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INDEPENDENT COMMISSION
AGAINST CORRUPTION



**CORRUPTION RISKS IN
NSW PUBLIC SECTOR
PROCUREMENT**

**CONSULTATION
PAPER**

JULY 2010

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ISBN: 978 1 921688 08 9

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1. Introduction

Procurement is a major risk area for corruption in the NSW public sector. Its impact can include financial loss, reputational costs, a negative impact on safety, and poor quality goods, services and infrastructure. Recent ICAC investigations into the NSW Fire Brigades, Housing NSW, Roads and Traffic Authority, RailCorp, and TransGrid exposed the costs of procurement-related corruption to these agencies.

Between 1989 and 2010, 26 of the Commission's investigations involving public inquiries made findings of corrupt conduct related to procurement, including disposal of goods and services. These investigations represent 30% of the 87 investigations involving public inquiries that made findings of corrupt conduct during that period.

Each year approximately 12% of complaints received by the Commission include allegations regarding corruption in procurement. In the 2008-2009 financial year the figure was 15%.

Purpose of this paper

In view of the prevalence of procurement, including disposal, in matters reported to and investigated by the Commission, the Commission initiated a project to examine the corruption risks associated with procurement and to provide assistance to agencies in managing these risks. This consultation paper is a key part of this process. The research will culminate in a position paper containing recommendations and advice on how to better manage corruption risks in public sector procurement, which will be released at a later date.

"Procurement" is defined as all activities involved in acquiring goods or services, either outright or by lease (including disposal and lease termination). This includes acquiring goods (including consumables, capital equipment,

real property and infrastructure) and services (including consultancies, professional services, facilities management and construction). This also includes the outsourcing of functions and subsequent contracting.

The project has identified 12 problem areas that the Commission considers need to be addressed in a systematic way in order to minimise opportunities for corruption. Interested organisations and individuals are invited to make submissions about how the 12 problem areas can best be managed in order to reduce opportunities for corruption. Questions are included at the end of the sections to guide submissions. See page 23 for details of how to make a submission.

Procurement in NSW

Public sector procurement in NSW is complex, widespread and diverse. In the course of delivering government services, public agencies spend billions of dollars on goods and services, information and communication technology, and construction. Public sector procurement involves large sums of money, often spent in small parcels, in a system of great complexity, with high levels of decentralisation.

Each year NSW state and local governments procure goods and services worth around \$30 billion, including for capital works (such as new infrastructure projects) and recurrent procurement (such as consumables and maintenance costs). A survey of NSW public sector agencies, including local government councils, undertaken by the Commission found that:

- 57% of procurement funding was spent on capital and infrastructure projects
- 27% was spent on general maintenance and other services

- 14% was spent on general consumables
- 2% was spent on consultancies.

On paper there is a standardised, formalised and centralised framework guiding the way procurement should occur. However, procurement occurs in a changing policy environment, where public officials are uncertain about what to do, and agencies have varying requirements for goods and services. There are also thousands of public officials involved in procurement, many of them distant from managers. In addition, procurement practitioners coming from the private sector and other jurisdictions do not always understand NSW public sector policies and procedures. The result is that, in practice, procurement in NSW is a mixture of compliance with state policy, individual agency practice, personal habits, informal arrangements and 'work-arounds'.

These characteristics of public sector procurement create opportunities for corrupt behaviour. The system has become more fraught as procurement of goods and services has evolved, increasingly moving into areas where:

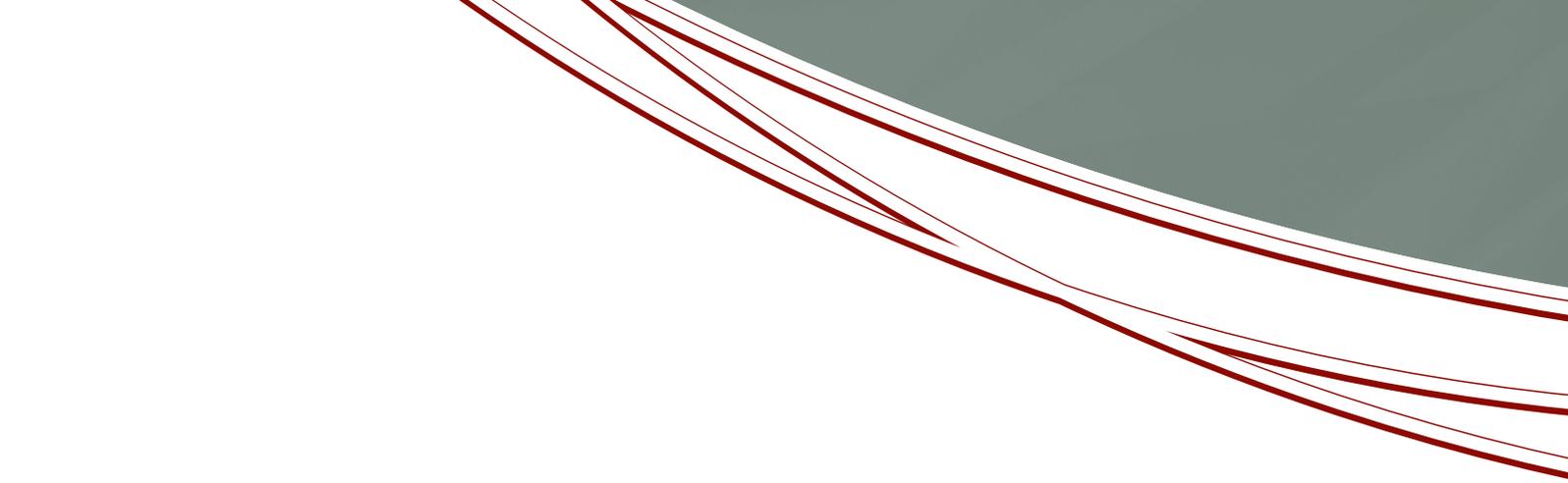
- project management and monitoring are so complex that expert staff are essential;
- direct negotiation with suppliers is required or desirable to avoid cumbersome and labour-intensive tender procedures when extending or varying a contract;
- there is not a fully-functioning, competitive market, especially for former government functions that are contracted out to non-government organisations (NGOs) (e.g. disability support services) or private firms (e.g. building tunnels); and

- prior determination of need and specification of deliverables is difficult, especially in the case of services (e.g. the quality of rehabilitation provided to a prison inmate).

Methods

The 12 problem areas analysed in this paper, and the areas of procurement most vulnerable to corruption, were identified using information received through nine different activities listed below. More information about these methods and activities is provided in Appendix A.

- **Analysis of the policy, regulatory and legislative framework** that governs procurement in NSW, including NSW Treasury, Department of Services, Technology and Administration (DSTA) and local government documents.
- **A written survey** of 153 NSW state and local government organisations about their procurement practices, what they considered to be risks in procurement and where they obtained guidance and advice on procurement.
- **Review of private sector surveys** about fraud and corruption.
- **Interviews with senior procurement experts** from DSTA, NSW Treasury, Local Government Procurement, the now Division of Local Government (DLG), and NSW Health, and one private consulting firm that provides probity and procurement consultancy services to government.
- **Six focus groups** involving 46 public sector procurement specialists and suppliers of goods and services were held in city and regional locations to better understand procurement practices.

- 
- **Review of DSTA's procurement training** to identify gaps in relation to probity and corruption.
 - **Review of the 26 ICAC reports of investigations** that made findings of corrupt conduct relating to procurement, including disposal.
 - **Analysis of allegations made to the ICAC** about corruption in procurement to understand the workplace activities and types of conduct common to procurement-related allegations.
 - **Review of research literature on corruption** to ascertain the commonly identified risks and systemic weaknesses in public sector procurement.

As mentioned, this paper focuses on the 26 investigations out of a total of 87 ICAC investigations between 1989 and 2010 where (1) findings of corrupt conduct were made, and (2) the corruption was related to procurement or disposal. Where this paper subsequently refers to an ICAC investigation or investigations this refers only to these 26 investigations.

ICAC research in 2005 and 2006 reviewed all past investigation reports. As a result of this research, 18 factors that increase the likelihood that corruption will occur in the workplace were identified. Where this paper mentions "factors" for corruption this refers to the factors identified through this research.

