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James Cook University Introduction to Probity

OVERVIEW

- Topic 1 – Introduction to probity
- Topic 2 – Principles of probity

MORNING TEA

- Topic 3 – Probity framework
- Topic 4 – Tools to assist with probity compliance
- Questions & Answers

Introduction to probity



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Introduction to probity

- What is probity?
- Why is probity important?
- Differentiating probity from legal
- Public v private sector
- Role of probity auditors and advisors.



What is probity?

‘Probity requires that procurement activities are conducted ethically, honestly and with fairness to all participants.’

– James Cook University, FMPP711 – Procurement Procedure

What is probity?

‘At its core, probity means that decisions are made with integrity, honesty and fairness while observing due process as necessary elements in the pursuit of value for money’

- Australian Standard AS325-2008: Assuring Probity in Decision Making

What is probity?

‘Probity means more than just the avoidance of corrupt or dishonest conduct. A decision maker acting with probity makes decisions with integrity and honesty. Observing probity means making decisions with the right intentions and in good faith and employing appropriate policies and practices.’

– Australian Standard AS325-2008: Assuring Probity in Decision Making

What is probity

‘A procurement process that conforms to the expected standards of probity is one in which clear procedures that are consistent with the applicable probity framework are established, understood and followed from the outset’

- *Ethics, Probity and Accountability in Procurement*, Queensland Department of Public Works and Crime and Misconduct Commission, 2006

What is probity?

Ethics, Probity and Accountability in Procurement, Queensland Department of Public Works and Crime and Misconduct Commission, 2006:

‘The broad objectives of probity in procurement are to:

- Provide accountability of the process;
- Maintain public sector integrity;
- Ensure compliance with relevant processes;
- Ensure that all offers will be evaluated against the same criteria;

...

What is probity?

...

- Preserve public and supplier confidence in the government processes;
- Minimise potential conflicts and the potential for litigation;
- Ensure the procurement activity provides the best outcome for the purchaser; and
- Avoid the potential for misconduct, fraud and corruption.'

Why is probity important?

- Consequences for James Cook University
- Consequences for YOU as individual
- Consequences for suppliers

Differentiating probity and legal advice

- **Legal advice** in relation to procurement has a narrow focus:
 - the legality of the process
 - reducing JCU's exposure to legal risks
 - protecting JCU from unwanted liability.

Differentiating probity and legal advice

- **Probity advice** in relation to procurement has a broader focus:
 - ensuring the integrity, honesty fairness of the process
 - reducing JCU's exposure to broader risks such as harm to reputation, loss of supplier confidence, loss of funding body confidence, disciplinary action against employees (as well as potentially, exposure to legal risks).

Example

- Assume that a request for tender states:

‘JCU is not required to maintain any records of its evaluation process, including evidence of considering tenders, scoring of tenders and reasons for scoring’.
- Evaluation chair seeks legal and probity advice on whether he should maintain such records notwithstanding the provision.

Example

- **Legal advice** may focus on:
 - Is there a legal requirement to maintain such records (i.e. through case law, legislation)?
 - Could JCU be sued for not maintaining such records?
 - If maintained, could they expose JCU to liability (i.e. provide evidence against JCU) or protect JCU from liability (i.e. provide evidence in support of JCU)?

Example

- **Probity advice** may focus on:
 - Transparency and accountability of decision i.e. will maintaining the records improve the transparency and accountability of the procurement process or conversely, not maintaining the records compromise the transparency of the process
 - Acting ethically i.e. whether not maintaining the records would be unethical in the circumstances
 - The 'Townsville Bulletin Test'

Differences in public and private sector

- **Private sector:**
 - less detailed legislative framework (concerned with fraud, unconscionable conduct, anti-competitive conduct)
 - wide discretion as to whether or not to comply with policies/codes promoting principles of probity
 - wider discretion to avoid potential liability through minimal or no tender obligations
 - limited rights for disgruntled tenderers to access information outside of formal litigation in a court

Differences in public and private sector

- **Public sector:**

- expected to be the ‘moral exemplar’ i.e. higher standards
- detailed procurement and probity framework:
 - Legislation
 - Policies/codes
 - Case law
 - Public perceptions
- ability for disgruntled tenderers to obtain information on the process through right to information procedures

Role of probity advisors and auditors

- Independent not involved in the evaluation process
- Range of qualifications (law, accounting procurement)
- Accredited/non-accredited.



Role of probity advisors and auditors

- **Probity advisor :**
 - engaged at the commencement of a procurement process
 - assists in establishing procedures which meet recognised probity standards
 - observes, reviews and provides guidance on the probity framework and/or processes of a procurement project
 - provides opinions and guidance on probity risks and issues that may arise during the process
 - usually confirms, in writing, to the purchaser whether the process is consistent with the requirements outlined in a probity plan as well as general probity fundamentals

Role of probity advisors and auditors

- **Probity auditor:**
 - may be engaged at beginning, end or other stage of a procurement process
 - provides independent scrutiny of a procurement process (or part of a procurement process) already undertaken to ensure that prescribed processes are actually adhered to
 - provides a report at the end of the process which records an independent professional view of the way in which the procurement process was managed, from a probity perspective
 - generally does not provide advice or assistance in ensuring compliance

Role of probity advisors and auditors

Probity Advisor	Probity Auditor
Forward looking (usu. before the fact)	Backward looking (usu. after the fact)
Provides advice contemporaneously to ensure compliance with requirements	Provides audit opinion on compliance with requirements
Involved in process	Independent from process
Anticipates and prevents lapses in probity to provide assurance	Traditional assurances services (identifies non-compliances)
Reports to and liaises with project team	Reports directly to senior management
No strict methodology, adopts own methods	Follows an audit methodology
Prepares probity plan or similar	Verifies compliance with plans

Role of probity advisors and auditors

- FMPM711 contemplates JCU utilising probity advisors not auditors.
- FMPM711 provides a process for determining the probity requirements of a particular project.

Principles of probity



Principles of probity

- Fairness & impartiality
- Transparency & accountability
- Confidentiality and security of information
- Managing conflicts of interest
- Acting ethically



Fairness and impartiality

According to the JCU FMPM711, conducting a fair and impartial process involves:

- ‘Treating all tenderers and conducting the process fairly and equitably, consistent with the rules of natural justice and procedural fairness, including ensuring that tenderers are provided with access to the same information [in the same form and at the same time] in order to prepare their tenders’
- ‘Ensuring that the process is conducted in accordance with the process terms and conditions provided to tenderers’.

Fairness and impartiality

According to the JCU FMPM711, conducting a fair and impartial process involves:

- ‘Ensuring that the need to avoid inherent bias in the procurement process is taken into account when making decisions which may impact on the process, including decisions as to how to advertise and market the process and timeframes’.

Fairness and impartiality

According to the JCU FMPM711, conducting a fair and impartial process involves:

- ‘Ensuring tenderers do not engage in collusive or anti-competitive conduct when preparing tender responses’.



Fairness and impartiality

Collusive or anti-competitive conduct:

- *ACCC v TF Woollam & Son Pty Ltd* [2011] FCA 973 and [2011] FCA 1216
 - ‘Cover pricing’ or ‘cover bids’ - company wants to be seen to tender but does not want to win nor spend the time and money to properly price so company submits a high bid;
OK BUT
 - Issues arises when other bidders communicate their prices in advance to facilitate that high bid

Fairness and impartiality

Collusive or anti-competitive conduct

- *ACCC v TF Woollam & Son Pty Ltd* [2011] FCA 973 and [2011] FCA 1216
 - Involved companies were found to have breached the Trade Practices Act (now Australian Consumer Law) for ‘price controlling behaviour’ and misleading and deceptive conduct. Now may constitute serious cartel conduct.
 - Total fines for individuals and companies of \$1.3million

Fairness

Not limited to deliberate unfairness - most issues with fairness occur inadvertently due to lack of understanding by the relevant personnel of the implications of their actions or carelessness

Impartiality

‘Organisations demonstrate impartiality by:

- making decisions and providing advice based on merit—without bias, caprice, favouritism or self-interest, and
- acting fairly by objectively considering all relevant facts and fair criteria.’

