Instruction(CEI) 6.2 Gifting Public Property and Receiving Gifts and Benefits*
- *Australian National Audit Office (ANAO) Better Practice Guide - Fairness and Transparency in Purchasing Decisions: Probity in Australian Government Procurement August 2007*

- *Defence Resource Management Handbook, Ethics Matters*
- *Defence Workplace Relations Manual Chapter 7, Part 5*
- *Defence Instruction (General) PERS 25-2- Employment and Voluntary Activities of ADF Members in Off-Duty Hours*
- *Defence Instruction (General) PERS 25-3 - Disclosure of Interests of Members of the Australian Defence Force*
- *Defence Instruction (General) PERS 25-4 - Notification of Post Separation Employment*
- *Defence Instruction (General) PERS 25-6 - Conflicts of Interest and Acceptance of Offers of Gifts and Hospitality*
- *Departmental Personnel Instruction 1/2006 – Financial and Other Private Interest Statements by Defence Senior Executive Service Officers*
- *Defence Materiel Instruction (Personnel) 1/2007 – Post Separation Employment Policy*
- *Defence Materiel Instruction (Personnel Management) 001 -Dealing with Conflict of Interest in the Workplace*
- *APS Ethics Advisory Service (www.apsc.gov.au/ethics/)*

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