

Use of probity auditors and advisors guide



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Version	Date	Comments
v1.4	November 2018	Published
v1.5	August 2025	Minor updates made – highlights: <ul style="list-style-type: none">• DHPW corporate branding• Machinery-of-government changes• Hyperlinks verified and updated or removed• Document date updated• New version history log and 'Administration' section added• Updated document title• Removed contextual policy information
v1.6	September 2025	Minor updates made - Queensland Government Corporate Branding

The State of Queensland (Department of Housing and Public Works) 2025.

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Disclaimer

This document is intended as a guide only for the internal use and benefit of government agencies. It may not be relied on by any other party. It should be read in conjunction with the Queensland Procurement Policy, your agency's procurement policies and procedures, and any other relevant documents.

The Department of Housing and Public Works disclaims all liability that may arise from the use of this document. This document should not be used as a substitute for obtaining appropriate probity and legal advice as may be required. In preparing this document, reasonable efforts have been made to use accurate and current information. It should be noted that information may have changed since the publication of this document. Where errors or inaccuracies are brought to attention a reasonable effort will be made to correct them.

Administration

Version 1.6 of this document replaces all previous versions of this document and takes effect immediately.

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Purpose

This guide provides information about the engagement of independent probity auditors and probity advisors during the procurement process.

Context

The Queensland Government is committed to ensuring the integrity of procurement decision-making processes.

Government procurement should be able to withstand public scrutiny and instil confidence that all potential suppliers are given fair and equitable treatment. Depending on the procurement at hand, one thing that can help achieve this is the use of a probity auditor and/or advisor.

Agency responsibility

The engagement of a probity auditor and/or advisor does not transfer the requirement for ensuring probity away from the agency, and should not be seen as a substitute for procurement officers managing a well-planned process that addresses probity requirements. Regardless of the procurement value, the highest standards of ethical behaviour must always be exercised to ensure probity of the procurement process.

Accountable officers are responsible for ensuring that systems, policies and procedures are in place in their agencies to ensure the integrity of the procurement decision making process. These should be able to withstand public scrutiny and preserve private and public sector confidence in the procurement process. The engagement of a probity auditor or advisor should be seen as complementing existing sound probity processes.

Probity plans

A probity plan should be prepared before the commencement of each procurement process and forms part of procurement planning documentation. It should identify the probity risks and related management strategies for the procurement, including the role and responsibilities of each stakeholder in responding to those risks. Where the procurement is part of a broader project, the probity plan should be agreed with the project's governing body and management.

As part of the probity plan, a description should be provided of the probity services that are to be sourced, including whether a probity auditor and/or probity advisor is to be engaged, and the scope and nature of the probity services that will be delivered.

All members involved in the procurement, or project, including the steering committee, advisors and other project stakeholders should be aware of arrangements put in place to preserve the probity of the process and should be provided with a copy of the probity plan.

In those procurement situations where more than one agency is involved in different elements of the procurement process, it is essential that the roles and responsibilities in relation to probity be addressed within the probity plan to ensure that accountabilities are clear and that governance practices are in place. The responsibility for probity remains with the agency to which funds have been appropriated. Where this agency engages service providers (Government or private) to engage in procurement activities on its behalf, it should require those providers to meet its (the agency's) responsibility and particular requirements regarding probity. However, this does not transfer the responsibility for probity to the service provider, which remains with the agency.

Probity auditors and probity advisors

There is no legal or professional standard in relation to the correct or agreed use of the terms 'probity auditor' and 'probity advisor'. Although the terms 'probity auditor' and 'probity advisor' are often used interchangeably there are distinct differences in the roles of probity audit and probity advice.

The Australian National Audit Office's Better Practice Guide *Fairness and Transparency in Purchasing Decisions: Probity in Australian Government Procurement* (2007), outlines the difference between the two engagements.

Probity audit

A probity audit is an assurance engagement, in which a probity auditor provides an independent scrutiny of a procurement process and expresses an objective opinion as to whether the prescribed probity requirements have been adhered to. The conclusion expressed should be based on evidence gathered against prescribed criteria.

Independence is essential to a probity audit. A third party to the procurement should be able to rely on the probity audit to obtain greater confidence as to whether the probity requirements of that procurement have been adhered to.