- Managing Probity: Procurement Guide, Department of Treasury and Finance, Victoria

Example

Pratt Contractors Ltd v Transit New Zealand [2005] 2 NZLR 433 (Privy Council)

- Several road construction projects in New Zealand
- Transit Authority evaluation panel took into account Pratt's reputation in the industry for 'lowballing' its tender price and accepted a higher tender.
- Pratt challenged the decision on the basis that Transit had breached its obligation to act fairly (implied through tender process contract).

Example

Privy Council held:

- Obligation to act fairly under a tender process contract does not mean a strict absence of bias.
- Nothing improper in evaluation panel taking into account Pratt's reputation in the industry as this was a valid commercial consideration.
- In the absence of unequal treatment of the tenderers or bad faith on the part of transit or the evaluation panel members there was no breach of the tender process contract.
- Emphasis on honesty

Example

‘... the duty of good faith and fair dealing as applied to [the tender evaluation panel’s assessment] required that the evaluation ought to express the views honestly held by the members of the [evaluation panel]. The duty to act fairly meant that all tenderers had to be treated equally. One tenderer could not be given a higher mark than another if their attributes were the same. But [the purchaser] was not obliged to give tenderers the same mark if it honestly thought their attributes were different... The obligation of good faith and fair dealing also did not mean that the [tender evaluation panel] had to act judicially.’

- Per Lord Hoffman, *Pratt Contractors Ltd v Transit New Zealand* [2005] 2 NZLR 433

Fairness and impartiality

Ethics, Probity and Accountability in Procurement, Queensland Department of Public Works and Crime and Misconduct Commission, 2006 provides detailed guidance on the matters required for a process to be fair and impartial, including:

- Material should be available to all interested parties within the same time frame, and each offeror should have access to the same material (that is not commercial in confidence).
- Each offer must be given due consideration and be treated objectively with no conflicts of interest or bias towards certain offerors.

Fairness and impartiality

- All material communication with stakeholders should be carried out in the same timeframe and in the same substantive manner. The most appropriate mechanism should be selected according to what is being communicated, to whom, and the urgency of the communication.
- Additional information or clarification arising from individual offeror requests should be provided to all potential offerors so that they have the same information on which to offer.

Fairness and impartiality

- Where feasible, information should always be provided in writing, whether in hard copy or electronic form.
- Notifications to offerors should be provided in a timely fashion. For example, once the successful offeror has been appointed, all unsuccessful offerors should know the results as soon as possible. Agencies need to consider the most effective way of notifying offerors, taking into account postal delays, particularly if there are international offerors.

Fairness and impartiality

- Request for Offer documentation should clearly detail the conditions of offer, conditions of supply and evaluation criteria and be equally available to all interested parties. Well defined conditions of offer give suppliers a clear indication of requirements and prevent the unproductive use of resources through the lodgement of unsuitable or misdirected offers.
- Request for Offer documentation must clearly identify and separate the mandatory conditions from those evaluation criteria that are ‘desirable’ or ‘optional’. The mandatory conditions should be well targeted, clearly measurable, and not excessive in number.

Fairness and impartiality

- Request for Offer documentation should list any ‘desirable’ criteria in order of relative importance to assist suppliers in structuring their offer.
- An extension notice to an offer closing date must be provided to all potential offerors in sufficient time to reach them before the originally published closing date and time.
- The adoption of selection criteria that do not selectively advantage or disadvantage a particular party and which are based on objective measures that meet the primary procurement needs.

Fairness and impartiality

- Weightings for the evaluation criteria must be documented during the planning/preparation stage, prior to offers being invited.
- Selection criteria and performance specifications must not be changed midstream unless all offerors are given an equal opportunity to revise their offers and approval for any changes is obtained at an appropriate level. If the changes are substantial then a recall of offers may be warranted.

Fairness and impartiality

- Decisions on the selection of suppliers must be made by independent and objective evaluation against the nominated evaluation criteria and supply conditions.
- Officers involved in the various procurement stages and processes should not be those who approve the spending of public money

Example

A request for tender (RFT) for engineering design and project management services was issued by a statutory body. The RFT required tenderers to allow for project management services over a 10 month construction period. The RFT stated that a tender which did not allow for the full scope of services was non-conforming, and that non-conforming tenders would not be considered.

Example

It was subsequently realised that the expected construction period was actually 16 months not 10, so the procurement administrator issued a tender addendum by email to the nominated email address of each tenderer in accordance with the RFT. When tenders were received, Tenderers A & B allowed for the 16 month construction period, but Tenderer C allowed only for the original 10 month construction period.



Example

After tenders had been opened, and the discrepancy was realised, the procurement administrator emailed Tenderer C, noting that an addendum had been issued and inviting them to change their to allow for this, so that the evaluation panel could make an ‘apples with apples’ comparison of the tenders.

Tenderer C indicated that they had not seen the addenda, and 4 days later provided revised price response schedules which increased their price to account for the additional 6 months of project management services. Once the ‘apples with apples’ comparison had been made, Tenderer C was the preferred tender and the statutory body wished to accept it.

Example

- Was the process undertaken fair?
- Any reason why Tenderer C's tender should/should not be accepted?
- Would the answer be different if, the RFT had expressly said that email was not a valid method of communication and that all addenda were to be delivered by registered post?

Example

- All parties were originally provided with the same information at the same time, and given the same time to respond (no unfairness)
- The tender addendum was issued to all tenderers in accordance with the RFT, and as such, all tenderers were given the same opportunity to price for the amended project duration (no unfairness)

Example

But:

- Tenderer C's tender was non-conforming as did not allow for the scope of services and according to RFT should be set aside.
- Tenderer C had over 4 days longer to prepare its price for the project management services than its competitors therefore, not all tenderers provided with an equal opportunity to respond.

Example

- Tenderer C submitted its price after its competitors had submitted their tenders increasing the risk of a breach of confidentiality and that Tenderer C may have had information as to the prices submitted by Tenderer A and B
- Cannot allow a tenderer to fix a non-conforming tender (even to facilitate an 'apples with apples' comparison) as this applies different rules to one tenderer than the others.
- If tender addendum not issued as per the RFT, then potential unfairness to Tenderer.

Transparency and Accountability

- Fairness and impartiality relate to *how* the process is to be conducted
- Accountability and transparency relate to being able to *demonstrate* that the process was conducted properly.

Transparency and Accountability

‘Transparency refers to the openness of the procurement activity to scrutiny. It involves providing documented reasons for decisions and the provision of appropriate information relevant to stakeholders.

– *Ethics, Probity and Accountability in Procurement*,
Queensland Department of Public Works and Crime and
Misconduct Commission, 2006

Transparency and Accountability

‘Accountability involves agencies being able to demonstrate and justify the use of public resources to an appropriate authority. This involves allocating and taking responsibility for past and expected performance. This necessarily involves keeping good records that leave an audit trail’

– *Probity and Probity Advising*, Independent Commission Against Corruption (ICAC), November 2005.

Transparency and Accountability

‘Accountability for outcomes requires that the University and its purchasing staff be able to explain or provide a defensible and documented account for how the procurement decisions have been reached and serve to assist in achieving desired outcomes’

– James Cook University, FMPM711: Procurement Procedure

Transparency and Accountability

According to FMPM711, ensuring that the process is open and transparent involves:

- Establishing, promoting and monitoring compliance with all guidelines with respect to probity issues including conflicts of interest, confidentiality and fair dealing; and
- Disclosing to tenderers the methodology to be adopted for the evaluation of tenders, including all evaluation criteria.

Transparency and Accountability

According to FMPM711, maintaining a clear audit trail involves:

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

Transparency and Accountability

- Transparency and accountability require:

RECORDS

RECORDS

RECORDS!!



