Probity in Tendering Guidelines

April 2012
Probity in Tendering Guidelines

Responsible Position: Manager, Financial Operations
Approved by: Chief Financial Officer

Table of Contents

OVERVIEW .................................................................................................................. 5

PURPOSE .................................................................................................................. 5

COVERAGE .................................................................................................................. 5

Exclusions ................................................................................................................... 5

GUIDELINE OBJECTIVES .......................................................................................... 5

Probity Management ................................................................................................ 5

KEY CONSIDERATIONS ............................................................................................. 6

Probity and Tendering ............................................................................................... 6

The Importance of Probity ....................................................................................... 6

What is Probity? .......................................................................................................... 6

What Probity is Not .................................................................................................... 6

Open vs. Closed Tenders ......................................................................................... 6

The Importance of Probity Management ............................................................... 7

Public Scrutiny .......................................................................................................... 7

Public Confidence .................................................................................................... 7

Litigation .................................................................................................................... 7

Legal Framework Summary ...................................................................................... 8

Probity and Tendering Key Responsibilities ......................................................... 9

Maintain a Secure Environment ............................................................................. 9

Conduct a Fair and Equitable Process .................................................................... 9

Ensure the Process is Open and Transparent ........................................................ 9

Minimise Potential Liability .................................................................................... 9

Maintain a Clear Audit Trail ..................................................................................... 10
<table>
<thead>
<tr>
<th>PROBITY PRINCIPLES: CONFIDENTIALITY AND SECURITY</th>
<th>11</th>
</tr>
</thead>
<tbody>
<tr>
<td>PROTECTION OF SENSITIVE INFORMATION</td>
<td>11</td>
</tr>
<tr>
<td>OBLIGATIONS OF THE TENDER TEAM</td>
<td>11</td>
</tr>
<tr>
<td>RELEASE OF SENSITIVE INFORMATION TO ADVISERS</td>
<td>12</td>
</tr>
<tr>
<td>RELEASE OF SENSITIVE INFORMATION TO TENDERERS</td>
<td>12</td>
</tr>
<tr>
<td>RELEASE OF SENSITIVE INFORMATION TO THE DECISION MAKER, MINISTERS AND OTHER STAKEHOLDERS</td>
<td>12</td>
</tr>
<tr>
<td>PRIVACY</td>
<td>12</td>
</tr>
<tr>
<td>BREACHES OF CONFIDENTIALITY AND PRIVACY</td>
<td>13</td>
</tr>
<tr>
<td>ACCESS TO SENSITIVE INFORMATION</td>
<td>13</td>
</tr>
<tr>
<td>PROBITY PRINCIPLES: CONFLICTS OF INTEREST</td>
<td>14</td>
</tr>
<tr>
<td>CONFLICTS OF INTEREST AND TENDERING</td>
<td>14</td>
</tr>
<tr>
<td>SUMMARY OF MAIN CONFLICT OF INTEREST PRINCIPLES</td>
<td>14</td>
</tr>
<tr>
<td>CONFLICT OF INTEREST UNDERTAKINGS</td>
<td>14</td>
</tr>
<tr>
<td>CONFLICT OF INTEREST GUIDELINES AND PROTOCOLS</td>
<td>15</td>
</tr>
<tr>
<td>ADVISER CONTRACTS</td>
<td>15</td>
</tr>
<tr>
<td>CONFLICTS REGISTER</td>
<td>15</td>
</tr>
<tr>
<td>PROBITY PRINCIPLES: REQUEST FOR TENDER</td>
<td>16</td>
</tr>
<tr>
<td>PROBITY AND THE REQUEST FOR TENDER (RFT)</td>
<td>16</td>
</tr>
<tr>
<td>RFT INFORMATION</td>
<td>16</td>
</tr>
<tr>
<td>PROBITY AND THE ADVERTISED RFT</td>
<td>17</td>
</tr>
<tr>
<td>STANDARD RFT CONDITIONS REGARDING PROBITY</td>
<td>17</td>
</tr>
<tr>
<td>PROBITY PRINCIPLES: RECEIPT OF TENDERS</td>
<td>18</td>
</tr>
<tr>
<td>RECEIPT AND OPENING OF TENDERS</td>
<td>18</td>
</tr>
<tr>
<td>LATE TENDERS</td>
<td>18</td>
</tr>
<tr>
<td>PROBITY PRINCIPLES: THE EVALUATION</td>
<td>19</td>
</tr>
<tr>
<td>EVALUATION PLANS</td>
<td>19</td>
</tr>
<tr>
<td>DRAFTING OF EVALUATION PLANS</td>
<td>19</td>
</tr>
<tr>
<td>EVALUATION TEAM</td>
<td>19</td>
</tr>
<tr>
<td>EVALUATION METHODOLOGIES</td>
<td>19</td>
</tr>
<tr>
<td>CARRYING OUT THE EVALUATION</td>
<td>20</td>
</tr>
<tr>
<td>AMENDMENT OF EVALUATION CRITERIA</td>
<td>20</td>
</tr>
<tr>
<td>PROBITY PRINCIPLES: COMMUNICATION</td>
<td>21</td>
</tr>
<tr>
<td>CONTACT WITH TENDERERS</td>
<td>21</td>
</tr>
<tr>
<td>PROTOCOLS FOR CONTACT WITH TENDERERS</td>
<td>21</td>
</tr>
<tr>
<td>NOMINATED CONTACTS</td>
<td>21</td>
</tr>
<tr>
<td>CONTACT DOCUMENTATION</td>
<td>21</td>
</tr>
<tr>
<td>MEETINGS</td>
<td>21</td>
</tr>
<tr>
<td>COMMUNICATION OF CHANGES TO TENDER</td>
<td>22</td>
</tr>
<tr>
<td>PROBITY PRINCIPLES: NEGOTIATIONS</td>
<td>22</td>
</tr>
<tr>
<td>NEGOTIATIONS</td>
<td>22</td>
</tr>
<tr>
<td>SPECIFICATION OF TERMS FOR NEGOTIATION</td>
<td>22</td>
</tr>
<tr>
<td>PURPOSE OF NEGOTIATIONS</td>
<td>22</td>
</tr>
<tr>
<td>CONDUCT OF NEGOTIATIONS</td>
<td>22</td>
</tr>
</tbody>
</table>
Overview

Purpose

This guideline covers issues of probity that directly relate to tendering.

This guideline needs to be considered in conjunction with other University policies, procedures and guidelines.

