

Purchasing, tendering and corruption risks in the Local Government sector

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The red tape is there to prevent you from falling off a cliff.

Local governments do not have the luxury of running like private businesses. A 'quick fix' or glossing over the proper processes in local government purchasing can create real trouble for the local government or its officers.

Tendering

The *Local Government Act 1995* (WA) and other legislation provides for the roles and responsibilities of local governments in many different situations.

Contracts with an expected value of over \$150,000 (excluding GST) must be the subject of a tender (reg 11(1) *Local Government (Functions and General) Regulations 1996* (WA)). There are a number of exceptions reg 11(2), including emergency expenditures, the WALGA preferred supplier program, and a number of specific types of suppliers or situations.

Tendering is a high-cost and time-intensive process. Many ordinary contractors are not familiar with the requirements and may need to be walked through the process. The local government also does not have the option to split the contract up if the avoidance of a public tender process is a "significant reason" for not dealing with the matter in a single contract (reg 12).

In addition to the tender process in the *Regulations*, the local government will have obligations outside the regulations to comply with what is known as the 'process contract', which implies someone seeking tenders to treat all tenders fairly and equally, consistently with the terms stated in the request for tender.

The local government can be sued if it does not follow the process carefully and ensure that the tenders are consistent with the tender specification and that the tender process is conducted properly.

Purchasing Policies

If the contract is not valued at over \$150,000, your local government **must** have a purchasing policy, which will specify how quotes must be prepared, how many quotes must be obtained and a method for keeping records of the process. Your local government should already have a policy in place (or should prepare one urgently if it does not).

This specified process should be followed carefully. In one case, a metropolitan local government was investigated by the Corruption and Crime Commission for failing to follow a purchasing policy when their Manager of Parks and Gardens began to informally give jobs to a weed spraying company that had previously been engaged through the local government's purchasing process.

The Manager had treated the weed spraying contracts as an ordinary employee in the private sector might have done: he gave the contracts to a company he knew and trusted and sought competing quotes from other contractors.

The Manager had acted without a corrupt motivation – and he had not been trained on the relevant policies. In spite of this, the CCC concluded that he had engaged in misconduct and that his misconduct had increased the costs to the local government.

This finding of misconduct could have led to serious consequences for the officer if he had still been employed with the local government once the findings had been made.

In this case, both the local government and the officer could have been badly affected – and the Manager of Parks and Gardens had not even profited from his misconduct!

Conflicts of Interest

The person who makes the decision in the tender or purchasing policy process should not have a conflict of interest. This means that you should not have a relationship with the person tendering that might affect your decision.

Conflicts of interest can be hard to define, but it is useful to look at the six Ps:¹

1. **Public duty versus private interests** – Do I have personal or private interests that may conflict or be perceived to conflict with my public duty?
2. **Potentialities** – could there be benefits for me now, or in the future, that could cast doubt on my objectivity?
3. **Perception** – how will my involvement in the decision / action be viewed by others?
4. **Proportionality** – does my involvement in the decision appear fair and reasonable in all the circumstances?
5. **Presence of mind** – what are the consequences if I ignore a conflict of interest? What if my involvement were questioned publicly?
6. **Promises** – have I made any promises or commitments in relation to the matter? Do I stand to gain or lose from the proposed action / decision?

In the same case we referred to earlier, the Director of Technical Services had been friends with the owner of the weed spraying business. The Director signed purchase orders after the work had been performed, which was against the local government's purchasing policy. The CCC also found it was inappropriate that the Director had been present when the tenders were opened and that it could reasonably be perceived that he had a conflict of interest that affected the tender process. The CCC found that misconduct had occurred. This could have affected the Director's employment if he was still with the local government at the time.

The CCC also recommended that the local government review its policies on conflicts of interest to ensure that it did not occur again.

If you do have a conflict of interest when making a purchasing decision, this may lead to investigations, your employment being terminated, prosecutions and even a civil claim against you by the local government.

¹ Source: Integrity Coordinating Group (icg.wa.gov.au) 2011 Guide, *Conflicts of Interest Scenario 1, Managing procurement processes, tenders and contracts*

Disclosures of interest and gifts

The legislation concerning disclosure of financial interests and acceptance and reporting of gifts and contributions to travel requirements will assist you in avoiding *some but not all of these risks*.

You should always remember that if someone gives you a gift - even if permitted by the Act or Regulations – they may hope or expect that you do something for them in future.

Even if their gift or contribution to travel does not influence you, the public or the CCC may fairly believe that you have been influenced by them.

Contact

Civic Legal provides governance support, commercial and dispute resolution advice and representation to Local Governments. If you require advice or guidance, feel free to contact:



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