



Swimming Outside the Flags - A Common Probity Challenge

Presentation to Darwin IIA Members Meeting

By Stephen Linden - 7 June 2015

Introduction

- ▶ For today's session, I've used the analogy of the situation where lifesavers place internationally recognised flags at the beach to warn that, based on available information about the weather, swell, potential for rips and other factors, if beachgoers go outside of those flags they face the risk of not returning to the shoreline
- ▶ But, as we know, there are always people that swim outside the flags
- ▶ Why? There are many possible reasons. Some know better than the experts; others start inside the flags and drift out; others make sure they stay within the flags; and some decide not to swim at all
- ▶ The same situation often applies to procurement probity...

Outline of Today's Session

- ▶ Introduction
- ▶ Probity overview
- ▶ Procurement trends
- ▶ Probity scope and approach
- ▶ Some probity case studies - Swimming Outside the Flags
- ▶ Questions



Probity overview

What is probity and what do probity auditors / advisors do?

What is Probity???



- ▶ There are various definitions / descriptions of probity, who is responsible for it (roles) and what benefits may be achieved through it...

For example:

- ▶ “Probity advisors and probity auditors provide different services. A probity **advisor** provides advice on issues which may arise before and during the procurement. ... The probity **auditor** should be largely self directing and, as a result, will have a higher degree of independence than the probity advisor...” Independent Commission Against Corruption (ICAC), Probity and probity advising - guidelines for managing public sector projects, November 2005, pp. 13, 15).

Is there a difference between Auditing and Advising?

I believe the description on the previous slide is narrow.

- ▶ They see “audit” as a typical, after the event process (similar to traditional External Audit)
- ▶ A probity advisor follows a proactive consulting approach - better VFM (similar to Internal Audit)
- ▶ But, you can have both. The IA Standards set out how to provide consulting services without impacting on independence. And, keep in mind the following:
 - ✓ The probity role interacts with internal and external stakeholders;
 - ✓ It has no decision making authority
 - ✓ Review against the process, don't design the process

The Probity Value Proposition

When operating effectively, probity in procurement decision making will facilitate several observable, and highly desirable, conditions:

- ▶ Impartiality
- ▶ Removal of improper influence arising from conflicts of interest
- ▶ Accountability and transparency
- ▶ Confidentiality

...which, when combined, should result in the best value for money outcome.



Probity Risks

- ▶ Don't achieve value for money
- ▶ Damaged reputation
- ▶ Lack of credibility with business partners
- ▶ Process challenged - time, money



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Procurement trends

What's changed and the associated probity challenges

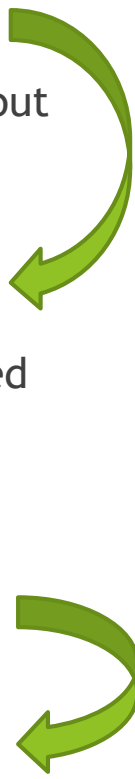
Procurement - journey from the “olden days”...



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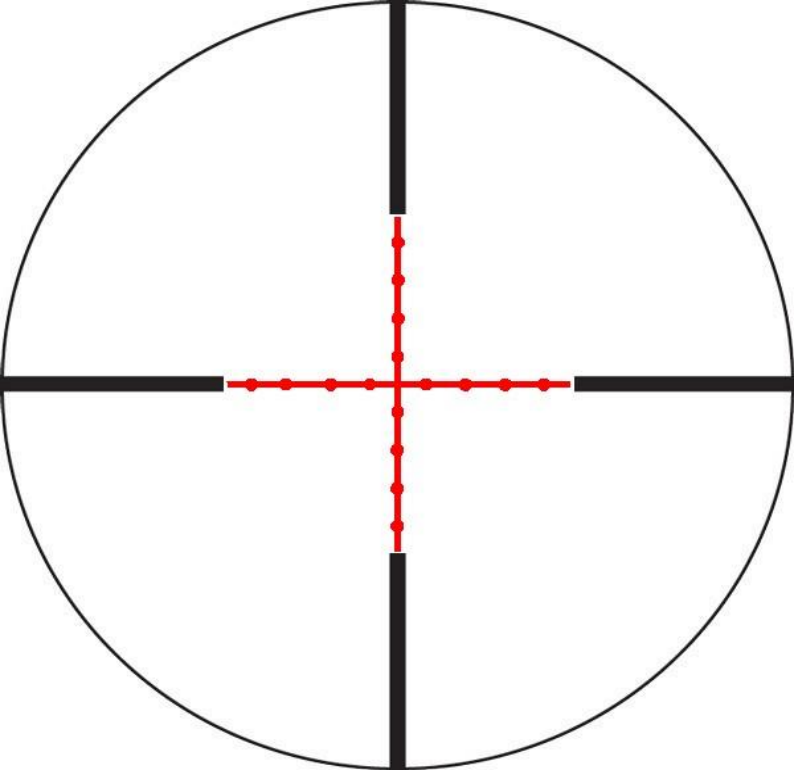
... a rough guide to the journey

- ▶ **Requests for tenders** - specifications provided and Respondents only had to bid against those, usually run by one agency, little to no interaction with Respondents, simple evaluation models, wording in mandatory criteria very prescriptive, one evaluation team, feedback to unsuccessful respondents negative. Allowance for alternative Responses but still had to provide a “conforming” response, ...
- ▶ **Requests for Proposals** - governments became aware that private industry could possibly provide better ways of achieving required outcomes through innovative design and approaches; evaluation of qualitative criteria became more subjective; more interaction via more clarifications requested from both sides, more phases, specialist evaluation sub-committees ...
- ▶ **...PPP** - contractor Designs, Builds, Finances & Maintains or Operates; increased interaction with Respondents; increased difficulty in like for like assessment of qualitative criteria, novation of design risk, complex finance models...
- ▶ **Alliance contracts** - procurement relies heavily on team building exercises between procurement agency and Respondents because of the collaborative nature of the resulting contract, painshare / gainshare models...;
- ▶ Interspersed with the above are market soundings, ECI, BAFO, Interactive Procurement Processes, multi agency contracts...