All references to monetary amounts in this guideline are on a GST inclusive basis.

Coverage

The Probity in Tendering Guidelines applies to all University budget centres, including Institutes, Centres, Divisions and the Foundation.

Exclusions

This guideline excludes information on:

- Tendering Guidelines
- Tendering Policy

Guideline Objectives

Probity Management

Probity must be managed in any procurement, whether it involves competitive tendering, or procurement from a single supplier.

This guideline provides the details required for an understanding of probity in tendering, and the probity principles behind the tendering process. This guideline is designed to assist staff involved in a tender process in understanding the major principles involved.

For specific information on implementation refer to the Tendering Guidelines.
Key Considerations

Probity and Tendering

As part of achieving efficient use of University funds, in order to obtain the best value for money outcome, and to ensure the conduct of a transparent process that survives public and private scrutiny, the University has a tender policy that requires, among other things, the use of a tender process for the purchasing of goods and services with a total value of over $100,000.

The Importance of Probity

The University of Tasmania (the University) is a statutory body continued under the University of Tasmania Act 1992. It is accountable to a large number of stakeholders including the Tasmanian Parliament. Performance of the University’s statutory functions involves the expenditure of funds including procurement of goods and services from third party providers.

What is probity?

Probity is defined as: ‘integrity, uprightness; honesty’ (Macquarie dictionary, Revised Third Edition, 2002).

Application of probity principles to a tendering process should ensure that a fair and robust process is undertaken and as a consequence minimise potential liability if the process outcome is challenged.

What probity is not

Probity is concerned with the quality of the ‘process’ of conducting a tender. It is not concerned so much with the ‘quality’ of the decision achieving the practical outcome (for example, the supply of services). Adhering to sound probity processes does not:

- ‘guarantee’ the best outcomes; or
- determine whether the evaluation criteria are going to be the right criteria to assess whether or not the requirement will be met.

If the tender process has clear objectives and a sound methodology to achieve those objectives (in particular, a clear statement of the University’s requirements and targeted evaluation criteria against which tenders are to be assessed to determine whether the tenderer can meet such requirements), the adherence to sound probity principles and processes can assist in obtaining the desired outcome for the tender process.

Open vs. Closed Tenders

Closed tenders occur where there are no competitors or where it would be a more efficient use of University funds not to engage in a competitive tendering process having regard to the scale, scope and risk involved in any given procurement. This document focuses on probity in a
competitive tendering environment and some considerations may be slightly different if there is a single supplier.

The Importance of Probity Management

Public Scrutiny

For the University, as a statutory body, management of probity related issues in its tendering processes is important. There is considerable public and private scrutiny of government and statutory bodies for several reasons:

- increased concern with ethics and accountability in public life;
- increased media, parliamentary and court scrutiny; and
- increased time and resources required from third party providers in formulating and submitting tenders, leading to demands for increased accountability and transparency in procurement processes.

Public Confidence

Effective management of probity in tendering leads to greater tenderer and public confidence in the University’s procurement processes. As a consequence potential tenderers are likely to be more willing to invest the time and resources associated with participating in University tender processes, therefore resulting in better and more competitive tenders.

In addition the implementation of an effective probity process in support of an impartial, open and competitive tendering process should facilitate defensible decisions which are less likely to be challenged.

Litigation

A failure to manage probity in tendering appropriately may leave the tender process open to challenge or public criticism. Defending challenges is time consuming, costly, personally destructive for those involved and can undermine public confidence and affect reputations and acts as a distraction from the University’s personnel’s core function.

Any challenge (whether or not ultimately successful) is negative and involves consequences for the University, senior management and potentially for staff and advisers generally.
Legal Framework Summary

The failure to manage a tender process in accordance with probity principles may leave the tender process open to legal challenge.

There are a number of ways in which disgruntled tenderers can potentially take legal action to challenge a statutory body tender process. These include principally:

- Contract (breach of a tender process contract);
- Misrepresentation normally, for misleading or deceptive conduct under the *Competition and Consumer Act 2010* (Cwth) or the *Australian Consumer Law (Tasmania) Act 2010* (Tas);
- Negligent misstatement;
- Estoppel; and
- Challenges based on the application of administrative law remedies - such as for a lack of procedural fairness.

The University is also subject to the following legislation under which a tender process may be challenged or scrutinised:

- The *Right to Information Act 2009* (Tas) (the RTI Act) under which disgruntled tenderers may attempt to obtain documents relevant to the tender process;
- The *Public Interest Disclosures Act 2002* (the PID Act) which empowers the Tasmanian Ombudsman to investigate complaints of improper conduct against the University; and
- The *Financial Management and Audit Act 1990* (the FMA Act) which empowers the Tasmanian Auditor-General to investigate certain matters in relation to the University which may include its procurement processes.

Understanding the legal framework may assist University personnel in understanding why probity is so important and where tender processes may go awry. A more detailed explanation of the legal framework is contained at Annex A.
Probity and Tendering Key Responsibilities

Some key probity responsibilities relevant to tendering for goods and services are included below. Staff involved in a tender should be made aware of these responsibilities prior to engaging in a Tender process. In summary the University should;

**Maintain a Secure Environment**

- Those with access to Sensitive Information should have provided confidentiality undertakings.
- Sensitive Information should be stored securely.
- Access to Sensitive Information should be restricted and recorded (so that the audit trails show who has had access and when).
- Sensitive Information should not be moved from the secure environment.
- Sensitive Information should be identifiable (i.e. marked as ‘confidential’).
- The tender process should not be discussed with persons not specifically engaged on the tender team - including other University personnel.
- Release of Sensitive Information to advisers or tenderers should be tightly managed and controlled.
- Privacy requirements in relation to any personal information contained in the documentation should be met.
- There should be procedures in place to manage breaches of confidentiality and privacy.

**Conduct a Fair and Equitable Process**

- Treat all tenderers and conduct the process fairly and equitably, consistent with the rules of natural justice and procedural fairness, including ensuring that all tenderers are provided with access to the same information in order to prepare their tenders.
- Ensure that the need to avoid inherent bias in the 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.
- Ensure that the process is conducted in accordance with the process terms and conditions provided to tenderer.
- Ensure tenderers do not engage in collusive or anti-competitive conduct when preparing tender responses.

**Ensure the Process is Open and Transparent**

- Establish, promulgate and monitor compliance with all guidelines with respect to probity issues including conflicts of interest, confidentiality and fair dealing.
- Disclose to tenderers the methodology to be adopted for the evaluation of tenders, including all evaluation criteria.

