

# Factsheet: Direct Dealing

## What is Direct Dealing?

'Direct dealing' can be defined as:

*Solicited or unsolicited by government and refers to exclusive dealings between a government agency and non-government sector body over a commercial proposition or proposal.*

*Source: New South Wales Government*

The NSW Government Independent Commission Against Corruption (ICAC) says the term 'direct negotiations' refers to exclusive dealings between a government agency and another party without first undergoing a competitive procurement process.

Direct dealing may also be referred to as 'sole source', 'direct negotiation', 'directly sourced', 'single sourced' or 'non-competed contract'.

## Why is Direct Dealing Used?

Governments are continually seeking to create value and leverage unique and innovative ideas, projects and initiatives that can provide tangible benefits. To achieve this, governments procure projects, goods and services using a range of methods. Direct dealing is one method which may be used where government believes a competitive procurement process may not be the best option.

Direct dealing examples may be:

- › Where a party is in a unique position to offer a solution that cannot be offered by competitors.
- › A public project needs to interface with existing facilities, equipment or technology.

Direct dealing may occur for:

- › Procurements of various size, scope, value, significance and risk.
- › Unsolicited proposals for infrastructure projects.
- › Small transactions where the value may be less than the cost of conducting a competitive procurement process such as purchase of emergency supplies.

In local government, direct dealing may also occur subsequent to a failed procurement exercise where a provision to 'reject all and negotiate' exists in some legislation. NSW ICAC have urged caution with the use of this allowable provision, lest it mask a predetermined intention for a direct dealing.

There should be compelling reasons for direct dealing, and it is not recommended for routine use or as a substitute for a competitive procurement process.

## What are Procurement Principles?

Procurement activities should be designed to facilitate observable and highly desirable conditions:

- › Value-for-money.
- › Impartiality.
- › Removal of improper influence.
- › Accountability, transparency and probity (integrity).
- › Confidentiality.

Transparency is about openness, communication and accountability. It means operating in a way that it is easy for others to see what is happening. Probity is evidence of legal and ethical behaviour in a process, and is defined as 'complete and confirmed integrity, uprightness and honesty'. Transparency and probity contribute to sound procurement processes that give equal opportunity to all potential bidders, prevent corruption, and possess sufficient rigour and discipline to achieve value-for-money outcomes.

Procurement processes should be conducted with transparency and probity. Adopting a transparent and ethical approach enables business to be conducted fairly, reasonably and with integrity. Ethical behaviour enables procurement to be conducted in a way that allows all potential vendors to compete as equally as possible.

## Why might Direct Dealing be Used?

Direct dealing may be used in a variety of situations including:

- › Procurement from large infrastructure to smaller purchases.
- › Private financing of public infrastructure and amenities.
- › Delivery of government services through public-private partnerships.
- › Joint ventures where government cannot deliver a project or service with its own resources.
- › Disposal of government property and assets.
- › Direct appointment of employees.
- › Licences and rights to use natural resources.
- › Sponsorships.
- › Grants.

- › Entrepreneurial business proposals.
- › Access to data.
- › Bartering arrangements rather than cash transactions.

## What are Direct Dealing Risks?

The closed nature of direct dealing can create opportunities for dishonest and corrupt conduct. Direct dealing may lead to perceptions of favouritism and corruption allegations. Reputational risks associated with direct dealing situations warrant serious consideration and thoughtful actions to mitigate them – they ought not be dismissed lightly.

Having to compete for a procurement in a fair and transparent manner is an obstacle for corrupt individuals. Direct dealings are highly sought after and there have been many investigations by anti-corruption bodies involving attempts to avoid competition. Corruption risks associated with direct dealing are significantly higher than with an open procurement process and other forms of market testing.

Direct dealing can also be detrimental to the public interest, for example by government not realising the full value of public assets. Where it is considered appropriate to engage in direct dealing, it is important attention be paid to risk mitigation measures to ensure integrity and reduce corruption risk.