Accountability and Transparency

Ethics, Probity and Accountability in Procurement, Queensland Department of Public Works and Crime and Misconduct Commission, 2006 provides that accountability and transparency can be achieved by:

- Procurement activities and decisions that are open to reasonable scrutiny and are able to withstand a ‘public defensibility’ test in the context of fairness, equity and value for money.

Accountability and Transparency

- Arrangements that enable agencies and individual procurement officers to justify decisions made and actions taken in complying with:
 - legislative requirements including those established by the: *Financial Administration and Audit Act 1977; Financial Management Standard 1997; and Public Sector Ethics Act 1994.*
 - the agency's Code of Conduct;
 - the State Purchasing Policy;
 - the agency's procurement procedures;
 - the agency's Corporate Procurement Plan; and
 - the identified requirements of the particular procurement exercise.

Accountability and Transparency

- Appropriate separation of functions and responsibilities.
- Timely response to a legitimate request for information.
- Compliance with relevant financial and other delegations.
- Appropriate management reporting and evaluation processes.

Accountability and Transparency

- Accurate record keeping with appropriate records being maintained throughout the procurement process. These should include evaluation criteria, weightings, decision-making processes and decisions made, and notes regarding communication with offerors. The records should provide sufficient information to enable internal audit, as well as external audit and other independent review functions. The type and detail of information recorded will depend on the complexity or sensitivity of the particular procurement issue.

Accountability and Transparency

- Development of ‘Agency Purchasing Procedures’ that incorporate and promote probity principles.
- Awareness training of all staff in general procurement procedures with specific training of officers who participate in procurement processes.
- Firm adherence to established procedures except for cases with clearly justifiable and well-documented reasons. These reasons should be approved at a senior level by those who have the appropriate delegations and who are not directly involved in the procurement process.

Accountability and Transparency

- The evaluation of offers, submissions, expressions of interests etc, by more than one person, including suitable internal and external experts to ensure sound and accountable decision-making.
- The appointment of a probity advisor who can provide advice about the integrity of the proposed process where deemed desirable for large, complex or controversial contracts.
- The use of documentation that will elicit the information necessary for proper evaluation of proposals under each of the selection criteria based on objective measures of performance.

Accountability and Transparency

- The evaluation of offers on a consistent basis, using predetermined criteria that are established and documented prior to calling for offers, and which are made available to all potential offerors.
- Implementation of measures to protect confidential information with no information released during the process that will selectively benefit or disadvantage particular offerors.
- Regular and systematic monitoring of the supplier's performance to determine whether requirements are being satisfied.

Accountability and Transparency

- An evaluation of outcomes and performance at the end of the contract taking into account the complexity, quality, duration, cost and any other key issues relating to the supply. Outcomes should be measured against the stated objectives.

Example

An evaluation panel individually evaluated the tenders for the construction of an office building. The scores were aggregated and discussed at an evaluation meeting at which the tender panel agreed on the score for each criteria. However, the evaluation panel did not take any notes of the consensus reasons for the decision and instead only recorded the final scores.

When a probity audit was undertaken prior to the recommendation of the evaluation panel being accepted by the principal this lack of transparency was discovered.

Example

The chair of the evaluation panel attempted to record the reasons for the consensus scores based on the individual comments made during the assessment, however these did not align with the consensus scores.

The evaluation panel was required to re-undertake the evaluation assessment and record detailed reasons for its scores.

This enabled the evaluation panel to be transparent in its debriefing with the unsuccessful tenderers, including one particularly disgruntled tenderer who had flagged a possible challenge to the process. That disgruntled tenderer was ultimately satisfied with the debriefing and no challenge was made.

Confidentiality and Security

‘The integrity of competitive procurement hinges on maintaining appropriate confidentiality that will protect information and give offerors the confidence to do business with government.’

– *Ethics, Probity and Accountability in Procurement*,
Queensland Department of Public Works and Crime and
Misconduct Commission, 2006

Confidentiality and Security

The measures required to maintain confidentiality need to be considered in the context of the project itself (value, risk and complexity of the procurement activity).

Includes confidentiality of:

- information provided by tenderers in their tenders;
- procurement activities, such as evaluation and negotiations;
- Outcomes after the decision has been made

Example

- *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* [2012] ACTSC 126
 - Wagdy Hanna unsuccessfully tendered for the construction of a storage facility for the National Library of Australia in Canberra.
 - Tender was awarded to another tenderer who built the facility.
 - When the facility was completed WH claimed that the building incorporated a ‘a number of features of [WH’ s] tendered proposal which the [NLA] had revealed to [the successful tenderer] prior to finalising its choice of tender’

Example

- *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* [2012] ACTSC 126
 - These features included allegedly ‘unique’ shelving and materials retrieval system
 - There was no express obligation for confidentiality expressed in tender conditions but WH claimed that one should be implied, and that it had been breached.
 - WH sought damages including a loss of profit.

Example

- *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* [2012] ACTSC 126
 - Court found that:
 - there was a term of confidentiality implied by law; but
 - there was no evidence of a disclosure in breach of that obligation by NLA.

Example

- *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* [2012] ACTSC 126
 - Whilst NLA was ultimately successful and staff were found to have done nothing wrong:
 - Tender process was in 1996
 - Legal proceedings commenced in 2003
 - 8 day trial held in the Supreme Court in 2008
 - Judgement handed down in 2012
 - Numerous witnesses
 - Extensive legal fees

Conflicts of interest

- Conflicts of interest can be:
 - **Actual** – where a person is in a position to be influenced by their private interests when performing their role
 - **Perceived** - where a person is in a position to appear to be influenced by their private interests when performing their role
 - **Potential** - where a person is in a position where they may be influenced in the future by their private interests when performing their role.

Conflicts of interest

‘Conflicts of interest can involve financial or non-financial interests of the staff member and the interests of a business partner or associate, family member, friend or person in a close personal relationship with the staff member’

- JCU FMPM711

Conflicts of interest

FMPM711 has a range of activities which are deemed to be a conflict of interest under that policy and which **must** be avoided. Relevant examples include:

- Staff member raising a requisition or approving a purchase from a business in which the staff member, a business partner or associate, family member, friend or person in a close personal relationship with the staff member has a financial interest (**Actual conflict**)
- Where a staff member has an interest in an enterprise with which JCU does business, and could be perceived to be in a position to influence relevant business decisions (**Perceived Conflict**)

Conflicts of interest

For example:

- A **potential conflict** of interest may exist where an evaluation panel member has an interest in a business which may in the future seek to do business with JCU



Conflicts of interest

- Whether a conflict of interests exists must be determined objectively.
- A conflict of interest does not necessarily exclude somebody from involvement in a procurement process but must be carefully managed.

Conflicts of interest

- *Managing Conflicts of Interest in the Public Sector*, Independent Commission Against Corruption and the Crime and Misconduct Commission (Queensland), 2004
 - Best option to manage will depend on the nature of the conflict, complexity of the circumstances and the subtleties and severity of the case.
 - Six major options

Conflicts of interest

- Six major options for managing conflicts of interest:
 - Register
 - Restrict
 - Recruit
 - Remove
 - Relinquish
 - Resign

Conflicts of interest

- Register-
 - Record details of the existence of possible or potential conflicts in a conflict register
 - Registering does not of itself resolve the conflict but improves transparency and accountability
 - Suitable for low risk actual conflicts and potential conflicts
 - Not suitable where perceived conflict of interest remains, or for more significant or higher risk conflicts.
 - Strategy is to ensure relevant supervisors or managers aware of the conflict

Conflicts of interest

- Register- Example:
 - Third party (consultant) evaluation panel member discloses that the husband of an employee of that person works for a tenderer.
 - The employee has no knowledge and is not involved in any way with the procurement process
 - The employees husband has no knowledge of and is not involved in the tender being submitted by his company.
 - Evaluation panel member discloses the interest.
 - No actual conflict and risk of perceived or potential conflict is low.