**Minimise Potential Liability**

- Ensure effective contract risk management arrangements are in place.
Maintain a Clear Audit Trail

- At the commencement of the process, clearly allocate responsibilities to parties engaged in the conduct of the process including reporting and recording obligations.
- Ensure the process is fully documented.
- Ensure all process and probity issues and actions taken to resolve such matters are fully documented.
Probity Principles: Confidentiality and Security

Protection of Sensitive Information

The protection of confidential and commercially sensitive information (Sensitive Information) is an important probity requirement - it helps to protect the competitive position of tenderers and the commercial interests of the University. It also has to be balanced with the needs of the University to meet any of its public accountability obligations.

In the tendering context, Sensitive Information usually includes the tenders, all evaluation information (including information obtained during discussions and negotiations with tenderers) and recommendations.

If tenderers are not confident of the University’s security processes they may be deterred from tendering or may reduce the information they provide in their tender response.

The effective management and recording of Sensitive Information is crucial to preserving confidentiality. It is important that procedures are adopted to oversee the protection of this information.

Obligations of the Tender Team

Members of University staff involved in the preparation of the tender process and the receipt, evaluation and review of tenders, including discussions and negotiations with tenderers leading to contract signature with the preferred tenderer, need to be aware of their obligations to maintain the confidentiality and security of Sensitive Information.

Such obligations can be addressed in probity briefings to the tender team and tender team members may be required to sign confidentiality undertakings specific to the tender process.

Security arrangements should deal with both physical and electronic security of Sensitive Information. Sensitive Information should be used and stored in a physically secure environment. Sensitive Information should be easily identifiable (for example, separated from other material and be appropriately marked) and access to it restricted to personnel who have given appropriate undertakings. Appropriate computer systems should be in place for the electronic storage and use of the electronic versions of Sensitive Information. For each tender process, the University should consider implementing procedures such as:

- adopting a desk security and clean desk policy regarding Sensitive Information;
- locking Sensitive Information away;
- not removing Sensitive Information from controlled areas;
- storing Sensitive Information in an electronic environment that is not accessible from others (including IT personnel with administration rights).
Release of Sensitive Information to Advisers

These obligations need to extend not only to University staff, but contractors (such as advisers) engaged by the University who will have access to Sensitive Information in any given tender process.

Typically the terms of engagement of contractors oblige them and their employees and agents to maintain the confidentiality of Sensitive Information obtained during the performance of their contractual obligations. The terms of such contracts should be reviewed to determine whether the confidentiality provisions are appropriate for the tender process in which the contractor is to be employed by the University.

Contractors should also be obliged to follow any University directions in respect of the handling of Sensitive Information during a specific tender process.

Release of Sensitive Information to Tenderers

If there is a need for Sensitive Information to be released to tenderers, there should be procedures in place to manage the release. Tenderers should be obliged to execute confidentiality undertakings which prohibit or limit disclosure of information, restrict copying, require that the information be used in a secure physical environment and govern the return or destruction of information once it is no longer needed.

It may be necessary to for the University to obtain third party consents for the release of Sensitive Information to tenderers.

Release of Sensitive Information to the Decision Maker, Ministers and other Stakeholders

There should also be procedures in place to manage the release of Sensitive Information to the decision maker, the Tasmanian Parliament, or any other government bodies or stakeholders, including Ministers to whom the University may need to release information.

It may be useful to determine at the beginning of any specific tender process which of these persons are likely to have a need to review the documentation.

Privacy

The Personal Information Protection Act 2004 (Tas) (the PIPP Act) and the University Privacy Policy may have an impact on the way tender documentation should be handled, and University personnel involved in the procurement process should be familiar with the legislation and the policy.

In particular the PIPP Act and the Policy would apply if the tender process preparation or the tender involves members of the tender team or tenderers collecting or accessing personal information concerning University employees or students. For example: if tenderers are invited to undertake due diligence on or otherwise inspect University records to assist with their tender preparation.
Breaches of Confidentiality and Privacy

There should be procedures in place about how to manage breaches of confidentiality and privacy.

Access to Sensitive Information

A record should be kept of those persons within the tender team and any others who have access to Sensitive Information.
Probity Principles: Conflicts of Interest

Conflicts of Interest and Tendering

In the context of a tender process, conflicts of interest arise when:

- through any current or proposed future dealings or relationships (financial or non-financial) with a tenderer or any person or entity involved with a tenderer, University personnel involved in the tender process, their families or business associates stand to gain a benefit or advantage; or
- there is any other reason why specific University personnel involved in the tender process for the University may be tempted not to deal with a tenderer in an objective manner.
- Conflicts of interest also exist if there is the potential for a conflict of interest to arise, or there is a perceived actual or potential conflict of interest.

Some examples of conflicting interests include:

- any personal financial interest in the project;
- any immediate relatives, close friends or business associates with a financial interest in the project;
- any personal bias or inclination which would in any way affect an individual’s decisions in relation to the project; and
- any personal obligation, allegiance or loyalty which would in any way affect an individual’s decisions in relation to the project.

Summary of Main Conflict of Interest Principles

In summary, some of the major points of which University personnel should be aware are:

- the difference between actual and potential conflicts or perceived conflicts and that all may present problems and need to be declared, managed and resolved properly;
- conflicts need to be managed throughout the tender process:
- it is not a matter of ‘signing the undertaking and forgetting’;
- University personnel should avoid situations where the issue may arise;
- be aware of contact with tenderers, in any context.

Conflict of Interest Undertakings

Where competing interests and priorities exist (as they may in any tender process), appropriate procedures should be adopted to minimise or avoid situations where conflicts could arise.

- Conflicts of interest should generally be a standing agenda item at the beginning of all tender team meetings held throughout the tender process.
- All University personnel (including advisers and contract staff) should be required to give conflict of interest undertakings in respect of any tender process with which they are involved. Even if general conflict of interest undertakings have been given at the commencement of employment or engagement at the University, personnel should give additional undertakings in respect of specific tender processes.
Staff involved in tendering should also be under a continuing obligation to declare any conflict of interest (actual or potential) that arises during the tender process and give updated undertakings at key tender process milestones if needed.

**Conflict of Interest Guidelines and Protocols**

Adoption and distribution of protocols that address the various conflict of interest situations which may arise during the conduct of the tender process and which set out an appropriate mechanism for dealing with each situation may be a useful conflicts management tool.