Key elements of a probity audit are

- **Criteria.** These are the predetermined benchmarks used to measure and evaluate whether the probity requirements within the procurement have been met. The criteria should be clarified and agreed prior to commencement of the audit and would be informed by a probity plan or probity framework. The criteria are then used by the probity auditor to establish a program of audit investigation and assessment.
- **Evidence.** The probity auditor is required to obtain sufficient, appropriate evidence for all established criteria. The probity auditor's decision must be supported by robust facts and documentary evidence. It is not sufficient for professional judgement to be used as the justification for decisions that are not otherwise supported by the facts and circumstances of the audit or sufficient relevant evidence. However, the probity auditor will use professional judgement as to whether the evidence is adequate so as to support the decision based on the determined criteria.

The results and opinion of the probity auditor as to whether the probity requirements have been met are documented in a probity audit report, which includes any significant issues that have been identified and that impact upon the opinion that the probity auditor provides.

Probity advisor

The role of probity advisor involves the provision of advice and assistance before and during the course of the procurement process, as a basis for improving the procurement outcome and addressing unexpected probity issues that arise.

The key difference between a probity advisory engagement and a probity audit is that an engagement for provision of probity advice does not provide a verification role and is not intended to provide an opinion as to whether the probity requirements have been met (as in the case of a probity audit). Thus, it is not intended to provide assurance as to compliance with probity requirements.

A probity advisor provides guidance and advice on how probity issues should be addressed, and may also assist in anticipating problems and advising on courses of action to be taken. In the course of providing probity advice, the probity advisor may become aware of real, perceived or potential breaches of probity. In these cases, the probity advisor would be required to report these in a timely and informed manner to the appropriate level of management. This would, however, be incidental to the primary function of probity advice.

A probity advisor may also be expected to provide comment on matters and issues of probity accountability and transparency during the procurement process, how probity risk issues are being managed and how strategies set out in the probity plan are being applied.

Guidance on choosing between probity auditors and probity advisors for a procurement engagement and considerations for selecting probity auditors and probity advisors is contained below.

Independent verifier

In some construction procurements, an independent verifier may be engaged. An independent verifier confirms by investigation the validity of claims to ensure compliance with a set of standards.

An independent verifier's role may include audit functions such as a review of records, data, equipment and activities and is expected to provide expert professional services that relate to an industry where they have direct experience and are appropriately qualified to provide verification. For example, a Quantity Surveyor would be appropriately qualified to provide verification of a contractor's progress claims.

Where a body external to the agency is engaged to provide a verification service, the responsibilities, obligations and acknowledgments of the independent verifier would be contained within the commissioning documents.

High risk procurement and probity

Agencies are expected to be able to demonstrate that they have used a documented, rigorous and defensible approach for determining what level of risk a procurement has. As part of a broader procurement risk identification analysis of these agencies should assess the probity risks inherent in a particular procurement at the earliest stages of procurement planning. In addition, risk should continue to be reviewed as the procurement progresses to consider whether the level of risk has changed.

Significant procurement planning

During a significant procurement planning process, agencies are expected to consider the specific risks associated with that procurement in more detail, including risks associated with procurement in general (i.e. supply market considerations and business risk considerations), as well as risks particular to probity of the procurement process. This can assist in clarifying the specific role that the probity auditor and/or advisor will play and the particular issues that he/she may be required to address.

These considerations should form part of probity planning and be documented within a probity plan. A probity plan should be developed with each significant procurement plan.

Factors to consider in determining procurement risk

The determination of risk involves extensive analysis and the application of judgement to the specific circumstances and context of the particular procurement. The onus is on the agency to demonstrate that a thorough risk analysis has been undertaken and to provide justification for the assigned risks to a procurement (and how these risks are to be managed).

As part of the risk assessment process, the following factors may indicate that a procurement is high risk. However, these factors should not be regarded as either complete or conclusive when determining whether the procurement is high risk.

- The agency is not an informed buyer, or lacks experience in managing the nature or magnitude of the project or procurement being undertaken.
- The procurement is subject to a high degree of public scrutiny. Public scrutiny levels may be high particularly where considerable public funds are involved or the matter is sensitive.

