

PPP: PROBITY AND THE PERPETUAL PROCESSOR

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I INTRODUCTION

Public private partnerships ('PPPs') have gained favour in Australia as a way for both State and Commonwealth governments to procure public infrastructure. In adopting PPPs, governments have endeavoured to procure public services efficiently by using the private sector as a source of financing, construction, project management, and operation and maintenance, while gaining advantages generally linked with the private sector such as cost-effectiveness and commerciality.

PPP contracts tend to be for long terms, from five to 10 years for information technology related contracts to 30 years or more for contracts relating to other infrastructure. As a consequence, the value of PPP contracts is significant, which results in greater attention to probity issues than may otherwise be the case. That probity concerns can arise is demonstrated in cases such as *Hughes Aircraft Systems International v Airservices Australia*¹ and *Cubic Transportation Systems Inc v State of New South Wales*.² Unfortunately, the existence of these cases can result in government bodies feeling unjustly restrained in the manner in which they conduct tender processes. An inordinate amount of time can be spent on compliance with a probity process, which is often cumbersome and inflexible. Whilst the relevant government department may have the best intentions at the commencement of a tender process, the probity elements of that process have the potential to escalate quickly and bear little relevance to the project they were initially designed to protect.

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1 (1997) 76 FCR 151 ('*Hughes Aircraft Systems*').

2 [2002] NSWSC 656 (Unreported, Adams J, 26 July 2002) ('*Cubic Transportation Systems*').

II WHAT IS PROBITY?

No doubt there are many definitions of ‘probity’. The Commonwealth Government’s *Guidance on Ethics and Probity in Government Procurement*³ describes probity as the ‘evidence of ethical behaviour in a particular process ... [which] contributes to sound procurement processes that accord equal opportunities for all participants’.⁴ Fairness of process is at the core of probity. Increasingly, the media and the public have demanded that governments ‘[address] the public mistrust of private involvement in the provision of public infrastructure and services’.⁵ Accordingly, the process of probity has not only been elevated in importance, but has also been expanded in an attempt to deal with the demands of fairness and transparency fuelled by the scepticism of the media and the public.

III WHAT DOES PROBITY IN A PPP INVOLVE?

In the procurement of a PPP project, probity can involve many types of controls by the government. These include controls on written and oral communication, controls on information to be submitted and rules around how a tender will be assessed. Guidance documents on probity suggest that a probity plan is developed early in the procurement cycle to ensure that probity principles underpinning the tender process are observed from the outset.

Often, the tender documentation released by governments will allow the government party very wide powers in how it conducts the tender process. For example, the rules may allow the government to change the tender process at will (including changes to evaluation criteria), to engage in negotiations with one or more tenderers to the exclusion of others, or to change their requirements for the project. Recent examples of government pre-appointment dealing processes have gone as far as to state that the government may allow a tenderer to amend its proposal to the exclusion of other tenderers, or without permitting any other tenderers to amend their proposals in a same or different way. In this instance, private parties are justified in asking: ‘why bother with a probity process at all?’ This so called ‘process’ flies directly in the face of the judicial findings of implied fairness, equality and impartiality in *Hughes Aircraft Systems* and *Cubic Transportation Systems* and makes it possible for a government department to engage in one-on-one price negotiations with a particular tenderer.

Whilst these wide ranging powers may aggrieve the private sector, as a matter of practice, governments rarely, if ever, use the broad powers they grant themselves. In fact, governments often seem reluctant to use even the reasonable

3 Department of Finance and Administration Financial Management Group, Commonwealth of Australia, *Guidance on Ethics and Probity in Government Procurement*, Financial Management Guidance No 14 (2005) <www.finance.gov.au/procurement/docs/Guidance_on_Ethics_Probity_11.01.05.pdf> at 14 October 2006.

4 Ibid 4.

5 Joint Select Committee on the Cross City Tunnel, Parliament of New South Wales, *Second Report – The Cross City Tunnel and Public Private Partnerships* (2006) ix.

powers they have granted to themselves in such pre-appointment or other probity process documents. All tenderers would benefit from a probity regime that placed more emphasis on the establishment and use by governments of appropriate powers to improve the efficiency and outcomes of the tender process, rather than seeking to protect the government in any circumstance, no matter how extreme.