Supplementary training or briefing of University personnel (including advisers and contractors) may be required to ensure that conflict of interest scenarios are understood as well as the procedure to be followed once a conflict has been identified.

Interaction with tenderers should be limited and should be through one point of contact. This assists with ensuring that tenderers receive the same or similar information (which relates also to fairness and equity) but it also reduces the risk for there to be a perceived conflict of interest.

**Adviser Contracts**

The University’s advisers and contractors may be under additional contractual obligations with respect to conflicts of interest. All advisers and contractors should be required to immediately notify the University in writing of any conflict or potential conflict.

**Conflicts Register**

As part of maintaining a clear audit trail and the proper management of conflicts, the University should maintain a conflicts register for each tender process which records, amongst other things, all conflicts (actual or potential) identified in the course of the tender process, together with all steps taken to resolve the conflicts of interest.
Probity Principles: Request for Tender

Probity and the Request for Tender (RFT)

The underlying principle behind the RFT is that tenderers should understand the basis upon which decisions will be made.

The RFT should set out all of the criteria against which tenders are to be evaluated and the information (to be provided by tenderers with their tender or sourced by the University’s tender team from third parties, such as commercial credit checks) which is to be considered by tender team in evaluating against each criterion.

If tenderers are obliged to satisfy any mandatory criteria, such requirement should also be clearly set out in the RFT. For example, a criterion might be that the tenderer has a specific technical qualification or approval, such as a quality assurance rating.

The RFT should explain the approach that will be taken if a tenderer fails to satisfy the mandatory criteria. For example, tenderers may be excluded on the basis that their tender does not meet certain mandatory criteria; or tenderers may be permitted to submit alternative non-compliant tenders if they also submit compliant tenders.

The evaluation methodology as detailed in internal documentation (such as evaluation plans) should be consistent with the RFT.

There should be internal consistency between the RFT and the tender process documentation (including evaluation plans, recommendation reports and similar) followed by University personnel, and the audit trail should evidence this.

At times, the University may seek non-conforming tenders, for example, in cases where the tenderer believes they can identify a more efficient or effective way of providing goods or services. If this is required, the RFT should set out how non-conforming tenders will be treated and assessed. As discussed in more detail below, comparison and evaluation of tenders requires a level playing field and non-conforming tenders can be difficult to compare with tenders that conform to the RFT. The approach taken in the University standard RFT is to have all tenderers submit a ‘conforming’ tender, but give the tenderers the option to submit an ‘Alternative Tender’ as well (see clause 18, standard conditions of tender).

RFT Information

It is important that the RFT requests sufficient information and information of a type that will permit a meaningful assessment and comparison of the tenders. It may also be necessary (particularly where the tenderers may not be well known or the goods and services may be of a type that is new) to request information that will enable the University to assess the financial viability and general standing of the tendering organisation by various probity and financial checks.
**Probity and the Advertised RFT**

An important part of meeting probity requirements is to follow the ‘advertised’ process (i.e. the process outlined to tenderers whether in the initial advertisements, invitations to register interest, RFTs or any other correspondence or documentation). However, the tender process should also be flexible enough to ensure the University achieves the best possible outcome.

**Standard RFT Conditions Regarding Probity**

The standard University RFT conditions of tender:

- reserves certain rights on behalf of the University (see clause 23 of the conditions of tender) allowing the University to do certain things such as:
  - be flexible in its decisions regarding the conduct of the process (i.e. it may cease the process at any time or call for new tenders);
  - negotiate with persons who are not tenderers; and
  - alter the statement of requirement,

- sets out in general terms the evaluation process that will be adopted, but without being too prescriptive, thereby maintaining flexibility for the University (clause 19).
Probity Principles: Receipt of Tenders

Receipt and Opening of Tenders

The receipt and opening of tenders is an important part of the tender process at which probity needs to be considered. The RFT should be released to tenderers on the same day and it should require all tenderers to submit their tenders by a specified date and time at a specified address. All tenderers should be treated equally and given equal time to respond to the tender.

Usually, tenders should be delivered to a secure point in the University (preferably a locked tender box) prior to the closing time. The tender box should be opened and all tenders should be logged, catalogued and registered at that time to ensure that:

- there can be no issue as to when each tender was received and what was provided by each tenderer which comprised its tender; and
- the tenders are secured to avoid them being lost or misplaced.

The RFT should also address whether tenders can be submitted by facsimile, e-mail or other electronic means. See clauses 2 and 3 of the standard University RFT.

Late Tenders

The University policy is that late tenders will not be accepted unless the University resolves, in its absolute discretion, that to accept the late tender would not compromise the integrity of the tender process or gives any tenderer an unfair advantage (clause 8 - standard conditions of tender). Late tenders not accepted are to be returned to the tenderer.

In making its decision, the University may consider the reasons for late lodgment, how late the tender was submitted, whether there had been any other late tenders or requests from other tenderers for late submission that had been rejected.

The University should consider each late tender on the basis of each specific circumstance and consider whether accepting a late tender into the evaluation process is likely to provide the late tenderer with an unfair advantage over other tenderers who submitted their tenders on time.

For example, in many tender processes it would be unlikely that a tenderer who submitted a tender ten minutes after the closing time would have gained an unfair advantage over those tenderers who lodged their tenders prior to the closing time. It would however be necessary to consider each late tender on a case by case basis.
Probity Principles: The Evaluation

Evaluation plans

The tender evaluation plan should help ensure that there is a ‘level playing field’ for tenderers, in that all tenders should be assessed against the same criteria, by persons qualified to make that assessment.

Drafting of Evaluation Plans

Internal evaluation plans containing the procedures to be adopted in respect of the receipt of tenders and providing clearly defined methodologies for the evaluation of tenders should be drafted and finalised prior to receipt of tenders.

Evaluation Team

The evaluation team must have the requisite skills to properly assess tenders, including from a financial, technical and commercial perspective. Evaluation team members should be expected to:

- be open minded;
- act with integrity and honesty;
- be impartial and objective;
- act consistently and fairly to all tenderers;
- be fully familiar with and apply the methods, protocols and criteria set for the tender process in accordance with plans; and
- make recommendations which reflect the outcome of the evaluation process.

The conduct of groups within the evaluation team should be considered (for example those undertaking a technical assessment of offers and those engaged in the financial assessment) and ideally be separated during the evaluation to ensure the maintenance of independent decision making within the tender team.

