

# PPPs: One-to-One Discussions with bidders

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**Developing bidders' PPP proposals in one-on-one discussions with the public sector purchaser is critical to success. How best to manage this interactive engagement given the project and probity challenges?**

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## Introduction

A May 2010 report for Infrastructure Australia noted the importance of *"having a high degree of fruitful interaction during tender processes within appropriate but not excessive probity requirements."*<sup>1</sup>

Interactive engagement is designed to *"improve the quality of proposals, and ultimately deliver better outcomes for government."*<sup>2</sup>

As New Zealand moves to greater use of PPPs – such as the Wiri prison – one of the most critical issues will be development of principles for one-to-one engagement between bidders and the public sector

agencies. In Australia, this is typically called interactive tender processes.

A well known variant is the EU's Competitive Dialogue approach, which derives from the EU procurement framework.

A common complaint by vendors in New Zealand, in all procurement, is that the public sector does not take advantage of the opportunity available, within probity requirements, to engage more fully with vendors, leading to poorer project outcomes.

In fact, not to engage in such discussions breaches probity requirements, rather than the other way around, provided this is properly managed, as it can be.

This highlights the need to get this right in PPPs, where interactive engagement is critical to success.

## Procurement skills are key

The current initiative on improving public sector procurement in New Zealand has, as part of its focus, up skilling those involved in procurement. This reflects the experience in

<sup>1</sup> KPMG Review for Infrastructure Australia: PPP Procurement: Review of Barriers to Competition and Efficiency in the Procurement of PPP Projects (May 2010)

<sup>2</sup> Para 14.2 National Public Private Partnership Guidelines Volume 2: Practitioners' Guide

Australia, noted in KPMG's May 2010 report to Infrastructure Australia:<sup>3</sup>

Almost all Participants [mostly, vendors] were very positive towards Interactive Tender Processes and increasing levels of interaction on recent projects, and would like to see further increases in interaction in the future. However, Participants feel that the effectiveness of interactions varied from project to project, often depending on the level of experience and capability of the project director and key project team members. In projects where project teams appeared to lack confidence, Participants felt that the Interactive Tender Process failed to result in effective interaction and good outcomes.

Often regarded as a bureaucratic hassle, probity instead is the servant not the enemy of best project outcomes.<sup>4</sup>

Good process and probity are consistent with achieving value for money in commercial engagements. Probity management is an integral part of the process, not separate obligations.

KPMG conclude in their report:<sup>5</sup>

In most instances, Governments do have a high level of interaction during procurement processes via the Interactive Tender Process, leading to a greater understanding of each party's perspective and to significant efficiency gains, with better value for money bids. However, as noted above,

appropriate interaction continues to be stifled unnecessarily in some projects due to overly risk-averse probity processes. Such probity processes often occur in projects where those responsible for the process are less experienced and, as a result, are less prepared to lead a process within appropriate probity boundaries, as opposed to allowing probity to drive the process.

There is now enough experience within the Australian PPP market to minimise the risk of project teams not having, or having ready access to, experience in managing PPP procurement processes. Accordingly, we recommend that the procurement of an appropriately skilled team be a prerequisite to commencing the PPP procurement process.

## Key issues

These include:

- To what extent can one-on-one interactive engagement occur, consistently with probity requirements?
- When should the discussions happen (and to what extent at each stage)?
  - Before the EOI (market sounding)?
  - During the EOI and/or RFP phases (or similar procedures such as PQQ<sup>6</sup>)?
  - During single preferred vendor phase (after down select to one)?
  - Or all of the above?

<sup>3</sup> Page 34 KPMG Review for Infrastructure Australia: PPP Procurement: Review of Barriers to Competition and Efficiency in the Procurement of PPP Projects (May 2010)

<sup>4</sup> National Public Private Partnership Guidelines Volume 2: Practitioners' Guide

<sup>5</sup> Page 56 KPMG Review for Infrastructure Australia: PPP Procurement: Review of Barriers to Competition and Efficiency in the Procurement of PPP Projects (May 2010)

<sup>6</sup> Pre-Qualification Questionnaire

- What needs to be disclosed to all bidders arising from interactive engagement particularly given bidders' proposals can vary widely (e.g. what is relevant to one may be irrelevant to another)? And how is confidential information treated?
- How to limit the risk.