A Fairness, Equality and Impartiality

The notions of fairness, equality and impartiality impose an obligation for the tender documentation to be available to all parties so that the tender process is carried out consistently and transparently.⁶ This means that documentation should clearly detail the conditions for participation in the tender as well as the criteria to be used for the evaluation of tenders and the selection of a successful tenderer. This allows tenderers to ensure they have met the mandatory requirements of the tender and to seek to directly address the selection criteria. Clear requirements should also reduce the number and cost of noncompliant bids.⁷

However, in a tender process which is intended to encourage tenderers to identify individual and innovative solutions, the application of rules of fairness and equality must include some flexibility to reflect the nature of the different bids. For example, the issues of most significance to the government entity in two different bids may vary greatly. The government entity should not feel that fairness requires it to raise the same issues with each tenderer, as opposed to raising its most important issues separately with each tenderer.

B Use of Appropriate Process

The tender process should be such that it allows competent suppliers in the market to tender. This ensures that there are opportunities for various suppliers, including those who may not have previously worked with the public sector, and that there is true competition in the tender. For example, any changes to the process during the tender phase should be communicated to all tenderers so they respond and effectively compete in the tender process.

In order to regulate their own behaviour during the tender process, governments generally operate under codes of practices to ensure that appropriate standards and processes are adhered to. Examples include the *Commonwealth Procurement Guidelines*⁸ and the New South Wales Government *Code of Practice for Procurement*.⁹

6 See *Hughes Aircraft Systems* (1997) 76 FCR 151.

7 Department of Finance and Administration Financial Management Group, *Guidance on Ethics*, above n 3, 19.

8 Department of Finance and Administration Financial Management Group, Commonwealth of Australia, *Commonwealth Procurement Guidelines*, Financial Management Guidance No 1 (2005) <http://www.finance.gov.au/procurement/docs/CPGs_-_January_20051.pdf> at 14 October 2006.

9 New South Wales Government, *Code of Practice for Procurement* (2005) <http://www.treasury.nsw.gov.au/procurement/pdf/code_of_prac-curr.pdf> at 14 October 2006.

C Avoiding Conflicts of Interest

Conflicts of interest may arise where a party that is involved in the tender process has an affiliation or interest that may affect their impartiality.¹⁰ A fair tender process requires that conflicts of interest are addressed and managed. In order to do this effectively, a plan of management for such issues should be prepared at the start of the process and complied with. However, it is important that the plan allow flexibility so that the response to a particular incident can be selected to appropriately reflect the effect of the conflict. By way of example, it may be appropriate for an individual to cease to have a role in the tender process rather than excluding a tenderer.

D Probity Auditor

Often the government will appoint an independent probity auditor to oversee the probity plan and deliver a report on probity. If a tenderer has any probity issues throughout the process, they will be directed to the probity auditor to carry out an independent investigation. This approach allows parties to be comfortable with the integrity of the procurement process; though, in practice, it is sometimes difficult to see the value added by the role. The role adds to the cost of a process, which is already cost sensitive through the requirement of each tenderer to meet the Public Sector Comparator.

It is interesting to note that, while probity auditors are standard in all PPP projects in Australia, they are rarely used in the United Kingdom ('UK') – the world leader in PPP procurement. Despite this significant point of difference, there is no evidence which points to a greater level of probity issues raised in the UK than in Australia.

IV PROBLEMS WITH THE APPLICATION OF PROBITY

A Tender Stage

The desire of a government to avoid litigation relating to the manner in which a tender process is run may cause probity to become excessive¹¹ and allow it to ultimately interfere with the commerciality of the tendering process.

1 Evaluation Criteria

While the inclusion of evaluation criteria in bid documents allows tenderers to formulate an appropriate tender, excessive evaluation criteria may lead to all compliant tenders being very similar and stifle any real innovation, with the only distinguishing factor between the compliant bids being the bid price.

Probity may also control the tender process by allowing the evaluation criteria to overtake the selection process. For example, the tenderer with the best

10 Often in large public private partnership projects, which involve a large construction company or national or international advisors, conflicts are unavoidable. The easiest and most effective solution in dealing with such conflicts is prompt communication with all tenderers which clearly identifies the conflict and outlines the process and the solution proposed to deal with the conflict.