Evaluation Methodologies

The evaluation methodologies adopted for the tender process should not result in an inherent bias toward the selection of one or more tenderers (for example, this may be an issue if the tender process invited tenderers to consider a range of proposals or options). The evaluation of tenders should be defensible from a probity perspective and undertaken consistently with the process outlined in the RFT documentation. There should be sufficient flexibility within the evaluation process to allow the evaluators to deal with issues which may arise during evaluation without the risk of offending due process.

Whist the internal evaluation plan will be more detailed, the plan should be consistent with the evaluation criteria as outlined in the RFT. The evaluation criteria should be carefully structured to ensure that the tenderers have the capacity to meet the University’s requirement. The University may consider the use of an evaluation tool which may, for example, consist of
attributing weighted scores to several of the criterion. Evaluation plans should then be followed once tenders are received.

Consideration should be given to ensure that the proposed timetable for the evaluation process is not inherently unfair to tenderers, especially if tenderers are requested to respond to clarifications and requests for additional information.

The proposed decision making process including the ultimate decision maker and their role in evaluation should be identified and consideration given to their ability to reject/ignore findings of the evaluation team or to seek to amend the evaluation report.

**Carrying out the Evaluation**

Appropriate reporting processes should be established to confirm that compliance with the agreed evaluation methodology and tender conditions has been achieved and that the appropriate sign offs have been obtained in relation to compliance with these agreed processes.

The evaluation should be documented contemporaneously with the conduct of the evaluation and the University must have the working reports reviewed by the University Legal Office. The evaluation team should ultimately produce an evaluation report (which may also be reviewed by the University Legal Office) and should be required to provide a ‘sign-off’ addressing their participation in the evaluation process and in particular that the evaluation methodology has been complied with and that their reports have identified all relevant matters arising from the evaluation. The University Legal Office may also wish to have a legal process adviser review the working papers and the final draft of the evaluation report prior to sign-off.

The documentation should be complete and sign-off should preferably occur prior to the short listing or selection of a preferred tenderer.

**Amendment of Evaluation Criteria**

If it becomes apparent during the conduct of a tender process that the evaluation criteria needs to be amended, and the RFT conditions of tender permits such amendment (for example, see clause 7 of the University’s standard conditions of tender), all tenderers should be given an equal opportunity to respond against the revised evaluation criteria.
Probity Principles: Communication

Contact with Tenderers

Contact with tenderers may be required to request clarification or seek additional information from tenderers, or during contract negotiations. A more detailed list of practical considerations in respect of requesting clarification and seeking additional information from tenderers is located at Annex B.

Protocols for Contact with Tenderers

To achieve fair and equitable treatment of tenderers during the conduct of the tender process it is necessary to establish protocols for communications to ensure that information will not be provided to any bidder which:

- gives, or has the potential to give, an unfair advantage to that bidder;
- reveals proprietary or confidential information of another bidder; or
- unfairly disadvantages another bidder.

Protocols or procedures should also be adopted in contemplation of more formal communications with tenderers, for example, any meetings, interviews, site visits and presentations. These protocols and procedures should outline at what stage of the tender process these meetings will occur and what constraints should be placed on the information provided at those meetings. These protocols and procedures should also document the procedures governing issue of clarifications by tenderers to ensure that these do not amount to variations of their tenders.

Nominated Contacts

Contact with tenderers should only occur through a nominated contact point. Having established this nominated contact point, consideration should be given as to what restrictions need to be placed on information given in response to tenderers’ enquiries.

Contact Documentation

Any communication with tenderers should be documented with appropriate document management systems implemented. A contact log should be established by the University or its advisers containing a formal record of all communications with tenderers and their representatives and advisers.

Meetings

All meetings should be conducted in accordance with the format, procedures and protocols established and agreed prior to the meeting and these should be consistent for all tenderers.
Communication of Changes to Tender

If it becomes necessary to change the tender process or any of the tender process procedures, these changes should be communicated to all tenderers promptly so as to minimise any potential detrimental outcomes for them. The ultimate strategy adopted depends on the degree of variation contemplated and should be assessed on a case by case basis.

Probity Principles: Negotiations

Negotiations

Negotiations with one or more tenderer may only be conducted if the tender conditions contemplate that the University may undertake such negotiations (the standard University RFT conditions of tender allow for the conduct of negotiations – see clause 19.2(b)).

Further principles in respect of conducting negotiations with tenderers are located at Annex C.

Specification of Terms for Negotiation

In order to avoid any misunderstanding as to the nature and extent of any negotiations, the terms and conditions of the negotiations (including the proposed timeframe) should be provided, in writing, to the tenderers invited to negotiate. Tenderers who agree to participate in the negotiations should confirm their acceptance in writing.

Purpose of Negotiations

The aim of the negotiations is to achieve the best possible result for the University, taking into account the needs of stakeholders and recognising that the successful tenderer should be satisfied with the result as well. A successful tenderer who feels put upon, taken advantage of or indirectly intimidated during the negotiations may be less likely to enter into a mutually satisfactory working relationship in undertaking its responsibilities under the resulting contract.

Conduct of Negotiations

A competitive situation should, however, be maintained throughout negotiations. For example the preferred tenderer should not be given the impression that it is certain to proceed to contract as such an impression may undermine the University’s negotiating effectiveness. It may also give rise to a claim for damages based on Estoppel or misrepresentation if the preferred tenderer ultimately does not get the contract.

Negotiation of Changes to Tender

Of primary concern in relation to any negotiations is whether the negotiations give rise to an alteration of the basis on which tenderers were required to submit their tenders (for example a change to the tender specifications).
If the negotiations result in a material change either to the tenderer’s bid or to the tender specifications or other requirements, the University should consider whether it should give other tenderers the opportunity to revise their tenders. Probity and legal advice should be sought if there is any doubt as to whether tenderers should have the opportunity to revise their tenders in accordance with the revised specifications. Notes on the conduct of negotiations are at Annex C.

**Documentation of Negotiations**

A record of negotiations should be kept. In summary, the records should clearly show:

- the aim of the negotiations
- the plans followed
- a record of exchanges; and
- an evaluation and summary of the effectiveness and outcomes of the negotiations.
Probity: Documentation

Purpose of Documentation

The entire tender process should be documented to:

- demonstrate the objectivity and impartiality of the process;
- substantiate the recommendations of the evaluation team; and
- to meet any of the University’s own record keeping requirements.

The comprehensive documentation of the tender process will assist the University in justifying the tender process in the event of parliamentary or other audit, or challenge to the process. It also helps the tender evaluation team members in understanding their responsibilities and understanding the tender process generally. It helps to ensure that the process set out in the tender documentation is properly followed.