## The realities

There are obvious probity and project risk issues in choices as to when, what and how to engage in one-to-one discussions. In terms of project risk, there are pluses and minuses in the timing of developing the design. Front-ending detailed design and discussions with bidders can add to overall cost (for bidders and the public sector). The additional cost may drive away potential suppliers given the high cost of PPP bids.

Contrast that with more detailed design and discussions later in the process, with maybe just one or two down-selected bidders. This latter reduces competitive tension, and runs the risk that the negotiated design changes so much that the original requirements in the RFP are not met (often leading to a need to reopen the process).

Agencies have some choices to make.

## Project and probity success are consistent objectives

As Infrastructure Australia notes:<sup>7</sup>

Good process and probity are consistent with achieving value for money in commercial engagements. Probity management is an integral part of the process, not separate obligations.

Often regarded as a bureaucratic hassle, probity instead is the servant not the enemy of best project outcomes. One is not off-set against the other: problems usually arise because the principles are not correctly applied. For example, probity calls for a strategic approach to procurement. This includes strategic planning ahead of going formally to the market. An aspect of strategic planning is the design of communication

<sup>7</sup> National Public Private Partnership Guidelines Volume 2: Practitioners' Guide

protocols. To get this right, the requirements and evaluation criteria, etc, must also be carefully designed.

Reports on failed procurements (such as in OAG reports) frequently come back to inadequate strategic design. This comes right back to the start: the need for the public sector to get great information from the market, before the formal procurement process starts, while avoiding vendor capture.<sup>8</sup>

This makes clear that market soundings – that is, talking to suppliers before the formal commencement of the process – is encouraged. This is confirmed in the *Guidance for Public Private Partnerships (PPPs) in New Zealand*.<sup>9</sup>

There is no “one size fits all”: strategic procurement planning helps get the best design and outcomes. This requires use of experience and careful judgment calls:<sup>10</sup>

There is never a perfect solution to this, but a bit of pragmatism and depth of experience goes a long way.

## Why have one-to-one communications with PPP bidders?

The pros and cons of when and how to engage in one-on-one communications are well set out in KPMG's March 2010 white paper, PPP in New Zealand: *Getting the procurement model right*. By way of overview KPMG note:

One of the important shared characteristics of successful procurements around the globe is the encouragement of healthy dialogue between the public and private sectors during the procurement and prior to the receipt of tenders. At a base level the benefits of this seem self evident – the mutual understanding of both parties' requirements. The private sector has the opportunity to clarify and clearly understand the public sector requirements, and the public sector gets a real

<sup>8</sup> The MED Mandatory Rules are consistent with this best practice, so long as vendor capture is avoided.

<sup>9</sup> Page 21

<sup>10</sup> KPMG's March 2010 white paper, PPP in New Zealand: *Getting the procurement model right*

understanding of the solution proposed by the private sector including price, scope and risk transfer. If the aim is to deliver long-term successful partnerships, it is essential for all organisations to understand fully what each party is offering.

## Overseas learnings

Fortunately, New Zealand can take advantage of off-shore PPP experience, such as:

- Australian (reflected, in particular, in the National Public Private Partnership Guidelines<sup>11</sup>);
- Canadian experience, increasingly referred to for best practice; and
- the EU (in particular, the Competitive Dialogue approach).

The approach to interactive engagement is more prescriptive in the EU than in Australia, reflecting the underpinning EU procurement framework. The Competitive Dialogue process comes in for some criticism. See for example the March 2010 Norton Rose commentary, *Taking Stock: competitive dialogue four years on*.

The Australian approach is more consistent with New Zealand's policy-based approach, but all material will help New Zealand develop the best approach for this country.

## New Zealand-specific base line requirements

This is not the place to come to concluded views as (a) each situation differs (and, generally, New Zealand follows principled-based procurement rather than prescriptive procurement) and (b) considerable thought and reflection is needed to get this right.

