



## PURPOSE

This policy provides instruction to Departmental staff in the management of confidentiality and conflicts of interest:

- during the evaluation of *tenders* by Departmental staff and other persons engaged for this purpose; and
- as a requirement for the tenderers and contractors.

## SCOPE

This policy applies to all Departmental staff involved in a procurement or contract management process, and includes tenderers and contractors.

## POLICY STATEMENT

### 1 Evaluation of *Tenders*

- 1.1 The Evaluation Chairperson is responsible for ensuring that the confidentiality and conflict of interest requirements of this procedure are complied with during the *tendering* process.
- 1.2 All persons involved in the evaluation process of a procurement (including contractors and Departmental staff) **must** sign a Conflict of Interest and Confidentiality Agreement using one of the templates [PR115-1](#).
- 1.3 Confidentiality is a condition of employment in the Public Sector, and every employee is bound by the [Code of Ethics for the South Australian Public Sector](#). The reference to the Code of Ethics should be deleted for persons not employed under the Public Sector Act.
- 1.4 It is not necessary for Approved Officers to sign a confidentiality agreement when viewing tenders at the time of submission. However, where staff participate in a major tender evaluation process, they must sign the relevant confidentiality agreement.

### 2 Conflict of Interest during Tender Evaluation

- 2.1 In some circumstances, it will not be known whether a potential conflict of interest exists until the tenders have been submitted, in which case the staff member should notify the Evaluation Chairperson as soon as it becomes apparent.
- 2.2 A potential conflict of interest will not necessarily preclude a person from being involved in the evaluation process – the most important factor is that the potential conflict is declared and can be independently assessed.

2.3 Whether a potential conflict of interest is regarded as a material conflict of interest which will preclude them from being involved in the evaluation will depend on the circumstances.

For example, the following would not be regarded as a material conflict of interest in relation to a company submitting a *tender*:

- A small shareholding in a national public company listed in the top 100 companies in the stock exchange and winning the tender would not affect the share price;
- Having a close friend employed by a company which is tendering, but that person is employed in a different division of the company and / or is not involved in the preparation of the *tender*, or
- Having an immediate relative (e.g. son, daughter, partner, sibling) employed by a company which is tendering, that person is not involved in the preparation of the *tender* and winning the tender would not have a material impact on the company and/or the relative;
- Socialising with an employee of a tenderer, for example, at a sporting club or community group.

The following would be regarded as a material conflict of interest:

- A pecuniary interest - for example; a significant shareholding in a small private company which is submitting a tender;
- Having an immediate relative (e.g. son, daughter, partner, sibling) employed by a company which is tendering, that person is not involved in the preparation of the tender and winning the tender would have a material impact on the company;
- Having a relative who is involved in the preparation of the tender to be submitted by a company;
- Exhibiting a bias or partiality for or against a tenderer (e.g. because of events that occurred during a previous contract);
- A person engaged under a contract to assist the Department with the assessment, assessing a direct competitor who is submitting a tender;
- Regularly socialising with an employee of tenderer who is involved with the preparation of the tender;
- Having received gifts, hospitality or similar benefits from a tenderer in the period leading up to the call of tenders (refer Commissioner for Public Sector Employment Guideline: Gifts and Benefits);
- Having recently left the employment of a tenderer; or
- Considering an offer of future employment or some other inducement from a tenderer.

- 2.4 A person with a material conflict of interest listed above must not be an evaluation panel member. However, it does not necessarily preclude them from being a technical advisor who:
- only provides comment on the technical merits of submissions, without a score, or
  - assesses the relevant technical aspects of the submissions where the authorship of each submission is not known to the technical advisor.
- 2.5 Notwithstanding that a person with a conflict of interest may be able undertake their duties impartially, the perception that a person might exhibit bias is sufficient justification for excluding them from being on an evaluation panel.
- 2.6 A determination whether any potential or actual conflict of interest is material will be made by the Evaluation Chairperson, who will refer the matter to the Manager, Goods & Services Procurement or Manager, Construction Procurement in the first instance, or a Probity Advisor / Auditor if in doubt.

### 3 Confidentiality of Tender Documentation

- 3.1 Unless a valid reason exists to the contrary, tender documents issued by the Department are public documents and should not be subject to any confidentiality requirements or restrictions as a matter of course. This is consistent with the principles of transparent and open government that PC027 Disclosure of Government Contracts is based upon.

Note that under this policy, those parts of the *tender* documents which are incorporated in the contract may be disclosed on the SA Tenders and Contracts website.