Key risks introduced

- ▶ ***Increased inter-activity between the procuring agency and the Respondents*** - probably THE biggest risk to maintaining confidentiality
- ▶ ***Multi agency procurements*** - identification of the lead agency and responsible minister. Can cause issues in attempting to achieve “consensus” assessments and outcomes
- ▶ ***Outsourcing of key procurement roles*** - significantly increases the risk of conflicts of interest (refer to case study B)
- ▶ ***Role Specialisation required*** - big increase for in-depth understanding of financing arrangements and how to assess them
- ▶ ***Lack of understanding of the process and governance frameworks*** - people sign off on what they don't understand (refer to case study A) or make inappropriate comments (refer to case study C)



Probity scope and approach

Reference Points and how we might use them

Understand the Regulatory Environment

Applicable legislation	What we are looking for
<ul style="list-style-type: none">▶ Territory / State Government procurement policies	<ul style="list-style-type: none">▶ Specific application to the agency and any exemptions that may be available
<ul style="list-style-type: none">▶ National / international procurement agreements / FTA that may impact on the above	<ul style="list-style-type: none">▶ The circumstances in which they apply and their impact on the selection criteria
<ul style="list-style-type: none">▶ Agency procurement policies and any exemptions from the above	<ul style="list-style-type: none">▶ Framework to be followed

Identify key documents

Document	What we are looking for
▶ Business case or PID	▶ Appropriately approved
▶ Procurement plan	▶ Appropriately approved, consistent with business case, who does what, when and how
▶ Request / Invitation documents	▶ Consistent with PP, adequate level of detail, T&C
▶ Probity plan, which may include a communication plan, a governance framework, site visit rules, interactive meeting rules	▶ Framework to manage the probity risks adequately - especially conflicts of interest, confidentiality
▶ Probity risk management plan	▶ Mitigation strategies & their effectiveness
▶ Evaluation / Negotiation plans	▶ Consistent with Request documents
▶ Recommendation reports	▶ Consistent with all of the above ▶ Don't introduce new and irrelevant information



Some Probity Issues

Swimming outside the flags and similar interesting behaviour



Be prepared for...

- ▶ people that don't like scrutiny and become defensive to your questions or review - find a way to allay their fears
- ▶ people that don't understand your role so wherever possible ask to do a presentation up-front
- ▶ senior people with a pre-determined outcome in mind, display a biased approach and try to influence others - find a nice way to put a stop to that
- ▶ times when very senior stakeholders want a particular respondent "out of the race" and try to persuade you to raise a probity issue (that isn't a probity issue) - don't!!!
- ▶ Finally, let the project people do their jobs. Assist when needed, stay out of the spotlight as much as possible

Case Study A

- ▶ Company A and Provider B undertake study for future wireless network needs
- ▶ The study estimates costs at between \$250k and \$1m for design, procurement and installation of a wireless network upgrade
- ▶ Select RFP issued to five firms and only two responded - Company A and another, Company X
- ▶ Qualitative assessment - Company A 15% higher than Company X
- ▶ Pricing - Company A three times the price of Company X
- ▶ And the winner is...

Case Study A, continued...

- ▶ Company A, of course.
- ▶ We were asked to review after recommendation report submitted for approval
- ▶ Eleven serious deficiencies identified
- ▶ No evaluation plan, RFP changed scope of pricing from all three elements to only design (no approval to do this), selection process fundamentally different to that included in Procurement Plan and RFP, calculation of VFM based on an incorrect multiplier that favoured a lower qualitative score and higher price, not all of the Steering Committee signed off the evaluation report, agency negotiating with Company A prior to approval, platform to be used - Provider B proprietary product...
- ▶ Outcome - recommended that process be terminated and started again. New process resulted in different company being awarded contract, significant cost savings to agency

Case Study B

- ▶ Management of a procurement process outsourced to a private sector project manager (who was also named on the evaluation team)
- ▶ A Respondent to the Request calls to say he thinks the service provider has shares in one of the other Respondent companies
- ▶ I call the service provider and ask the question
- ▶ Service provider says “yes, I have shares in that company but it is only a minor holding...”
- ▶ “...of 60%”
- ▶ **Lesson learned:** ensure that conflict of interest declarations provide details of what might constitute an actual, perceived or potential conflict and then assess. Re-visit at key points of the process.

Case Study C

- ▶ Governance structure includes that the evaluation team evaluates the responses, writes a recommendation report that reflects the outcome of the evaluation process and sends to steering committee
- ▶ The steering committee approves or asks for more information and then approves
- ▶ Goes to State Tenders Committee for agreement
- ▶ Board then signs off and approves contract
- ▶ Chair of board, not involved in the process until board sign-off, discusses potential outcomes with a group of people at a social function
- ▶ One of those people then “spreads” the discussion
- ▶ **Lesson learnt:** probity briefings need to extend to the highest levels

Questions???

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