Conflicts of interest

- Restrict-
 - Restrict the involvement of the person in the relevant matter (i.e. the procurement process).
 - Suitable where the person can be effectively separated from the process or relevant parts of it and the conflict is not likely to arise frequently
 - Common restrictions include:
 - non involvement in setting critical criteria or critical decision making or discussion
 - restricted access to information
 - Ensure affected parties know the management strategy implemented and why it was implemented

Conflicts of interest

- Restrict - Example:
 - Employee of an agency is engaged as the project manager for a construction project which the agency is procuring. The employee is responsible for preparing the specification and technical requirements for the project.
 - The employee discloses that wife has a substantial ownership interest in a potential tenderer.
 - The employee is removed from developing the specification and technical requirements, is restricted from any involvement in the procurement or evaluation process, but retains a role as project manager of the project.

Conflicts of interest

- Recruit-
 - Recruit an independent third party to oversee all or part of the relevant process (can be still another employee)
 - Suitable where the potential or perceived effect of conflict is more significant but the conflicted person needs to remain involved in the decision making process (i.e. due to limited internal resources, remote community etc)
 - Not suitable where
 - No suitable third party is available
 - Conflict is serious and recruitment of others is impractical in the circumstances

Conflicts of interest

- Recruit-
 - Strategies include:
 - The recruited person may make the relevant decision
 - The recruited person provides independent oversight (such as a probity auditor or advisor) where there is no actual conflict but a need to reduce a perceived conflict of interest or where the decision has already been made.
 - Increasing the number of people making the decision
 - Seeking the views of affected people as to whether they have any concern about the conflict

Conflicts of interest

- Recruit - Example
 - Same facts as previous example, except that employee was the only employee within the agency with specific technical experience required for to prepare the specification and technical requirements.
 - Agency recruits a third party consultant with the relevant expertise to develop the specification and technical requirements and the employee is restricted from any involvement in the development of the specification or the procurement or evaluation process, but retains a role as project manager of the project.

Conflicts of interest

- Remove-
 - Conflicted person is removed from the relevant matter (i.e. the procurement process)
 - Suitable where restriction or ad hoc recruitment of others to perform some functions is not feasible or appropriate
 - Not suitable where
 - Conflict presents a low risk
 - Conflicted person prefers to relinquish private interests which lead to the conflict

Conflicts of interest

- Remove-
 - Strategies include:
 - Conflicted person removed from all involvement (including any position which could be perceived to enable the exertion of influence)
 - Re-arranging duties
 - Transfer of role
 - Removal usu. considered together with relinquishment

Conflicts of interest

- Remove - Example
 - Same facts as previous. The company owned by the project manager's wife wins the tender following a thorough and independent procurement process.
 - The employee's role as project manager will place him in a position to heavily influence the profitability of the project for the successful tenderer and assess and certify payments to the successful tenderer for the duration of the lengthy project. It is not practical for the employee to be restricted from some of these functions but still remain as project manager for the project.
 - The employee is removed from his role on that project, and assigned to another project.

Conflicts of interest

- Relinquish-
 - Conflicted person relinquishes the private interest that is creating the conflict
 - Suitable where:
 - Private interest is capable of relinquishment
 - Relinquishment is preferable to radical change in work role.
 - Not suitable where
 - Unwilling or unable to relinquish conflicting interest
 - Conflict presents a low risk
 - Strategies include:
 - Conflicted person divests themselves of interest

Conflicts of interest

- Relinquish - Example
 - Same facts as previous (i.e. wife has an interest in a tenderer) but the wife was already intending to sell her share of the tenderer.
 - Prior to the tender being submitted by the wife's company, the wife sells her share in the company and retains no ongoing relationship with the company.

Conflicts of interest

- Resignation -
 - Conflicted person resigns their position
 - Most extreme solution
 - Suitable only as a last resort where no other management strategy available
 - Not suitable where conflict presents a low risk or other options available
 - Strategies include resigning or transferring from employment.

Conflicts of interest

- Resignation -
 - Same facts as previous (wife has ownership share in successful tenderer) but there are no other projects to which the employee can be transferred within the agency and no other attractive roles for him to take within the agency. The employee's wife does not wish to sell her very profitable share in the construction company.
 - On the wife's company becoming the successful tenderer, the employee resigns his position.

Acting Ethically

- Very broad concept
 - kick backs/commissions
 - gifts and benefits
 - social relationships
 - JCU's code of conduct

Acting Ethically

Gifts:

- JCU Code of Conduct:
‘we will only accept gifts and benefits where these are not identified to influence our decision making’
- JCU Reportable Gifts Policy:
‘Individuals should exercise judgement in determining whether receipt of a gift could be seen by others as an inducement which could place that staff member under an obligation to the donor or associated parties...’

Certain gifts to be reported

Acting Ethically

Gifts: JCU Reportable Gifts Policy:

An Officer of the University must not:

- solicit for private purposes any benefit in connection with their official function and duties;
- accept any benefit for any official function or duties, performed or not performed, which could create a conflict of interest or be seen to create such conflict; or
- accept any gift of money or benefit by way of loans and the like for any functions or duties, performed or not performed, which are part of the normal duties of a member of the staff of the University.

Acting Ethically

- Gifts generally. Consider:
 - purpose
 - rules
 - openness
 - value
 - ethics
 - identity
 - timing
 - perception



Acting Ethically

- Social Functions
 - comply with JCU Code of Conduct
 - maintain confidentiality
 - stay sober
 - avoid being isolated
 - reasonable hospitality
 - report anything ethically inappropriate such as attempts to influence a tender process or gain info
 - consider timing

Example

- Compare:
 - Zero tolerance
 - The shout
 - The junket



Probity Framework



Probity Framework

JCU and its procurement activities governed by a framework that includes:

1. Legislation
2. Case law
3. Government and JCU policies and codes
4. Public perception risks:
 - a) Political
 - b) Media



LEGISLATION

Legislation

The legislative framework includes:

1. *James Cook University Act 1997* (Qld)
2. *Financial Accountability Act 2009* (Qld)
3. *Financial Performance Management Standard 2009* (Qld)
4. *Public Sector Ethics Act 1994* (Qld)
5. *Crime and Corruption Act 2001* (Qld)
6. *Judicial Review Act 1991* (Qld)
7. *Fair Trading Act 1989* (Qld)
8. *Ombudsman Act 2009* (Qld)
9. *Auditor-General Act 2009* (Qld)
10. *Right to Information Act 2009* (Qld)

James Cook University Act 1997 (Qld)

- Act establishes JCU as a body corporate, providing that JCU has all the powers of an individual, which include:
 - right to contract
 - ability to sue or be sued
 - hold, dispose or deal with property
- JCU Council is governing body with authority to exercise powers, however may delegate to:
 - Sole member of JCU Council
 - Committee
 - Members of JCU Staff

Financial Accountability Act 2009 (Qld)

- This Act specifies broad principles focused financial responsibility considerations and actions for Government Departments and statutory bodies (including JCU)
- One of the functions of JCU under the Act is to perform the functions required under the Financial Performance Management Standards.

Financial Performance Management Standard 2009 (Qld) (FPMS)

- The FPMS requires statutory bodies to establish a governance framework that manages the performance of its functions and operations and requires that framework to include the concepts of:
 - openness, integrity and accountability
 - due care
 - public defensibility
 - the ethics principles of the *Public Sector Ethics Act 1994* (Qld)

Compliance with the *FA Act and FPMS*

- How does JCU comply with the *FA Act and FPMS*?
 - establishing and complying with the JCU Procurement Manual and related policies
 - procurement planning (i.e. whole of JCU, different departments, significant procurement plans)
 - JCU wide expense management system
 - procurement delegations
 - Budgeting and financial reporting

Consequences of failing to comply with the *FA Act and FPMS*

- Consequences for JCU
- Consequences for YOU

Public Sector Ethics Act 1994 (Qld) (the PSEA)

- The Act sets out the ethics principles fundamental to good public administration:
 - integrity and impartiality
 - promoting the public good
 - commitment to the system of government
 - transparency and accountability
- The Act requires:
 - JCU to establish a Code of Conduct based on the ethics principles; and
 - JCU employees to follow the Code of Conduct

Consequences of failing to comply with the *PSEA*

- Consequences for JCU
- Consequences for YOU

Crime and Corruption Act 2001 (Qld) (CCA)

- The purposes of the CCA is to reduce:
 - the incidence of major crime; and
 - the incidence of corruption in the public sector.
- The CCA establishes the Crime and Corruption Commission and gives it the power to investigate corrupt conduct

Crime and Corruption Act 2001 (Qld) (CCA)

- Corrupt conduct is conduct by anyone that adversely affects a public agency or public official so that the performance of their functions or the exercise of their powers:
 - is not honest or impartial, or
 - knowingly or recklessly breaches public trust, or
 - involves the misuse of agency-related information or material.
- Crime and Corruption Commission has broad powers in investigating corrupt conduct which includes:
 - Require information or documents;
 - Enter premises to conduct an investigation;
 - Require interviews;
 - Refer corrupt conduct to JCU Council for consideration.