Documentation Process

The following procedures should be adopted:

- all meetings should be minuted;
- all decisions recorded;
- all contact with tenderers noted and registered;
- all copies of correspondence regarding the tender process should be maintained; and
- a probity issues register and a conflicts register (see paragraph 39 above) should be maintained.

The maintenance of such records should assist in identifying any deficiencies in the tender process which may be addressed prior to the tender process being completed and the recommendations being made. Consideration should also be given to documents that may be held by advisers and which may need to be collected prior to the disengagement of such advisers from the project.

Tenderer Debriefing

Debriefs

Procedures should be adopted in respect of the debriefing of unsuccessful tenderers. Any information provided to tenderers should be consistent with the tender evaluation outcome.

It is important that a standard approach be taken in respect of debriefing. Tenderers should generally be verbally debriefed against the criteria against which they were assessed, although the briefing should be scripted and processes developed for dealing with tenderer questions.

Generally tenderers should not be provided with information concerning other tenderers, except for publicly available information and except in so far as comparative statements can be made without breaching confidentiality.
It is recommended that debriefings only be conducted at the conclusion of the tender process after the contract has been signed with the successful tenderer. Debriefings should be attended by more than one member of the project team.

**Role of Probity Adviser & Probity Auditor**

**Appointment of Probity Adviser**

Complex, sensitive, high risk or high dollar value tenders may need a probity adviser; please consult the Legal Office if this is the case. One of the lawyers may act as probity adviser or an external consultant may be appointed as probity adviser.

**Role of Probity Adviser**

The probity adviser will be independent to the tender process and will monitor and report on compliance with probity procedures. The probity adviser will usually be required to provide advice on the conduct of the tender process (including the tender evaluation procedures), ensure that the tender rules and procedures are followed, and ensure that the tender process will be conducted fairly and that tenders received are assessed in accordance with the stated evaluation criteria.

The probity adviser is not the legal adviser in relation to the tender process. The role of probity adviser is to monitor the tender, evaluation and selection processes to ensure that they are defensible and conducted in a fair and unbiased manner. The probity adviser does not undertake the evaluation and is not responsible for advising on the legal issues that arise from the conduct of the tender process.

The probity adviser will normally advise and report to the tender steering group and may attend and monitor meetings of other tender committees, such as the tender evaluation team. The probity adviser may also be required to advise on the composition of the tender evaluation team to ensure that there are no conflicts of interest and that the team contains the appropriate skills for the evaluation.

**Probity Auditors**

There is also a distinction between probity advisers and probity auditors. A probity auditor is generally engaged after the process, or specific stages of the process, have been completed (and therefore generally has less active involvement in the tender process than a probity adviser) to undertake an independent ‘audit’ of the tender process. The probity auditor’s report may be used as another ‘sign-off’ to justify a procurement decision.
Relevant Policy Document

Probity in Tendering Guidelines

Other Related Policy and Practice Documents

Policies

General Purchasing Policy

Procedures and Guides

General Purchasing Guidelines
Tendering Guidelines

Forms

UTAS Request for Tender Template

About this Document

<table>
<thead>
<tr>
<th>Title</th>
<th>Probity in Tendering Guidelines</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>April 2012</td>
</tr>
<tr>
<td>Responsible Officer</td>
<td>Chief Financial Officer</td>
</tr>
<tr>
<td>Name</td>
<td>Garry Hennessy</td>
</tr>
<tr>
<td>Review Cycle</td>
<td>3 year</td>
</tr>
<tr>
<td>Status of version</td>
<td>Draft</td>
</tr>
<tr>
<td>Author</td>
<td>John Clements/ David Nolan</td>
</tr>
</tbody>
</table>
Annex A: The Legal Framework

The following is an explanation of the legal framework under which persons may challenge a University tender or procurement process.

**Process contracts**

A process contract is a preliminary contract governing a tender process. Following Hughes Aircraft v Airservices Australia (1997) 146 ALR 1 (the Hughes case), it is well established that tenders can give rise to process contracts applying to statutory body tenders. Whether a particular tender process gives rise to a preliminary process contract will depend on the circumstances of each case and the obligations expressly or impliedly accepted.

The establishment of process contracts means that any departure by the University from the requirements set out in the tender documentation could leave the University exposed to challenges from unsuccessful tenderers for breach of contract and entitle the aggrieved tenderers to damages.

Even in the absence of a process contract, it is likely that there will still be some obligation on the University to act fairly (Pratt Contractors case, Gallen J at 478; and endorsed by Finn J in the Hughes case).

A finding that a process contract exists effectively means that the University is under an obligation to conduct the tender process in accordance with the requirements of its tender documentation. Any departure from this requirement could leave the University exposed to challenges from unsuccessful tenderers. If a tenderer can show that the terms of a process contract have been breached, then the tenderer may be entitled to damages or some other remedy (e.g. an order setting the tender decision aside).

**Process Contract: Invitation to Treat**

Whether or not a particular tender process constitutes a mere invitation to treat (which does not give rise to contractual obligations) or a preliminary process contract depends on a consideration of the circumstances and the obligations expressly or impliedly accepted (Pratt Contractors, 478 - 49; and endorsed by Justice Finn in the Hughes case). Generally speaking, a court will look to the substance of the tender process, as evidenced by the conditions of tender, and the conduct of the participants to determine whether contractual obligations arose in relation to the tender process.

Following the Hughes case, the following factors may indicate the existence of a process contract as opposed to an invitation to treat:

- language in the tender documentation which expressly or impliedly states that legal obligations are intended to be created in relation to all or part of the process created by the tender documentation;
- the use of mandatory, contractual language which dictates a strict process and sets out the rights and obligations of the tendering entity and the participants;
c. no express exclusions or disclaimers with respect to the tender documentation forming a process contract;

d. a limitation of liability clause; and

e. a requirement to provide a security deposit or performance bond in relation to participation in the tender process.

In the Hughes case the Civil Aviation Authority, a statutory corporation, (the CAA - now Airservices Australia) was found to be in breach of a ‘process’ contract when it changed the order of priority of the selection criteria which had been announced in a request for tender. The court found that there was an implied term in the tender process contract that the CAA would deal fairly with the tenderers. The court found that such a term was a necessary incident of competitive tender process contracts with public bodies.

The decision in the Hughes case was consistent with decisions in a series of cases in New Zealand, the United Kingdom and Canada concerning tender processes.