However, the MED Mandatory Rules enable us to identify some base-line requirements, at least for Government Ministries and Departments, which must apply those rules.

## Baseline requirements in the Mandatory Rules

Summarising relevant MED Mandatory Rule requirements:

<sup>11</sup> Especially the Practitioners' Guide

- Equal opportunity and equitable treatment for all suppliers, domestically and internationally;
- Fairness and impartiality in the procurement process;
- Information can only be given to a bidder if that does not give that bidder an advantage over its competitors;
- Evaluation criteria must be supplied in the RFP or equivalent;
- If the evaluation criteria or essential requirements are modified, all bidders must be able to resubmit tenders.<sup>12</sup>

The last point shows how important it is to try and get the requirements right at the outset. This comes right back to the importance of a strategic approach to procurement, something that is often insufficiently handled in procurement.

## There's a lot more than just the Mandatory Rules

In addition to the Mandatory Rules, there is much other material to consider. This includes the Auditor-General's guidelines, such as the 2006 guidelines, *Achieving Public Sector Outcomes with Private Sector Partners*.

See the overview in the New Zealand chapter we wrote for *the Global Competition Review's Public Procurement 2010*.

There is other material too. For example most PPPs require construction works. The Mandatory Rules encourage application of the New Zealand Construction Industry Council's *Principles of Best Practice in Construction Procurement in New Zealand*. Among other things, those Principles note, in favour of interactive engagement:

Key benefits produced by quality or value-based procurement include:

- **Positive relationships.** The critical client/contractor and client/consultant relationships are enhanced from the

<sup>12</sup> While the Mandatory Rules don't say so, it may also be necessary for other reasons to go out to the market more widely than the initial bidders as other vendors might submit on the changed requirements

beginning of the selection procedure by being based on cooperative problem solving, which is not adversarial as can be the case in a selection process based simply or predominantly on price. Focusing on value outcomes brings the client and the service providers together as a team from the beginning – often a key ingredient to ensure a quality project.

• **Clearly defined and mutually agreed upon scope.** Project scope is best determined when the client has had an opportunity to thoroughly discuss the desired project outcomes with the best-qualified firm. ....

## Principles of engagement

In a complex PPP or other procurement, the potential solutions can differ greatly. Often there will be concerns about preserving the confidentiality of a bidder's proposal, and avoiding cherry picking information provided by one bidder for use in the design accepted from another bidder.

In supplying information to a bidder, that bidder can't get an advantage over other bidders, as the Mandatory Rules specifically state.

This is easier said than done when bids can be very different in their nature, and there can be confidentiality issues, etc.

To get the right balance, to ensure the related objectives of optimal project and probity outcomes are achieved, requires carefully developed – and implemented - principles of engagement.

With care, this is achievable pragmatically. There will be risk in interactive engagement.

But handled carefully, both project and probity risk are reduced. Further, project risk (greatly

reduced by interactive engagement) is a far bigger risk than probity risk. There are no absolute answers: this is an issue of balancing risk.

## Probity auditors and procurement/probity strategic advisers

The solution may well include the probity auditor attending relevant discussions with bidders. While at first sight that looks to be unwieldy, in fact it may be the easiest and safest approach. In particular it may facilitate rather than hinder getting greater exchange of information between bidders and the public sector entity. The presence of the auditor also gives suppliers greater comfort and therefore lowers the risk of a claim.

This follows Australian practice, as Infrastructure Australia notes:<sup>13</sup>

The Probity Practitioner is commonly an observer in dealings between bidders and the procurement team, such as at presentations and interviews.

This calls for experienced probity auditors who understand pragmatic application of the requirements: quite a rarity in our experience.

In tandem with probity auditors (who must take an independent auditor's approach) there is increasing use of procurement/probity strategic advisers who can advise as to how to optimally use the procurement environment and requirements, as advocates and advisers for the public sector agency. The best advisers work closely with the probity auditors, thereby ensuring both independent and advocate roles are fulfilled.

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<sup>13</sup> Para 13.2 National Public Private Partnership Guidelines Volume 2: Practitioners' Guide

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*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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