Consequences for failing to comply with the CCA

- Consequences of breaching the CCA are severe:
 - Substantial fines
 - Imprisonment

Judicial Review Act 1991 (Qld) (JR Act)

- The JR Act provides a potential basis for a dissatisfied tenderer to challenge a procurement decision in a Court, but only if the decision is made under an enactment or a non-statutory scheme or program.
- Unlikely that most JCU procurement decisions would be subject to review.

Judicial Review Act 1991 (Qld) (JR Act)

- Orders that can be made under the *JR Act* include:
 - an order quashing the decision or parts of the decision (which includes a contract being declared void for illegality – *Hunter Brothers v BCC* [1984] 1 QdR 328)
 - an order referring the matter back to the decision maker to consider the decision again, with directions
 - an order declaring the rights of the parties to the decision
 - an order to the parties to do anything the Court believes is necessary to do justice between the parties (sec 30 *JR Act*)

Fair Trading Act 1989 (Qld) (FTA)

- The *Australian Consumer Law (ACL)* has been implemented in Qld by the *FTA* (sec 16 *FTA*), however it applies to JCU only to the extent that the activities of JCU constitute the “carrying on of a business”.
- Unlikely that it will apply to a typical construction or procurement process conducted by JCU but could potentially have application to more complex projects such as Discovery Rise.

Fair Trading Act 1989 (Qld) (FTA)

- Prohibitions in the ACL relevant to procurement activities include:
 - misleading and deceptive conduct
 - unconscionable conduct



Consequences for breach of the *FTA*

- Penalties for breach of the *ACL* include:
 - an award of damages
 - an injunction preventing the offending behaviour



Ombudsman Act 2009 (Qld)

- The Queensland Ombudsman has the power to investigate administrative action of JCU on complaint by the public
- After completing a review of an administrative action, the Ombudsman may:
 - provide a report to the Chancellor of JCU detailing its recommendations and the actions they believe appropriate to be taken
 - if there is a finding of misconduct, report to the Chancellor and if appropriate, the Minister
 - report any non-compliance with its recommendations to the Premier

Consequences of an adverse finding by the Ombudsman

- Consequences for JCU
- Consequences for YOU

Auditor-General Act 2009 (Qld)

- The Auditor-General may conduct an audit on all of JCU's activities, including its procurement activities
- The Auditor-General may issue a report of its audit activity to JCU noting issues uncovered
- If issues uncovered are considered significant the report may also be issued to the Minister and Treasurer

Consequences of an adverse finding by the Auditor-General

- Consequences for JCU
- Consequences for YOU

Right to Information Act 2009 (Qld) (RTI Act)

- Under the *RTI Act*, members of the general public may seek access to JCU's documents
- JCU has defenses under the *RTI Act* to the disclosure of documents which include:
 - the document contains exempt information (includes confidential information or information subject to legal professional privilege)
 - disclosure of the document would be contrary to public interest
- However, even if disclosure is protected under the *RTI Act*, documents may be discoverable by a litigant that commences action against JCU



POLICIES

Policies

- Government :
 - Queensland Procurement Policy 2013
 - National Public Private Partnerships Policy 2008 and the Project Assessment Framework 2015
- JCU:
 - James Cook University Code of Conduct
 - JCU Financial Management Performance Manual 710: Procurement Policy
 - JCU Financial Management Performance Manual 711: Procurement Manual

Queensland Procurement Policy 2013 (QPP)

- The QPP provides a broad principles focused procurement framework with its purpose expressed to be to deliver excellence in procurement outcomes for Queenslanders
- The six principles of public sector procurement are:

Queensland Procurement Policy 2013 (QPP)

Primary principle:

1. We drive value for money

Overriding policy principle of QPP is value for money, with value for money to be determining factor in the event of conflict with other principles

Queensland Procurement Policy 2013 (QPP)

Supporting principles:

1. Government organisations working as one to achieve savings and benefits
2. Applying best procurement practice
3. Delivering procurement outcomes to advance the Queensland Government's economic, environmental and social objectives
4. Maintain the confidence of stakeholders and the community in the management of public sector procurement
5. Undertaking procurement with integrity, ensuring accountability for outcomes

Other Government Policies

- Project Assessment Framework 2015
- National Public Private Partnerships Policy 2008

JCU Code of Conduct

- Provides a framework for how JCU staff are to conduct themselves towards others and perform their duties on behalf of JCU
- The principles contained in the Code of Conduct are:
 1. Seek excellence as part of a learning community
 2. Act with integrity
 3. Behave with respect to others
 4. Embrace sustainability and social responsibility

JCU Code of Conduct

- Most important principle consideration for JCU in relation to procurement and probity is Principle 2 – Act with integrity
- The Explanatory Statement to the Code provides that a member with JCU staff will be acting with integrity if they observe all policies, rules, codes, statements and guidelines in JCU's Policy Library

JCU Financial Management Performance Manual 710: Procurement Policy (FMPM710)

- The intent of FMPM710 is to ensure JCU is compliant with the Queensland Procurement Policy
- The FMPM710 requires:
 - JCU to seek to use its procurement activities to advance the principles set out in the *QPP*
 - JCU to establish a Corporate Procurement Plan
 - Significant procurement plans be drafted for high value and high risk procurements

JCU Financial Management Performance Manual 711: Procurement Manual (FMPM711)

- Key policy document for JCU procurement
- FMPM711 has been drafted to ensure consistency with the relevant legislation and policies
- Sets out JCU's specific expectations in relation to procurement



JCU Financial Management Performance Manual 711: Procurement Manual (FMPM711)

- FMPM711 provides guidance on:
 - procurement principles
 - best practice methodologies for procurement
 - probity and accountability

NOTE: JCU is in the process of amending the FMPM711

Consequences for failing to comply with Policies

- Consequences for JCU
- Consequences for YOU



PUBLIC PERCEPTION

Public Perception

- As a public institution, JCU is subject to particular scrutiny from the public, particularly the media
- JCU's credibility is essential to its operations, as JCU is dependent on:
 - students and government grants for its income; and
 - private sector suppliers to conduct its operations

Public Perception

- A negative public or media perception could potentially damage:
 - JCU's ability to attract students and academics
 - JCU's ability to obtain value for money from procurement processes – suppliers may withhold valuable ideas from tenders, decline to tender or increase their prices due to perceived difficulties
 - JCU's ability to obtain Government funding
- Negative publicity in relation to procurement practices may also encourage other dissatisfied tenderers to challenge JCU's decisions

Public Perception

- Large procurement processes are often the subject of media coverage, sometimes positive, sometimes neutral and sometimes negative.
- In recent days we have seen a number of headlines relating to procurement processes undertaken by TMR and also JCU itself



Townsville Bulletin

WERE YOU SNAPPED? SAVVY



Thursday, July 23, 2015

townsvillebulletin.com.au

\$1.40 incl GST

SPOONFUL OF SUGAR



CHILD Ears and his merry band of chimney sweepers through their paces ahead of Townsville's theatrical production of Mary Poppins. The Broadway Musical, which opened last weekend at Townsville Civic Theatre. Around 1000 tickets have already been sold. STORY, PAGE 6

PHOTO: WESLEY HOWLS

Local contractors 'duded' on \$200m contract

RING ROAD RUNAROUND

ANTHONY SALLOWAY
LOCAL contractors are lining out on Townsville's \$200 million Ring Rd project, earning less than half the amount paid to the principal contractor. The discrepancy has angered Mayor Jenny Hill and Herbert MP Eben Jones, who have called for contractors to get a better deal. STORY, PAGE 4

TAMOU VOWS TO MAKE AMENDS | SPORT

Story revolved around a Brisbane based contractor engaged by Transport and Main Roads to build the ring road in Townsville who was not using local cartage contractors.