## How to Avoid Direct Dealing?

Governments sometimes find themselves in situations where they may have no alternative but to enter into direct dealing. With improved planning this can potentially be avoided through measures such as:

- › Establishing and using panels of pre-qualified or pre-approved suppliers established through competitive processes.
- › Avoiding 'lock-in' where it becomes difficult to switch to an alternative vendor, perhaps by using a two-supplier arrangement.
- › Bundling contracts together to create larger contracts or unbundling contracts to reduce contract size.
- › Unbundling contracts where the scale or level of complexity of the bundle limits opportunity for respondents.
- › Determining contract length using commercial factors including vendor investment horizon.
- › Lowering bid costs to attract more potential vendors.
- › Developing alternative sources.
- › Considering in-house bids to stimulate competition.
- › Considering postponement or cancellation of procurement if direct dealing cannot be avoided or a procurement cannot be achieved on acceptable terms.

In local government where a 'reject all and negotiate' situation may arise, before recommending a negotiation be commenced there needs to be recognition such a situation represents a failure of the particular procurement activity. As

such, consideration should be given to the root cause of the failure when determining the most appropriate way forward.

## How to Manage Direct Dealing?

A number of control measure can be enacted over direct dealing including:

- › Ensure there is formal authority for the direct dealing.
- › Thoroughly document the process.
- › Establish robust governance oversight and regular validated reporting to decision-makers and key committees including the audit committee.
- › Put in place formal assurance strategy and assurance activities over the direct dealing.
- › Perform in-depth due diligence.
- › Segregate duties.
- › Manage conflicts of interest.
- › Conduct negotiations.
- › Agree on the price.
- › Execute the contract.
- › Monitor the vendor.
- › Undertake post-completion control and assurance activities.

The single most important principle to be applied to direct dealing is transparency. This can be problematic and warrants careful consideration at each step, as proponents may be seeking to protect their intellectual property or competitive advantage which may be a core reason why they have brought the proposal forward.

The use of independent probity assurance should also be given formal consideration in direct dealing situations involving high risk, either by nature or value.

## Acknowledgement

This factsheet has drawn upon information from the New South Wales Government, in particular:

- › Buy.NSW
- › NSW Independent Commission Against Corruption (ICAC).

## Useful references

'Direct Negotiations: Guidelines for Managing Risks', NSW Government Independent Commission Against Corruption (ICAC)

<https://buy.nsw.gov.au/resources/direct-dealing-guidelines>

'The 20 Critical Questions Series – What Directors should ask about Ethics and Fraud Control', IIA-Australia

Factsheet 'Conflicts of Interest', IIA-Australia

Factsheet 'Procurement Integrity (Probity)', IIA-Australia

Factsheet 'Tender Transparency', IIA-Australia

White Paper 'Auditing Transparency', IIA-Australia

White Paper 'Auditing Tender Evaluation Reports', IIA-Australia

White Paper 'Auditing Tender Specifications and Assessment Criteria', IIA-Australia

White Paper 'Conducting Fraud and Corruption Investigations', IIA-Australia

White Paper 'Conflicts of Interest in the Award of Contracts', IIA-Australia

White Paper 'Conflicts of Interest – A Framework', IIA-Australia

White Paper 'Corruption Indicators in Internal Audit', IIA-Australia

White Paper 'Corruption Related Risk in Decision-making', IIA-Australia

White Paper 'Fraud and Corruption Risk Assessments', IIA-Australia

White Paper 'Fraud Prevention: 10 Action Steps', IIA-Australia

White Paper 'Fraud Risk Indicators', IIA-Australia

White Paper 'Procurement Integrity (Probity)', IIA-Australia

White Paper 'Public Sector Procurement', IIA-Australia

White Paper 'Procurement Integrity (Probity)', IIA-Australia

White Paper 'Whistleblowing Program', IIA-Australia

'Fraud Examiners Manual', Association of Certified Fraud Examiners

Australian Standard AS 8001–2021 'Fraud and Corruption Control', Standards Australia

Transparency International website, [www.transparency.org](http://www.transparency.org)

The Australian Government Commonwealth Fraud Prevention Centre has guidance on how to counter fraud.

Australian State and Territory Governments have anti-corruption bodies that produce relevant guidance.

Many Australian State and Territory Auditors-General have issued fraud and corruption guidance.

