

PPPs: Handling conflicts of interest

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Declaring and managing conflicting interests is a significant issue for PPPs. Multiple players are involved, with limited expertise available. Related parties can be part of different consortia. This puts pressure on handling conflict of interest, which is already a challenging area. It does not lend itself easily to a checklist type of approach as interests potentially arise in many different ways.

Summary

1. PPPs have numerous parties and individuals involved in consortia, the public sector purchasing entity, etc. This raises much greater prospects of staff and advisers having conflicting interests, particularly since the skill base is relatively small. It needs to be carefully managed.
2. Often overlooked is the two step nature of the process: disclosing *and then* managing the interest. Furthermore, having an interest that needs to be declared does not necessarily mean the person is precluded from being involved.
3. Many current interest disclosure documents are inadequate. In view of the range and nature of disclosable interests, it is not possible to produce a full checklist of what needs to be disclosed. Rather, it is necessary for those completing declarations to understand the underlying considerations, and err on the side of over-disclosing interests. This enables optimal handling of interests (which often does not require that the interested party is excluded). A checklist (such as a list of transactions that are relevant interests) can be quite misleading, as it is not possible to cover many potential interests that need to be disclosed. Examples of disclosable interests, however, can be valuable.¹
4. There can be an incorrect focus on one element of conflict of interest (for example, the statutory requirements) when other elements (such as ethical requirements outlined by government's auditor) are overlooked.
5. When handling public sector-related conflict of interest, the biggest issue is not the actual or potential conflict of interest. It is the risk of adverse **public perception**. Approaching conflict of interest in this way, as required by government's auditor, can lead to quite different outcomes.
6. This note is far from a complete overview of this topic: it only highlights some key issues. It is essential for each PPP to work through closely the specific conflict of interest issues (for example, differing statutory requirements can apply). For more detailed background, see:
 - (a) the report to the Director-General of Health by Ian Wilson, David Clarke and our Michael Wigley on the Hawke's Bay District Health

¹ The Infrastructure Australia guidelines, below n 3, has some examples.

Board on procurement and conflict of interest issues;²

- (b) Infrastructure Australia's *Practitioners' Guide within the National PPP Guidelines*,³ particularly Appendices C and D; and
 - (c) the overview of NZ procurement requirements in the NZ chapter we wrote in *Global Competition Review's Public Procurement 2010*.
7. In the end, "cutting off nose despite face" should be avoided. There are usually pragmatic solutions. But there are some realities that can be overlooked in this area. Additionally, workable solutions can be overlooked too. That pragmatic approach is possible, taking into account factors such as those noted in this article, which are all based on well established principles.
 8. We deal here primarily with public sector issues. Overlapping issues will come up in relation to advisers to consortia and their members. Can one consulting firm act for two or more parties involved in a particular PPP, using Chinese walls?
 9. In fact that is also an issue for the purchasing public sector agency too: that agency will require that there be no collusion (or perception of collusion). As noted above, perception is the main issue. Should the public sector agency permit separate consortia or their members to use the same advisers, even with Chinese walls? Thus, in addition to conflict of interest issues as between providers – and an adviser's professional commitments (as a lawyer, an accountant, etc) – the purchasing agency will have a strong interest in this area too.
 10. There are specific considerations where related parties pitch as part of the different consortia.

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[http://www.moh.govt.nz/moh.nsf/pagesmh/7526/\\$File/hbdhb-report-mar08.pdf](http://www.moh.govt.nz/moh.nsf/pagesmh/7526/$File/hbdhb-report-mar08.pdf).

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[http://www.moh.govt.nz/moh.nsf/pagesmh/7526/\\$File/hbdhb-report-mar08.pdf](http://www.moh.govt.nz/moh.nsf/pagesmh/7526/$File/hbdhb-report-mar08.pdf).

Managing conflict of interest is a two step process

11. Often overlooked is that there are two separate steps in the management of conflict of interest and that both the discloser and the organisation have strong obligations at each step (in particular, the organisation cannot leave the obligations to the discloser, as often seems to happen). The steps are:
 - first, interests are disclosed; and
 - then, decisions are made as to how to manage those interests.⁴
12. In many instances, the decision will be that the person can continue to be engaged, possibly with some agreed rules. For example the person can be ring-fenced away from certain work and information.
13. A significant "one-off" instance is that the law encourages people with prior experience of vendors (including negative experience of the vendor) to sit on tender evaluation panels. This is managed by establishing the way in which that person engages. For example, there would be a rule that the person, and the rest of the panel, will have an open mind when evaluating a supplier's tender. In this way they can, and should, be able to take into account the negative experience.
14. Additionally, having a conflict of interest may be inevitable (for example, because other specialists are not available). That person can be appointed, with agreed rules as to how their involvement is managed. This assumes there is no other solution. In practice, there is often is another solution, and this is not sufficiently canvassed by discloser and/or organisation.
15. Even in relation to PPPs, where expertise is limited, other people are often available. Entities should look carefully for other options first.