Port has capacity for China cattle deal

ANTHONY GALLOWAY

TOWNSVILLE'S port could triple its live export trade, with the region's cattle industry confident it will benefit from Australia's landmark trade deal with China.

Many industry figures have expressed caution following the signing off on the deal to send one million cattle to China, with the country's disease protocols favouring cattle in Australia's south because of the prevalence of the non-infectious bluetongue disease in North Queensland.

But some of Queensland's leading cattlemen, who met in Townsville yesterday to discuss crucial recent developments in the international live trade market, were optimistic China would alter its protocols to take in a significant amount of northern cattle.

It comes after Townsville's port has set records for live cattle exports the past two years, handling 250,000 cattle in 2014 and 165,000 so far this year.

AgForce cattle president Bim Struss said he could see Port of Townsville's livestock "doubling or trebling" on the back of the China deal.

"We haven't seen the new protocols yet (and) it's all up in the air, but I would be surprised that if they're talking the numbers they're talking, if they wouldn't be taking some northern cattle," he said.

"There would have to be some relaxation, in my opinion, on that bluetongue vector, or the way it's handled.

"It may be as simple as cattle with vector may be shipped to certain ports ... and kept separate from other cattle.

"What comes out of it all, we're not sure yet but I think it's going to be positive."

Beef producer Alex Stubbs, who owns 1000ha of cattle property between Mirriwinni and the Atherton Tableland, said Townsville could export a lot of the cattle being sent through Darwin as Australia sent less cattle to Indonesia.



FAMILY AFFAIR. Christine Taylor got into the spirit of Daffodil Day with sons Benjamin, 5, and Lachlan, 3. PHOTO: FIONA HINDING

Golden opportunity for us to do our bit

CANCER Council Queensland is calling on Townsville to help save lives by supporting fundraising for vital research this Daffodil Day. More than 1000 people are diagnosed with cancer in the North each year.

CCQ raises funds for research into the disease each year through Daffodil Day, on August 28. The organisation hopes to raise more than \$140,000 in North Queensland alone, setting the goal to sell more than 9000 bunches of daffodils.

"Cancer Council Queensland hopes to raise \$1.7 million during the Daffodil Appeal and on the official Daffodil Day while nationally, the campaign aims to raise \$8.5 million," CCQ spokeswoman Katie Clift said. Daffodil Day sites will be operating throughout Townsville including Stockland Northshore, Townsville and Kmart Plaza, Hermit Park Shopping Centre, Castletown Shopping Centre, Annandale Shopping Centre and Townsville Bulletin Square.

Locals losing on job

Ring road contractors see profits swallowed by 'middle men'



ANTHONY GALLOWAY

anthony.galloway@news.com.au

LOCAL contractors are earning less than half that being paid to the principal contractor for work on the Townsville Ring Road, after the contract has been passed through a number of "middle men".

It's understood principal contractor Seymour Whyte is paying Brisbane-based Australian Premium Haulage nearly \$3 per tonne in haulage rates for the project, with work subcontracted to local businesses

for as little as \$1.80 per tonne.

With local contractors barely making a profit on the \$200 million project, Mayor Jenny Hill and Herbert MP Ewen Jones have called for governments to give local companies a better opportunity to tender for work in the first instance.

A local haulage operator, who asked not to be named, said Townsville contractors were being passed over during the tender process only to end up doing the work for less.

"Local guys are going backwards because of the unnecessary middle man taking his cut," he said.

"We have many local companies who have the equip-

“Local guys are going backwards because of the unnecessary middle man

TOWNSVILLE HAULAGE OPERATOR

ment and skills to do the job yet they keep giving work to out-of-town businesses who then have to take their cut.

"We have had to head out of town to look for work when there are major projects hap-

pening on our doorstep simply because we can't cover our running costs with the rate they are offering."

The Department of Transport and Main Roads and Seymour Whyte refused to comment on haulage rates paid to contractors, saying it was commercial-in-confidence.

A department spokesman said procurement complied with the Queensland Charter for Local Content guidelines.

"More than 80 per cent of Seymour Whyte's labour, plant, subcontractors and materials on the Townsville Ring Road, section four, have been sourced from the Townsville area," the spokesman said.

Cr Hill said the Federal Government needed to address the issue through its tendering policy. "We all understand the need for competitive tendering but the benefits for the local community should also be weighted as part of this process," she said.

"The feedback I'm getting from local businesses would indicate many of them feel shut out from these contracts."

Mr Jones said overly complicated tender documents meant many contractors were shut out. "The winner of the tender doesn't get their hands dirty any more, and the subcontractor carries all the debt and all the risk," he said.



JCU and Wu may still do deal as roommates

DANIEL BATEMAN

JAMES Cook University has not ruled out a partnership with Chinese developer Benny Wu to build on-campus accommodation in Cairns.

JCU confirmed yesterday it had been unable to reach an agreement with the Hong Kong property tycoon over the proposed \$30 million college, to be constructed at Smithfield.

The university had signed an exclusive dealing deed with Mr Wu's Hua Yuan (Australia)

Holding Pty Ltd, however the period ended on Friday.

Cairns campus head Professor Robyn McGuiggan said JCU would discuss the proposal with other potential developers to advance it, to be ready in time for the start of semester in 2017.

"We are out of the exclusive dealing period with Benny Wu, but it does not mean there aren't conversations still occurring with Benny Wu's group," she said.

"It means it opens it up to

other groups who we can have conversations with as well."

She said the university had already been contacted by a number of developers interested in the project.

The college was to house 300 students, offering fully catered single-room accommodation with ensuite bathrooms.

Prof McGuiggan revealed the original plan was for the building to be made in China, and shipped to Cairns, to be completed. She said this could still happen.

"We aren't actually building the accommodation, so it's not really our decision. We did not make that as part of the requirement to move ahead with the deal," she said.

"It's up to whoever we go with – it will be their business model.

"We'd love it to be made in northern Queensland, but it needs to be for the developer to be cost-effective or else we won't get any accommodation at all."

JCU Student Association

vice-president Laura Walker said on-campus accommodation was vital to the growth of the university in Cairns.

"You only need to look to the Townsville campus to see how successful on-campus accommodation is to building a culture on campus, developing better sporting facilities and also creating, essentially, a whole community around the whole university," she said.

Hua Yuan (Australia) Holding Pty Ltd did not respond to a request for comment.

Story concerns JCU's potential engagement of a development partner to deliver the on-campus student accommodation at the Cairns Campus



CASE LAW

Case Law

- Case law is effectively law developed by judges handing down written decisions in Court.
- Most relevant case law concept in probity and procurement, is that of the process contract.
- Commonly called a tender process contract but can apply to other procurement processes such as requests for expressions of interest.

What is a Process Contract?

- A contract formed between an inviter (purchaser) and a tenderer as to the conduct of the procurement process
- Binding on both inviter and tenderer.
- Sets out contractual rights and obligations of inviter and tenderer in respect of the procurement process.

When will a process contract be formed?

‘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.’

- per Sifris J in IPEX ITG Pty Ltd (In liq) v Victoria [2010] VSC 480

When will a process contract be formed?

Courts have held that indicia of whether the parties intend to be legally bound by a process contract include:

- Whether the organisation calling tenders has sought unequivocally to exclude the operation of the tender process contract are clear and unequivocal;
- The inclusion of contract terms by which the tenderer is to be bound if successful;
- The detail and length of the tender; and
- Representations made by the Principal to the tenderers regarding the process.