For example, in Pratt Contractors Ltd v Palmerston North City Council [1995] 1 NZLR 469 (the Pratt Contractors case), the Palmerston North City Council issued detailed tender documents for professional design services. Tenderers were required to pre-register and pay a non-refundable $100.00 deposit on registration. The tender was to be awarded to the lowest conforming tender, however, the Council accepted an "alternative non-conforming tender" for a lower amount than the conforming tenders. The High Court held that a preliminary contract was formed when Pratt Contractors submitted its tender which conformed with the Council’s tender documents, and that the Council was bound by the terms it had itself imposed.

More recently, Cubic Transportation Systems challenged the NSW Government’s tendering process for a public transportation ticketing system (Cubic Transportation Systems v State of New South Wales [2002] NSWSC 656 - the Cubic case). The proposed arrangements for the delivery of an Integrated Ticketing System (ITS) involved the preferred proponent contracting with 'the Principal', proposed to be a special purpose company having as its shareholders the participating operators and the relevant NSW Department. Cubic alleged that the tender selection process did not follow the procedures set out in the Call for Revised Offers (Call), was not a fair process and did not afford an equal opportunity to the two participating tenderers.

After reviewing case law on process contracts (including the Hughes case, and Transit New Zealand v Pratt Contractors [2002] 2 NZLR 313, but interestingly not MBA Land Holdings Pty Ltd v Gungahlin Development Authority (2000) ACTSC 89 (the MBA Land Holdings case) discussed below), the Court found that 'a contract of some kind was intended' based on the language of certain clauses in the Call. The Court also found that the nature of the contractual obligations of the parties in the context of the tender required the implication of a term of reasonableness and good faith. This term was implied as a matter of law (the Cubic case, para 44).

**Misrepresentation or Misleading or Deceptive Conduct**

Tender challenges based on the common law doctrine of misrepresentation or misleading or deceptive conduct under what used to be section 52 of the Trade Practices Act 1974 (Cwth) (the TPA) or section 14 of the Fair Trading Act 1990 (Tas) have not generally been successful to date. This legislation has now been replaced with the Competition and Consumer Act 2010 (Cwth.)
The application of relevant legislative provisions will depend on the specific circumstances of any particular tender, however, this legislation and the common law doctrine of misrepresentation should be kept in mind.

Accordingly, it is unlikely that an action for misrepresentation will be able to be sustained against the University in relation to a tender process unless there is an actionable misrepresentation at common law, e.g. a negligent misrepresentation for which damages may be claimed.

**Negligent Misstatement**

If a tenderer is unable to bring an action under the Competition and Consumer Act, it could make a claim under the common law doctrine of negligent misstatement. A negligent misstatement can arise even though:

a. the information is honestly given;
b. there is no contractual relationship between the person giving and the person receiving the information (such as in a tender); and
c. there is no charge for the information given.

In the context of statutory body procurement processes, a negligent misstatement would arise if the statutory body was to negligently provide information in its tender documentation.

In order to establish that the University had negligently provided such information, the tenderer would have to show that:

a. the University owed a duty of care to the tenderer;
b. the duty of care was breached by the University; and
c. as a result of the breach, the tenderer suffered loss.

It is likely that the University would be found to have a duty to potential tenderers to take reasonable care to ensure that information provided in its tender documentation or otherwise to tenderers is generally correct and accurate. Once a duty of care is established, it would then be necessary to show that the duty has been breached by the giving of negligent information. It is not enough to show that the information provided was incorrect; rather it must be shown that the University did not take reasonable care in providing the information.

**Estoppel**

Disgruntled tenderers could also seek to challenge a tender process on the basis of an Estoppel. An Estoppel might arise where a tenderer has relied to their detriment on an assurance, representation or conduct by the University in relation to a tender process in circumstances such that it would be ‘unconscionable’ to allow the University to go back on that assurance, representation or conduct. An Estoppel is likely to arise only if a specific assurance or representation etc was made to a tenderer and if it was reasonable for a tenderer to rely on that assurance etc and incur expenditure in relation to the tender process.
To date, the cases dealing with challenges to statutory body tender processes do not appear to have been based on Estoppel. However, in appropriate circumstances, Estoppel may give a disgruntled tenderer grounds to challenge a tender process as ordinarily it is not difficult to establish detrimental reliance when a tender has been issued with specific statements about how the tender process will be conducted and there has been a departure from the stated procedure.

**Administrative Law Challenges**

Public law remedies can provide a basis for challenges to the award of a contract or a tender process procedure. A challenge to a decision on University procurement processes could potentially be mounted under the Judicial Review Act 2000 (Tas) (the JR Act). A number of requirements must be satisfied before a tenderer can successfully challenge a decision under the JR Act. Fundamentally, the decision must be "of an administrative character, proposed to be made or required to be made under an enactment" (see section 4(1) of the JR Act). The decision may also be reviewable under common law remedies (rights under the JR Act are in addition to any other rights a person may have (section 10, JR Act)).

**Grounds for Review**

There are a number of grounds of review set out in the JR Act (see, for example, sections 17, 18 and 19 of the JR Act), and under common law remedies. Some of the grounds which have been considered by the courts are set out below.

**Procedural Fairness (Natural Justice)**

It is likely that even in the absence of a process contract, the University is likely to be subject to a duty to treat tenderers fairly (i.e. accord tenderers procedural fairness). Indeed, a failure to accord procedural fairness appears to be a ground increasingly relied on by tenderers to challenge tender processes. Such a challenge effectively seeks to apply administrative law remedies, such as the making of a declaration or grant of an injunction, to the conduct of a tender process. This was the basis of the decision in the MBA Land Holdings case.

In the MBA Land Holdings case, MBA challenged a decision made by the Gungahlin Development Authority or GDA (a statutory authority under the Gungahlin Development Authority Act 1996 (ACT)) to accept an amended proposal (containing a revised tendered price) from one of the tenderers after the tendered closing time. The court found that it was a breach of the entitlement of other tenderers to procedural fairness for the GDA to have accepted the amended proposal. The GDA was 'obliged to accord tenderers procedural fairness, to act according to law and not unreasonably'. The Court held that the breach of the duty to afford procedural fairness was sufficient to enlighten the power of the court to grant public law remedies.