- 3.2 However, it is recognised that in some instances genuinely confidential information will be made available to tenderers. Examples include:
- Information about third parties (refer [PR116](#) Information Privacy in Contracts);
  - Commercial and financial data;
  - Planning proposals regarding future transport strategy or infrastructure, particularly where property acquisition is likely; or
  - Data concerning projected population or patronage growth, demographics etc.
- 3.3 In these circumstances, the company representatives must formally agree to maintain confidentiality before being given access to the information. Use template [PR115-2](#) "Tenderer's and Contractor's Deed of Confidentiality". These confidentiality requirements should not be considered as a routine part of the procurement process.

The confidentiality requirements will usually continue in the eventual contract.

## **4 Confidentiality during the Tender Assessment**

- 4.1 All staff involved in the assessment of tenders must maintain strict confidentiality until a decision regarding the successful tenderer has been announced.
- 4.2 However, where permitted in the Evaluation Plan or otherwise approved by the Director, Project Procurement and Contracts or Director, Financial and Procurement Services, it may be permissible to advise a tenderer that they are unlikely to be successful. This would be after the completion of the preliminary evaluation.

## **5 Confidentiality of Tender Submissions**

- 5.1 The standard DIT Conditions of Tender include a clause which sets out each party's obligations during the tendering process.
- 5.2 To maintain an audit trail, the department does not return unsuccessful tenders. Although the standard Conditions of Tender state the department will maintain confidentiality (subject to certain restrictions), occasionally tenderers will be concerned about the confidentiality of their tender submission while it remains in the possession of the department. In these circumstances, it may be necessary for a specific confidentiality agreement to be drafted which provides an undertaking that the department will continue to maintain confidentiality.

## **6 Confidentiality during the Contract**

- 6.1 All Conditions of Contract used by the Department include standard clauses specifying confidentiality requirements. These clauses vary according to the type of contract and risk to the department.
- 6.2 Where a contractor will be given access to confidential information once the contract has been awarded and if they have not signed a Deed of Confidentiality during the *tender* process, the contractor must sign [PR115-2](#) before being given access to the information.
- 6.3 The Department does not normally obtain exemptions from the Freedom of Information (FoI) Act, and a Deed of Confidentiality will not prevent a FoI inquiry examining contract documentation or information. Contact the Manager Goods and Services Commercial and Contracts, or the Manager Construction Commercial Advisory if an exemption from the FoI Act is being sought. The rules and reporting requirements for making a contract exempt from the provisions of the FoI Act are available from <http://www.archives.sa.gov.au/index.html>.
- 6.4 A contract may impose confidentiality restrictions on the Department in regard to the Contractor's Intellectual Property. This may be a very significant issue - refer to [PR117](#) Intellectual Property for further advice.

## **7 Conflict of Interest Involving Contractors Providing Services to the Department**

- 7.1 This clause applies where the department engages a company to provide services which may impact upon the selection of a contractor

for a subsequent contract. It typically arises when a company is engaged to provide planning, specialist advice or preliminary design for a project and that company then wishes to be part of a bid for a following construction or installation contract.

In these circumstances it may be perceived that the company has benefited from its knowledge of the project, or even influenced the contract requirements to their advantage.

- 7.2 From a risk management perspective, the best approach is to engage the company in the first instance on the basis that they cannot be involved with bidders for the subsequent contract. However, this may restrict the field of potential providers for the subsequent contract, which is undesirable if it is a highly specialised field with a limited number of providers in the marketplace.
- 7.3 If the above approach is impractical, the following is recommended:
- terminate the initial contract as soon as practicable and in no case after the issue of a request for tenders;
  - ensure that the company does not have any role the tender / contracting processes, such as preparing request for tender documents or advising on the contracting strategy;
  - advise the bidders for the subsequent contract of the company's involvement and ensure all relevant data and information generated in the initial contract is passed on to the bidders;
  - if necessary, request the company to provide a statement that the services have been provided impartially and will not favour any party.
- 7.4 If the Department engages a company as a specialist advisor while obtaining bids from that company's competitors, that company must only be privy to the technical aspects of the bids and must not be given access to any information such as pricing that would give them an unfair advantage in future contracts.

## DEFINITIONS

*Pecuniary Interest (or financial interest)* - an interest that could lead to an actual or potential financial gain (or avoidance of loss) for the person concerned.

*Non- Pecuniary Interest* - a non-financial interest that potentially lead to bias or partiality (for example; arising from friendships or membership of a group that could benefit from a decision).

All definitions not specific to this policy are available in the Procurement Governance & Policy [Glossary of Terms](#). Defined terms are in italics.

## REFERENCES AND RELATED DOCUMENTS

[South Australian State Procurement Board Policies](#)

## DOCUMENT APPROVAL

Approval Date:	14 November 2018
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Policy Contact Officer:	Team Leader Policy
Policy Custodian:	Manager Procurement Governance & Policy
Division:	Finance & Procurement
Policy Owner:	Chief Executive

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