When will a process contract be formed?

- The full facts and circumstances including:
 - Terms in the request for tender that, for example:
 - the tenderer is unable to withdraw its tender during validity period;
 - the tenderer must lodge a deposit with the tender;
 - the purchaser will assess tenders in accordance with stated evaluation criteria

What are the terms of a process contract?

- Terms of a process contract:
 - **Express terms** e.g. the conditions of tendering or other relevant terms reduced to writing and included in the tender or tender addenda; and
 - **Implied terms** i.e. terms implied by law
- Usual rules of construction (interpretation) of contracts applies e.g. for resolving inconsistencies etc.

What are the terms of a process contract?

- **Implied terms: Obligation to act fairly and in good faith**

‘The process contract imposes a duty to act in good faith at least to the extent that the [inviter] is precluded from acting subjectively in bad faith and must treat all tenderers fairly.’

- per Le Miere J, *Dockpride Pty Ltd v Subiaco* [2005] WASC211 at [158]

What are the terms of a process contract?

- **Implied terms: Obligation to maintain confidentiality**
 - Not implied automatically in every process contract, but may be implied as a matter of law.
 - In *Wagdy Hannah and Associates Pty Ltd v National Library of Australia* [2012] ACTSC126, Refshauge J, found that ‘there was [in that case] a term implied into the “tender process contract” that the tender material of each tenderer would be kept confidential.’

What are the consequences of a breach of a process contract?

- Consequences of a breach of a process contract include:
 - Damages (could include costs of preparing the tender and potentially the loss of chance of making a profit)
 - Injunction preventing the award to another party or an order awarding it to the aggrieved party
 - [remedies under the Fair Trading Act]

Probity Framework - Conclusion

- YOUR actions or omissions as an individual involved in a procurement process can result in YOU being personally disciplined under JCU's Code of Conduct, your employment contract and potentially being prosecuted under the Crime and Corruption Act
- YOUR actions or omissions can result in JCU breaching relevant legislation and policies
- YOUR actions or omissions can result in JCU being sued by a dissatisfied tenderer
- YOUR actions or omissions can create a negative public perception of JCU as an organisation .

Probity Tools



Probity Tools

- How do I assist JCU discharge its probity obligations?
- Procurement Planning
 - What is procurement planning?
 - Why is procurement planning important?
- Specific Probity Tools
 - Procurement Plan
 - Evaluation Plan
 - Probity Plan
 - Evaluation Summary Report
 - Contract Management Plan
 - Probity Advisor
- Education opportunities

How do I assist JCU discharge its probity obligations?

- Recap what we have considered today:
 - Introduction to concept of probity
 - Principles of probity
 - Probity framework and potential consequences for breach
- Obligations not just on JCU, but on YOU as an employee of JCU

How do I assist JCU discharge its probity obligations?

- How do I assist JCU achieve probity in its procurement activities?
 - Early planning
 - Consult broadly
 - End users
 - Other users
 - Experts – Procurement, legal, finance, probity
 - Supply market

How do I assist JCU discharge its probity obligations?

- Documentation
 - Plans and reports
 - Communications
 - Meetings and actions

Procurement Planning

“Proper planning prevents poor performance”

- Anonymous



What is Procurement Planning?

- Big or small – plan your procurement – EARLY!
 - What do we need?
 - Why do we need it?
 - How much money do we have to get it?
 - When do we need it?
 - Where do we need it?
 - How will we get it?
 - Who can supply it?
 - Who is responsible for getting it?
 - What could go wrong with the procurement process?
 - What does success look like for this procurement process?

What is Procurement Planning?

- Extent to which you plan a procurement activity will vary, factors include:
 - What is JCU/my requirements and obligations under the Probity Framework?
 - Has this been done before (i.e. Standing Offer Arrangement, whole-of-Government Panels)?
 - Value and risk of the procurement activity?
 - Timeframes (poor planning should not create an emergency, you need to give yourself sufficient time)

Why is procurement planning important?

- Assists in ensuring you get the outcome that you want, without compromising probity
- Defines the goods, services or works to be procured
- Establishes a timeline for the procurement activity to assist in identifying the most efficient and practical method to conduct the procurement activity can be determined
- Stakeholders start talking
 - End users, potential suppliers, financial delegates, procurement, legal, finance, probity
 - Options generation – end goal, procurement strategy and contracting strategy

Why is procurement planning important?

- Analysis of the supply market
 - Makes for an informed buyer
- Identifies procurement and probity risks

Specific Probity Tools

- Procurement plan
- Evaluation plan
- Probity plan
- Evaluation summary report
- Contract management plan
- Probity advisor



Procurement Plan

- What is a Procurement Plan?
- Why is a Procurement Plan important?
- What are the essential elements of a Procurement Plan?



What is a Procurement Plan?

- A procurement plan outlines the procurement strategy and market approach, the project brief and tender method. It builds the business case/investment justification and includes a governance framework for the tender process and contract management.
- It proposes how tenderers will be selected, how the tender process will be managed and who will be responsible. It includes the basis for tender evaluation and key performance indicators for the proposed contract.
 - *Procurement Guidance: Planning for significant procurement*, Queensland Department of Housing and Public Works, 2014.

Why is a Procurement Plan important?

- Strategy document for the entire conduct of a procurement, considers:
 - Objectives
 - Timeframes
 - Roles and responsibilities
 - Demand analysis
 - Supply market analysis
 - Specification / requirement development
 - Evaluation
 - Procurement strategy
 - Contracting strategy
 - Contract management

Why is a Procurement Plan important?

- Business case for undertaking the procurement activity
- Sets the process and requirements for the entire activity
- Links to all other key probity tools
- One size does not fit all
- Initial stepping stone to obtaining finance and contract approval

What are the essential elements of a Procurement Plan?

- Background and objective to be achieved by the procurement
- Timeframes
- Budget
- Analysis of:
 - Internal demand
 - Other users habits
 - Supply market
- Specification / requirement to be achieved from procurement activity

What are the essential elements of a Procurement Plan?

- Evaluation
 - What does a successful result look like for this procurement activity?
 - Document how you will achieve a successful result in evaluation criteria, specification etc
- Procurement methodology
 - What is the best way to achieve a successful result?
 - What does the Probity Framework require?
 - Examples: Open EOI, open RFT, select supplier, standing offer arrangement, WoG Panel
- Contract strategy
- Sustainability considerations – economic, social and environmental

What are the essential elements of a Procurement Plan?

- Risks to the procurement activity and mitigation strategies:
 - Supply market
 - Procurement process
- Recommendations:
 - Procurement strategy
 - Contract strategy
- Performance and review measures
 - How will we determine if the procurement activity has been a success?
- Approvals for the procurement activity
 - Who needs to sign off to go to market?

Evaluation Plan

- What is an Evaluation Plan?
- Why is an Evaluation Plan important?
- What are the essential elements of an Evaluation Plan?

What is an Evaluation Plan?

- Evaluation is a process that enables selection of the most appropriate offer.
- This involves consideration of the nature, value and significance of the goods or services being procured. Evaluation allows the selection of the offer that achieves the best performance for the money being spent

What is an Evaluation Plan?

- Evaluation Plan is:
 - a useful internal planning and control document for the management and conduct of offer evaluation
 - sets out responsibilities in the offer evaluation process, a timetable for the evaluation and details the processes that will be followed when evaluating offers

Procurement Guidance: Evaluating Offers, Queensland Department of Public Works Procurement Transformation Division, 2014.

What is an Evaluation Plan?

- The Evaluation Plan documents the evaluation process that will be followed, which includes:
 - Screening for conformance with:
 - Conditions of offer
 - Mandatory criteria
 - Detailed evaluation of offers
 - Recommendation of preferred supplier
- Characteristics of a good evaluation include:
 - Value for money
 - Probity and fair dealing
 - Accountability

Why is an Evaluation Plan important?