2. Problem areas in public sector procurement

Twelve problem areas in public sector procurement were identified through the preliminary research for this project:

1. Expertise of procurement staff
2. Relationships
3. Management of staff
4. Public/private sector differences
5. Information about procurement policy
6. Tight timeframes
7. Direct negotiations
8. Use of subcontractors
9. Lack of genuine markets
10. Outsourcing
11. Bypassing the DSTA
12. Discretion

These problem areas, when not properly managed, can result in the following behaviours¹:

■ Collusion

Collusion was found in 62% of the 26 procurement-related investigations. It typically involves a public employee colluding with someone outside the agency, such as a contractor, to defraud the agency. An example of this could be the supplier providing invoices for goods and services that were never delivered and the colluding public official(s) signing off on those invoices in return for a share of the payment. Recent Commission investigations into Housing NSW, NSW Fire Brigades and RailCorp have also exposed several cases of public officials who have established a company

without receiving permission for secondary employment and then allocated contracts to their own firm.

■ Improper gifts and benefits, including bribes

The offering or receipt of improper gifts and benefits (including bribes) was found in 62% of the procurement-related investigations. This behaviour typically involves a contractor giving money, gifts or other benefits to a public employee in return for receiving contracts or for signing-off on or failing to report false invoices.

■ Improper use of information

Improper use of information was found in 42% of the procurement-related investigations. It includes release of confidential price or specification information by public officials to suppliers. However, some suppliers stated that public officials had, unsolicited, sent them competitors' price and specifications information. One supplier commented that one should always "make sure your quote is handed in at the last minute" to avoid the risk that information from the quote is passed on to competitors by the public official who receives it.

■ Fraud

Fraud was found in 42% of the procurement-related investigations and typically involves the submission of invoices for work that was never done, inflated invoices for more work than was actually done, or fake invoices from companies that do not exist for work that was never done. Fraud in procurement can also include the falsification of timesheets by contractors and consultants, or falsified requisitions, authorisations and certifications that goods and services have been delivered when they have not been delivered.

1. The corrupt behaviours listed were initially identified from a review of the Commission's 26 procurement-related investigations. They are listed in order of prevalence.

■ **Bias or favouritism in supplier selection**

Many sources of information focused on this behaviour. Focus groups with suppliers focused on it more than any other issue. Typically about 16% of complaints to the Commission each year include allegations of “favouritism/nepotism” (the equal first most common allegation), although not all of these complaints necessarily involve favouritism in allocation of contracts. The 2008-2009 financial year saw a steep rise in procurement-related complaints that included allegations of favouritism or nepotism, to 32% of all such complaints.

■ **Poor contract management**

Practitioners’ comments and the Commission’s experience show that organisations often pay little attention to a project once a tender process is finished and a contract is let. Poor contract management, including inadequate performance monitoring, can result in corruption going undetected. Individuals

may also be tempted to engage in corrupt conduct if they are aware that contracts are not performance monitored very well. Thirty-eight per cent of surveyed practitioners thought “contract management” was the most vulnerable element of the procurement process (double the next most vulnerable, which was assessment of bids). Focus groups mentioned that there are fewer field checks on contractors than in the past, because there are now fewer field officers to supervise contractors and quality assurance is left to the contractors.

Table 1 shows the behaviours that are likely to occur when problematic aspects of procurement are not managed properly. The table shows that these behaviours often occur together. There is also overlap between behaviours. For example, collusion often results in fraud which involves improper gifts.

Table 1: Potential behaviours arising from problems in procurement

Problems in procurement		Potential behaviours					
		Collusion	Bribery or gifts	Misuse of information	Fraud	Bias or favouritism	Poor contract management
1	Expertise of staff		✓	✓	✓	✓	✓
2	Relationships	✓	✓	✓	✓	✓	✓
3	Management of staff		✓	✓	✓	✓	✓
4	Public/private sector differences		✓	✓		✓	
5	Information about procurement policy		✓	✓		✓	✓
6	Tight timeframes					✓	✓
7	Direct negotiations	✓	✓			✓	
8	Use of subcontractors	✓			✓		✓
9	Lack of genuine markets	✓	✓			✓	
10	Outsourcing					✓	✓
11	Bypassing the DSTA			✓			✓
12	Discretion	✓	✓	✓		✓	✓

People – the human factor

1. Expertise of procurement staff

A major problem is the level of expertise of public officials involved in procurement. Some public officials with responsibilities for procurement are experienced and knowledgeable; experts in their trade. Others are not.

Some public employees with procurement responsibilities do not have relevant training, experience or adequate technical knowledge about the goods or services being procured. Lack of expertise is a problem for new staff, staff from the private sector who are not aware that the public sector does things differently, and staff who do not regularly conduct procurement activities and therefore never get properly trained or do not remember their training or retain knowledge. Maintaining staff expertise as procurement evolves is also a major challenge for public agencies.