The court concluded that although the tender process was not reviewable under the Administrative Decisions (Judicial Review) Act 1989 (ACT) (because it was not a decision made 'under an enactment'), the tender decision was reviewable under the common law because the GDA had public law obligations as a result of its status and function. The GDA was obliged by its Act to perform its functions in a manner which advanced the interests of the public.
The use of public law remedies is supported by other cases dealing with tender process challenges: e.g., Dalcon Constructions Pty Ltd & Ord v State Housing Commission & Anor [1998] WASC 14; (1998) 14 BCLC 477. In that case, the court observed that because the Commission was a statutory authority responsible for spending public funds for public purposes, it would be obliged to act honestly, impartially and in good faith. Although the court did not decide, it was noted that this obligation could potentially be enforceable by 'the prerogative writs' (i.e. public law remedies such as injunction).

**Legitimate Expectations**

Another aspect of the role of procedural fairness is the fulfillment of legitimate expectations. If, during a tender process, a particular tendering procedure gives rise to a legitimate expectation that the tender processes will be conducted according to that procedure, it is possible for a tenderer to challenge the tender process if the procedure is not followed.

In addition, it is not necessary for there to be a specific undertaking in a tender document before legitimate expectations can be generated (Seddon, N Government Contracts: Federal, State and Local 2nd ed, Federation Press 1999 at page 304). Codes of conduct and policy statements by the University or the Tasmanian Government about their statutory bodies may assert the University will observe high standards of fairness, ethics and probity. While the sources listed above cannot form an 'enactment' for the purposes of the JR Act, they may give rise to a legitimate expectation that procurement processes will be conducted according to those standards.

**Failure to take into Account a Relevant Consideration**

This means failure to take into account a consideration which a person is bound to take into account in making the decision. The statute under which the agreement is being entered into should be looked at to help determine what the relevant considerations may be. Mason J in the Minister for Aboriginal Affairs v Peko Wallsend (1986) 162 CLR 24 explained (at 39 - 40):

“What factors a decision maker is bound to consider in making the decision is determined by the construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether the enumerated factors are exhaustive or merely inclusive. If the relevant factors...are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act”.

Mason J also explained (at p 42) that where an Act rests on a discretion in a Minister, broad considerations of policy are usually permissible.
Other Relevant Legislation

The University is a ‘prescribed authority’ under the *Right to Information Act 2009* (Tas). This legislation may be applicable to certain documents relating to procurement (although there are a number of exemptions for specific documents).

Tenderers are also able to make complaints about improper conduct by the University or its personnel to the Tasmanian Ombudsman under the PID Act (section 6).

The University is a public authority under the FMA Act and, for example, the Tasmanian Auditor-General has power to investigate matters relating to the accounts, economy, efficiency and effectiveness of the University (section 44 of the FMA Act), which may include procurement processes.
Annex B: Requests for Clarification and Seeking Additional Information from Tenderers

During the evaluation process it is often necessary to require tenderers to clarify parts of their tender. On occasion it is also necessary to require tenderers to provide additional information in support of their tenders. These processes, if not carefully managed can result in a tenderer or tenderers being treated unfairly and could lead to a challenge to the tender process outcome.

The difference between a clarification and a request for additional information needs to be considered. Generally a clarification merely seeks to clarify part of the tender submitted and does not seek to amend the tender contents. On the other hand, information received from a tenderer in response to a request for additional information may, if accepted into the evaluation, result in an improvement in the tenderer’s tender. The legal and probity implications of both processes need to be considered.

It is important that such processes are conducted in accordance with the following principles:

a. the process for requesting clarifications and seeking additional information from tenderers is conducted in accordance with the tender conditions provided to tenderers;
b. requests to tenderers for clarification of tenders or the provision of additional information should be carefully considered to ensure that the clarification required or information requested will be given by the tenderer. An unclear request may lead to a tenderer providing information other than that required;
c. consideration should be given as to which tenderers should be asked to provide clarification or provide additional information and the potential impact of their response. For example if it is decided to seek additional information from a shortlisted group of tenderers, consideration should be given to the effect of seeking the same information from all tenderers (i.e. could the responses received from those tenderers not shortlisted have the effect of materially changing their ranking in the evaluation);
d. if additional information is requested from one or more tenderers, consideration should be given, having regard to the principle of treating all tenderers fairly, as to whether the information should be requested from all tenderers;
e. confidentiality of tenders should be maintained, in particular information from one tenderer should not provided to other tenderers in the request for clarification/information;
f. responses received should be considered to determine whether the information provided addresses the request, or provides additional information which should not, in fairness to other tenderers, be taken into account in the tender evaluation. Additional information not addressing the request can be excised and not provided to the members of the evaluation team undertaking the part of the evaluation to which the information relates.
Annex C: Conduct of Negotiations with Tenderers

The conduct of negotiations with one or more tenderers can often give rise to a number of probity issues. To ensure that such negotiations are defensible they should be conducted in accordance with the following principles:

a. the process for negotiating with tenderers is conducted in accordance with the tender conditions provided to tenderers.

b. a negotiation strategy is developed which clearly identifies the key issues for negotiation and the evaluation team’s preferred position (i.e. identify what is acceptable/non acceptable) and the strategy is understood and adhered to by those members of the evaluation or project team engaged in the negotiations. The strategy should also consider fall-back options/strategy in the event that the negotiation fails to achieve the desired outcome.

c. prior to the commencement of the negotiations, tenderers should be advised of the procedures or protocols to govern the negotiation process including:
   – the parameters of the negotiation (for example, if seeking improvements on risk and financial aspects of the offer);
   – the obligations of the parties (for example, the requirements to provide additional information or changes to offers or tender responses);
   – timeframes (including the time when tenderer responses are due);
   – the process for concluding the negotiations (including whether the tenderer will be required to execute any other and if so what legal documentation not otherwise referred to in the tender conditions); and
   – the parties to be involved in negotiations, including point(s) of contact with the tender evaluation or project team;

d. if tenderers are verbally briefed on the negotiation procedures or protocols, those tasked with briefing tenderers should have access to scripts or clear instructions to ensure that all tenderers are provided with the same instructions/information. Ideally, in order to avoid the possibility of any confusion as the terms of the negotiation process (given that tender conditions often do not detail how negotiations will be conducted) tenderers should be provided with the negotiation procedures or protocols in writing, or at least be notified in writing of the key elements thereof such as the timetable and requirements for any deliverables (e.g. amendments to offers, additional information);

e. during the conduct of negotiations, information provided by one tenderer should not be provided to another tenderer or tenderers;

f. contact should not be made with tenderer or tenderers by members of the evaluation or project team other than in accordance with the negotiation protocols; and

g. all negotiations with tenderers should be documented.