- The evaluation process will be protracted with lengthy and detailed face-to-face meetings with proponents.
- There has been a history of controversy or litigation in relation to the procurement, the project, the agency or one of the potential suppliers.
- The selection criteria involve a high level of subjectivity.
- The project is complex, unusual or contentious.
- The project will utilise a complicated contract structure. This could include, for example, non-traditional contract forms such as alliances and public private partnerships.
- The project involves a high level of intellectual property.
- A proponent has already been involved in a feasibility study or pre-tender stage of the project and thereby gained an advantage.
- The nature of the marketplace makes supplier grievances more likely (such as where competition is strong and commercial confidentiality is particularly important).
- The market is highly concentrated or involves very few players, or where there are many players, but some are very dominant. In such an environment, information sharing and the potential for collusion or other anti-competitive behaviour is usually high¹.
- There is a high potential for a conflict of interest or perceived conflict of interest. For example, where a public sector entity, or an incumbent contractor with a strong relationship with the agency, is bidding for the supply/contract.

Auditor/advisor independence

Ensuring the independence of the probity service provider will help to make sure that they provide an objective and impartial view of probity within the procurement process.

The involvement of an independent probity service provider provides greater assurance to the public and to suppliers wishing to do business with the Queensland Government as to the probity of the procurement process.

Determining independence

A key element of independence is impartiality, which means being free from bias and not affected by influences or interests that compromise professional judgment.

Impartiality allows the probity advisor or auditor to act with integrity and to exercise objectivity in respect of the probity engagement. In order for a probity advisor or auditor to be impartial and free from bias, he/she should not be exposed to situations or relationships that may impair his/her objectivity with respect to the engagement, or that may be perceived as impairing his/her objectivity with respect to the engagement.

Probity advisors and auditors must not only be independent in action but must also be perceived to be independent. The appearance of independence, as demonstrated by external facts and circumstances, provides an important indicator of actual independence.

Several publicly available documents² identify potential threats to independence as well as potential safeguards that mitigate these threats. A summary of these is provided below.

¹ The Australian Competition and Consumer Commission guide *Cartels: Deterrence and detection; A guide for government procurement officers* (2011), provide further information on how to detect possible collusion.

² *Independence guide* (4th ed., February 2013), published by Joint Accounting Bodies (CPA Australia Ltd, The Institute of Chartered Accountants in Australia, and The Institute of Public Accountants). See also APES 110 Code of Ethics for Professional Accountants (issued December 2010), published by Accounting Professional and Ethical Standards Board.

Threats to independence

- **Self-interest.** This occurs where the probity service provider stands to benefit from a financial or significant non-financial interest in a probity client (agency). When evaluating the significance of the self-interest threat, consider the type of interest (direct or indirect) and the materiality of the interest.
- **Self-review.** This occurs where a probity auditor reviews their own advice. For example, a probity advisor provides advice regarding probity within a procurement process and then conducts a probity audit over the procurement.
- **Advocacy.** This occurs where the probity service provider or related entity promotes, or may be perceived to promote, an agency's position to the point that objectivity may, or may be perceived to be, compromised. For example, this can arise where a probity services entity promotes a particular procurement strategy which has not been reviewed for probity by a third party.
- **Familiarity.** This occurs where a close relationship between the probity service provider and the agency causes the probity service provider to become biased to the agency.
- **Intimidation.** This occurs where the probity service provider is deterred from acting objectively, by threats (actual or perceived) from the officers of the agency. For example, a probity service provider may be threatened with replacement over a disagreement over a probity issue in the procurement process, or have their credibility threatened.

Safeguards for independence

Where there is a potential threat to the independence of the probity service provider, the agency should determine whether there are any safeguards that could eliminate or reduce the threats to independence. Safeguards could include:

- a governance structure that provides oversight and support for probity within procurement. For example, the probity service provider could report to the steering committee of a project, rather than to the project director or project manager
- agency implementation of processes and procedures that support probity within procurement
- training agency employees so that they are well informed with regard to probity requirements in procurement
- following a structured process in the appointment of the probity service provider to ensure independence
- allocating different staff the responsibility for providing a probity audit service in the case where probity advice has been provided on the procurement. This applies in the case where a single firm provides both probity advice and probity audit.

For example...

Using the same senior personnel on a probity engagement over a long period of time may create a familiarity threat. The significance of the threat will depend upon factors such as:

- the length of time that the individual has been providing probity services
- the role and scope of services provided by the probity service provider
- the nature of the probity engagements.