11 See *Cubic Transportation Systems* [2002] NSWSC 656 (Unreported, Adams J, 26 July 2002).

innovation, practicality or experience may not be ultimately selected as the preferred tenderer because the government has placed a lower weighting on these factors in its evaluation criteria.

2 *Lack of Communication*

The notion of fairness far too often means that tenderers have limited contact with the government throughout the tender process. Usually, tenderers are only allowed contact with a nominated representative to raise questions about any aspect of the proposal documentation, and questions asked in conversation will only be responded to in writing.

Equality in the tender process also requires that if a question is formally raised by one tenderer that results in the government making new information available to that party, the government must then ensure this information is given to all other tenderers.

While it may be argued that this limited communication and sharing of information allows the tender process to be fair by ensuring that all tenderers are supplied with the same information, it limits the questions that may be asked by tenderers for fear of other tenderers gaining an insight into their design or proposal. This results in tenderers delivering a 'safer' option to ensure a compliant tender rather than risking the confidentiality of their ideas by posing a formal question.

Many government agencies have avoided face-to-face discussion with tenderers during the bid phase as they are concerned that the different content of discussions with different tenderers will give rise to unfairness. However, provided all tenderers are given the same opportunity to meet and discuss the project and their bids, the fact that different tenderers choose to discuss different matters should not give rise to probity issues.

The lack of face-to-face dialogue will also often result in a reduction in the quality of bids, with tenderers not fully understanding the requirements of the government from the written tender documents. In the past, architects or designers have invested a great deal of time and money in developing ideas and presenting these ideas to the government. Often, government delegates have avoided any form of reaction to the presentation of these ideas (be it positive or negative) in fear of circumventing the probity process. Whilst this may lead to a rather dull presentation, more importantly the by-product is a design (or a number of designs) that has not been fully developed or tailored, and does not reflect a collaborative or partnered design which would be achieved in a typical designer-client relationship found in the private sector.

B Post-Contract Award

In PPPs, the issue of probity becomes further complicated following the contract being awarded to the preferred tenderer.

1 *Assessor to Partner*

When the government awards a tender, its position changes from that of an evaluator and negotiator requesting services to a project 'partner'. While the government still has to maintain its integrity and independence post-tender, the sharing of responsibility and risk for the project as well as the alignment of public and private interests may create issues for the government.

A practical example of this issue occurs where the once aligned interests of the government and the private party collide due to the public pressure on the government. The private party would argue that the government is a partner to the project and should share the responsibility for processes and outcomes agreed at tender, but the government may prefer to realign its interests with that of the public to avoid voter backlash.

2 *Probity as a Shield*

The accountability that the government continues to have to the public once a project is in operation may necessitate publicly making available certain project information. While the transparency obligation arising from probity would generally allow this, there is a risk that government agencies could use the pretext of commercial confidentiality as a shield against the disclosure of information that may be commercially embarrassing to the government.¹² In order to overcome this, future PPP tender documents may require certain information regarding the successful tender to become publicly available.¹³

V CONCLUSION

Probity is an important factor in PPPs as it ensures integrity of the process. There is, however, a danger that probity is often allowed to control the tender process, or be used as means to avoid difficult commercial issues. If this occurs, the success of PPPs that has been seen overseas may not occur in Australia. The private sector may become frustrated with the lack of commerciality of governments preferring minimal risk and accountability to optimal risk management. The fact that probity can instil fear in public servants and prevent a nod of appreciation in relation to a particular design is evidence of probity gone wrong. By the same token, a one-on-one price negotiation flies in the face of impartiality. The line that traces its way between too much probity and a lack of fairness and equality is a difficult one to draw. The line, however, should be

12 Pat Barrett, 'Public Private Partnerships - Are There Gaps in Public Sector Accountability?' (Paper presented at the Australasian Council of Public Accounts Committees 7th Biennial Conference, Melbourne, 3 February 2003) <<http://www.anao.gov.au/WebSite.nsf/Publications/CF07591C2441E5E74A256CC5002309BF>> at 14 October 2006.

13 See Joint Select Committee on the Cross City Tunnel, above n 5.

drawn only once by governments boldly and with clarity. It should be presented to prospective tenderers at an early stage of the tender to avoid the possibility of falling into a 'perpetual processor'.