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There are ongoing obligations to disclose and manage new interests that emerge.

16. In some instances, the decision will be that the person cannot fulfil the role.

possibility for improper conduct can be just as significant when considering how to manage the situation.

Careful management of conflict of interest is important

17. It is important that **both** the person disclosing and the purchasing entity manage the person's interests carefully, for a number of reasons. Particularly relevant in high profile PPP projects will be substantial political and reputational risk.
18. Handling conflict of interest is a high-profile topic and risk for public sector agencies. For example, a number of government inquiries, including Auditor-General reviews, focus on conflict of interest. With the high stakes in PPPs, there is also an increased risk of being sued too.

Public perception is the most important aspect

19. Handling interests is not just about actual or potential conflict of interest. Public perception can be more important. As the Auditor-General has pointed out:⁵

Most often, what needs to be managed (and be seen to be managed) is the risk of adverse public perception that could arise from overlapping interests....Usually, there is no suggestion [the person] is taking advantage of the situation for their personal benefit or been influenced by improper personal motives (nor that they are likely to do so). The [person] will often sincerely believe that they will never behave improperly. But the reasonable perception of an outside observer of the

The approach to disclosing interests

20. Handling interests has legal, ethical and good practice dimensions. Individuals should err on the side of over-disclosure of interests so that fully informed decisions can be made. It is not enough to restrict disclosure to the so-called "legal" dimension, such as what is set out in a statute.
21. Statutory obligations of course are relevant and need to be checked for each entity (or type of procurement if appropriate). So is Judge-made law: for example, it may be necessary to consider the Supreme Court's decision on the handling of interests by Wilson J in the well-known Saxmere case,⁶ and also the Auckland DHBS' decision on medical laboratories.⁷
22. Of course getting to this level of detail is too much for those effecting disclosure: it is essential for the purchasing agency to provide a workable summary to disclosing parties of the issues they need to consider when disclosing.
23. Actual and potential interests, where there may be an overlapping conflict of interest, need to be disclosed. Public perception, as noted above, is a major consideration.
24. Disclosure should cover both the person and his or her firm or company.
25. Potentially relevant interests include non-financial as well as financial interests.
26. Any bias, allegiance or loyalty that would, or would be perceived to, affect the person's ability to remain impartial when carrying out the role should be disclosed.

⁵ This is the also the view taken by Infrastructure Australia too as noted in the Practitioners' Guide referred to in the summary.

⁶ *Saxmere Co Ltd v Wool Board Disestablishment Company Ltd* SEC 64/2007 [2009] NZSC 72.

⁷ *Lab Tests Auckland Limited v Auckland District Health Board & Ors* [2008] NZCA 385.

27. Interests – financial and non-financial – held by family and friends may need to be disclosed. There is a judgment call to make as to how wide the circle of family and friends should be.
28. The potential array of interests means that a checklist approach is risky. That is so unless it is very clear that the checklist is non-exclusive and the person has been given guidance as to what and how to disclose. Using examples rather than a checklist can be a better approach. (Infrastructure Australia outlines some useful examples).
29. Articulating the level of detail as to what needs to be disclosed can also be badly handled. Often the detail is inadequate to enable informed decisions.
30. A particular issue for PPPs arises where related parties are involved in different consortia.⁸ Infrastructure Australia suggests a Chinese walls approach.⁹
31. In a perfect world, there would be no overlapping interests in different bids. But New Zealand will struggle more than other countries to achieve sufficient interest to create competition, given the limited number of players willing to participate at least initially. This suggests the initial view in the draft NIU guidelines on PPPs will need to be revisited as it likely that related parties will bid, and some mechanism needs to be created to deal with the problems this raises, such as the Infrastructure Australia solution.
32. The NIU paper, which notes specifically it can be changed, notes:¹⁰

A practice has been observed overseas whereby some large construction companies have subsidiaries in each of the bidding consortia. This has the potential to reduce or compromise competition. **The principle should be that parties with an equity stake in a bidding consortium should be completely independent of the parties that have equity stakes in other consortia.** [Highlighting added]

Related parties pitching in different consortia

Conclusion

33. There are many issues to consider when crafting interest disclosures, and managing the requirements. This note covers only some key points. There are good solutions available, which are pragmatic, so long as the right approach is taken.

⁸ This assumes that the RFP does not allow a party to be involved in two consortia (if that happens the conflict of interest issues are more acute). This is assumed by Infrastructure Australia. See their Practitioners Guide, above n 3, D2.

⁹ See *Practitioners' Guide within the National PPP Guidelines*, above n 3, Appendix D and para 13.7.

¹⁰ Quoted from the National Infrastructure Unit's Guidance for Public Private Partnerships in New Zealand (October 2009). Note that this Guidance makes it clear that feedback is welcome and that change to the Guidance is possible.

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.

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