- Methodology for ensuring that value for money is delivered during the procurement process
- Intertwined with the Procurement Plan
 - Specification links to the evaluation
- Ensures Evaluation Panel members are aware of their roles and responsibilities
- Control for ensuring compliance with tender documents, probity principles and probity framework
- Specifies outputs from an evaluation that will be considered in providing financial and contract approvals

What are the essential elements of an Evaluation Plan?

- Objectives of the procurement activity
- Description of the requirement and deliverables
- Administrative arrangements
 - Handling of responses
 - Communications with respondents
- Evaluation criteria
 - Mandatory criteria
 - Differentiating criteria
- Evaluation methodology
 - Lowest price
 - Numerical scoring
 - Weighted attribute analysis

What are the essential elements of an Evaluation Plan?

- Evaluation team
 - Sufficient experience and size
 - Roles and responsibilities clearly defined
- Timeframes
- Details for obtaining financial and contract approvals for the activity

Probity Plan

- What is a Probity Plan?
- Why is a Probity Plan important?
- What are the essential elements of a Probity Plan?



What is a Probity Plan?

- A probity plan is a document that highlights probity risks and related management strategies for the procurement activity, including:
 - the role and responsibilities of each stakeholder in responding to those risks
 - probity services to be engaged, if any (i.e. probity advisor or probity auditor)
 - *Procurement Guidance: Use of probity auditors and advisors in procurement*, Queensland Department of Housing and Public Works, 2014

What is a Probity Plan?

- A probity plan provides statements of the Probity Principles and Probity Framework that impacts on the procurement activity
 - A probity plan should include:
 - Identification of the probity risk
 - Likelihood of risk materialising
 - Impact and seriousness of risk materialising
 - Assigning responsibility for managing the probity risk
 - Risk mitigation strategies
 - How risks will be monitored
- *Probity and Managing Procurement: How to avoid corrupting the process*, Box and Forde, 2007.

Why is a Probity Plan important?

- Brings to the attention of delegates and evaluation panel members:
 - Probity Principles
 - Probity Framework
- Establishes probity roles and delegates responsibility for tasks such as:
 - Communications with respondents
 - Documenting meetings etc
- Assists in identifying when probity risks are best managed with the assistance of a Probity Advisor

Why is a Probity Plan important?

- Probity risks have been considered and mitigation strategies implemented or established processes to deal with risks (e.g. conflict of interest)
- Probity provides a level of assurance to delegates and suppliers that a procurement was conducted in a manner that is fair, equitable and defensible
- Avoid delays and expense of attempting to manage probity risks later in the procurement

What are the essential elements of a Probity Plan?

- Statement of the probity principles and how these will be achieved during the process
- Identifies the probity framework for the procurement activity
- Identify probity risks and document risk management strategies
- Protocols for security and confidentiality of information
- Engagement of a Probity Auditor or Probity Advisor
- Evaluation principles
- Documentation and reporting requirements

What are the essential elements of a Probity Plan?

- Principles for:
 - Security and confidentiality of information and documentation
 - Communications with respondents (including questions regarding process, pre-tender briefs, site visits)
 - Reference checks
 - Managing conflicts of interest
 - Post-offer negotiations
 - De-briefing unsuccessful suppliers

Evaluation Summary Report

- What is an Evaluation Summary Report?
- Why is an Evaluation Summary Report important?
- What are the essential elements of an Evaluation Summary Report?

What is an Evaluation Summary Report?

- After completion of the comparative evaluation, a detailed evaluation report is completed and presented to the appropriate delegate within the department/agency so that the selection of a supplier can be confirmed
 - *Procurement Guidance: Evaluating Offers*, Queensland Department of Public Works Procurement Transformation Division, 2014.
- The procurement evaluation involves collecting knowledge gained throughout a procurement process and using it to ascertain whether JCU's needs and expectations have been fulfilled and whether "value for money" has been achieved
 - Evaluation Summary Report documents this finding

Why is an Evaluation Summary Report important?

- Purpose is to obtain approvals from appropriate delegate and provides an opportunity to tell a story of:
 - Compliance with:
 - Probity Principles
 - Probity Framework
 - Delivering best value for money
 - Identifies issues and risks in the process for consideration
- Provides an opportunity to review objectives for the procurement against the outcomes
- Documentary evidence of the accountability, transparency and fairness of the procurement process

Why is an Evaluation Summary Report important?

- Capture and disseminate lessons learned from the process
- Informs the de-brief of suppliers that submit an unsuccessful offer

What are the essential elements of an evaluation summary report?

- Overview of the procurement process
- Details of offers/tenders received
- Conformance report
- Report on outcome of evaluation
 - Scoring schedule
 - Supporting rationales
- Basis for final recommendation, including statement of:
 - Whether objectives of procurement activities achieved
 - Capability of recommended supplier(s)

Contract Management Plan

- What is a Contract Management Plan?
- Why is a Contract Management Plan important?
- What are the essential elements of a Contract Management Plan?

What is a Contract Management Plan?

- Contract Management Plan documents the processes and systems to drive contract compliance and performance and deliver value for money
- The purpose of contract management is to ensure that the negotiated contract benefits are realised

What is a Contract Management Plan?

- Process for developing a contract management plan:
 - Identify key terms and conditions of contract
 - Identify reporting procedures
 - Identify monitoring required
 - Identify contract management team
 - Develop key milestones and deliverables
 - Document contract management plan
- *Advance Procurement C – Advance Contract Management*, Queensland Department of Housing and Public Works, 2010.

Why is a Contract Management Plan important?

- Disconnect between procurement function and end users
 - Pointless negotiating value for money and innovative outcomes if end users do not benefit
 - Contract Management Plan will assist end users to extract that value
- Informs future procurement activities (i.e. decisions to extend contracts or go back out to market)
- Assists with negotiations of variations
 - Understand supplier's obligations, better able to enforce them

What are the essential elements of a Contract Management Plan?

- Parties to the Contract
- Identifies key internal stakeholders
- Contract details:
 - Obligations – work required, service standards, pricing
 - Duration/Term of the contract
 - Key conditions of contract
- Risks
- Performance monitoring and reporting
- Budget
- Insurances
- Dispute resolution
- Review

Probity advisor

- Assist you with:
 - Planning
 - Documentation
 - Risk mitigation
 - Compliance with the probity principles and probity framework
 - Communication strategies
- Consider when use is appropriate
 - FMPM711 – Procurement Manual
 - General rule – high risk and high value procurement activities

Education

- Further reading – legislation, policies
- Procurement Transformation Division of the Queensland Department of Housing and Public Works
 - Library of Procurement Guidance Material
 - Procurement Certification Program specifically focused on Queensland Government procurement
- Chartered Institute of Procurement and Supply Australia
 - Peak body in Australia that provides professional qualifications in procurement and supply chain management

Probity Tools – Takeaway Points

- Probity principles and probity framework are daunting, BUT ensuring the probity of a process is manageable with:
 - Early and effective planning – probity should not be an after thought
 - Right plans in place – roadmap to success and compliance
 - Reporting your outcomes
- JCU Strategic Procurement have done the heavy lifting
 - FMPM711 – Procurement Manual
 - Template probity tools – procurement plan, probity plan, evaluation plan

Probity Tools – Takeaway Points

- Effective probity tools will:
 - Deliver value for money
 - Focus procurement activities
 - Generate options
 - Identify risks and mitigation strategies
 - Assign responsibilities and tasks
 - Improve fairness, accountability, transparency and defensibility of procurement process
- Probity advisor

Conclusion



Conclusion

‘Even the best probity processes do not guarantee that a project or activity will be immune from problems or criticism. Mistakes, delays and disputes can still arise despite the best efforts to ensure good management of probity risks. However, adopting best practice procurement procedures will minimise such situations and limit potential adverse consequences’

- *Ethics, Probity and Accountability in Procurement*, Queensland Department of Public Works and Crime and Misconduct Commission, 2006

QUESTIONS AND ANSWERS



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