The significance of the threat should be evaluated and safeguards should be considered and applied to reduce the threat to an acceptable level. Such safeguards might include:

- rotating the senior personnel engaged in providing probity services
- involving an additional professional probity service provider
- independent internal quality reviews of the probity services.

Conflict of interest

Conflicts of interest represent one of the potential threats to independence. A conflict of interest means having an interest (whether personal, financial or otherwise) which conflicts with, or may reasonably be perceived as conflicting with, the ability of the probity auditor or advisor to perform his/her obligations fairly and objectively. Perceived or potential conflicts of interest can be as damaging as actual conflicts of interest.

Recommended practice

The issue of independence should be specifically considered and addressed prior to engaging either a probity auditor or probity advisor. At this stage, potential threats to independence should be considered as well as any safeguards that might eliminate or reduce the threats to independence.

In the case of a probity audit, independence is essential. A third party to the procurement should be able to rely on the probity audit to obtain greater confidence regarding whether the probity requirements of that procurement have been adhered to.

Potential probity service providers should be required to divulge all potential threats to independence, including conflicts of interest, at the time of offer or as soon as any conflict becomes apparent during the probity service engagement. The probity service provider should be required to provide written assurance that he/she has no conflict of interest in the procurement, is able to remain objective and impartial throughout the engagement, and will provide notification of any conflict of interest, or compromise to independence, that arises during the probity engagement.

If the agency is advised of any threat to independence that has arisen during the probity service engagement, its impact on the engagement should be considered including how the threat will be managed.

Choosing between probity audit and probity advice

The choice as to whether probity audit or probity advisory services or both would be sought for a procurement process should be made as part of the significant procurement planning process and will depend on the specific probity and procurement issues identified in that procurement. The agency would also need to consider the broader probity issues that may have been identified and treated in the agency's procurement plan.

The key emphasis in probity audit is whether the process has complied with the set criteria, standards and principles. A probity audit may be required or used by a party other than the one responsible for ensuring the probity requirements of the procurement are met, to derive assurance as to whether or not probity requirements have been addressed. This could occur, for example, where a project steering committee engages a probity auditor so as to derive greater confidence as to the probity of the procurement; or where one agency is sponsor and owner of a project, but another agency is responsible for managing the procurement process within the project.

The key emphasis of probity advice is to assist with, and provide advice on, how a process can comply or could be made to comply with the set criteria, standards and principles of probity. The intended user is generally those who have responsibility for the procurement's probity, although other stakeholders may also have an interest. For a complex procurement process and contracting structure, it is likely that probity advice will be required during the conduct of the procurement, but, in addition, a probity auditor may be engaged to derive assurance as to whether or not probity requirements have been met.

At the outset of the procurement process, during procurement planning, and when developing a probity plan, all parties should clarify and confirm the role and service that the probity service provider/s is being engaged to perform for that procurement.

On high-risk projects, it is generally desirable to separate the audit and advisory functions through separate engagements (and from different organisations). This would allow the probity audit function to be performed strictly at arm's length from the project. Such arrangements assist in meeting the independence requirements for a probity audit.

In some procurement situations it is possible for an individual, while performing the role of probity audit, to provide probity advice at the same time. However, in these cases, it is essential to ensure the independence requirements are not compromised.

It is not suitable for a probity advisor for a particular procurement to also be engaged to provide probity audit services for that procurement due to the threat of self-review.

Selecting a probity auditor or probity advisor

A common-use supply arrangement for the provision of probity auditing and advisory services is available by searching the [Queensland Government Arrangements Directory](#) using the key words of 'probity auditor' and/or 'probity advisor'.

Using this arrangement when engaging external providers simplifies the process of selection while providing confidence that providers have met required standards.

A probity advisor or auditor should not also be a legal advisor to a procurement, and vice versa.

Use of internal resources for probity services

In some situations an internal resource may be able to provide a valuable source of probity expertise. In such situations standards should be observed, considering the:

- capacity of the internal resource to provide the required services
- capability of the internal resource to provide the relevant services, including relevant experience, knowledge, understanding and skills.

Where internal resources are used to provide probity services, it is essential that they can clearly demonstrate their impartiality and objectivity in relation to the procurement at hand and address the requirements relating to independence. This is of particular importance where the role to be provided is that of probity audit in which impartiality is fundamental to the engagement. A conflict of interest and independence declaration should be required from the internal resource.