One public sector focus group argued that local councils expose themselves to corruption risks if they lack an expert procurement officer or unit, as this usually means they give responsibility for procurement to lots of different people, not all of whom have adequate expertise. However, recruiting procurement specialists was reported to be a problem because of a shortage of such staff. Finding project managers with adequate expertise was reported to be especially difficult. Getting suitable existing employees to undertake certain procurement tasks can also be a challenge. For example, senior experienced staff are required for tender panels, but sitting on a panel requires a lot of reading and time away from normal duties so such staff often do not want to participate. A consequence is that the staff who participate in tender panels can lack experience and commitment, or are junior.

“Lack of expertise” was mentioned consistently across all sources of information as being a problem in public sector procurement, although it was not considered the most important problem by any one source. “Inadequate knowledge” was a factor in 65% of the Commission’s procurement-related investigations, the sixth most common factor. Thirty-seven per cent of procurement survey respondents said the most common reason they outsourced procurement functions was because they lacked in-house expertise in the area; yet outsourcing itself can lead to this situation.²

Many sources of information focused on the consequences of a lack of expertise, including inadequate

planning (especially of capital projects), market knowledge (resulting in inaccurate price estimates and poor decisions about products and price negotiations), contracting knowledge (resulting in poorly written contracts that may disadvantage the public sector agency) and contract management skills (resulting in inadequate project monitoring).

The consequences of a lack of expertise include that employees may not know:

- what policies and procedures should guide them, especially if these have changed since the last time they undertook procurement activities;
- where to find information and advice;
- what ethical and probity principles need to be applied when spending public money (e.g. accountability and impartiality);
- market prices for the goods or services they are buying; or
- how to manage and monitor a contract.

Inexpert public officials may lack judgment when they need to make a decision, not recognise red flags for corruption or not know what to do about corruption when they become aware of it.

Practitioners focused on the causes of lack of expertise. Some argued that the engagement of more and more staff on temporary contracts is resulting in fewer staff having knowledge about their organisation’s procurement policies and procedures, and consequently resulting in less compliance. One public sector focus group participant commented that there is “no standard tool box” for staff with procurement responsibilities, resulting in individual staff developing their own personal approach, which sometimes falls short of required standards.

Inadequate training was identified as the major factor causing lack of expertise. The procurement survey found that almost 50% of surveyed organisations do not provide procurement training to staff with responsibilities for procurement, although it is possible this is because the agency hires people that already have the required skills. Seventy-four per cent of organisations do not provide procurement training to contractors or consultants (including project managers) before they start working on procurements, but again this may be because the organisations assume these individuals already have the requisite skills. These survey findings were corroborated by focus groups and practitioners, who stated that not everyone with procurement responsibilities receives training or accreditation in procurement or in the agency’s code of conduct, which typically contains sections on conflicts of interest, gifts and benefits and impartial decision-making.

2. Athol Yates, *Government as an informed buyer. Recognising technical expertise as a crucial factor in the success of engineering contracts*, Institute of Engineers, Canberra, 2000.

A high turnover of contract staff, or an influx of new staff on contracts, also creates a challenge for agencies to provide induction and procurement training, especially compared to permanent employees who tend to get more organised induction. One agency reported that 50% of staff in its procurement unit are on contracts. The literature argues that as a result of contracting-out, many government agencies lack personnel with sufficient expertise to undertake and monitor the contracting-out process, resulting in poor tendering and contract management.³

Suppliers did not emphasise public officials' lack of expertise. Most suppliers said there is a spectrum from incompetent to excellent, with most public employees falling in the middle. Some suppliers said that given the many types of goods purchased by government, it would be unreasonable to expect public employees to have a good technical understanding of all those that they had to deal with. However, both suppliers and public officials mentioned that sometimes *contractors* lacked expertise and required guidance in engaging with public sector procurement practices.

QUESTIONS FOR SUBMISSIONS

- 1.1 Who should receive compulsory procurement training?**
- 1.2 What training should be provided to those public officials who only occasionally do procurement?**
- 1.3 What accreditation is needed for staff with responsibilities for procurement?**
- 1.4 Which agencies or organisations are best placed to provide training in procurement? Why?**
- 1.5 What should suppliers be expected to know about procurement in the public sector when they first start contracting to NSW public agencies?**
- 1.6 What is the best way to communicate to suppliers the things they should be expected to know about procurement in the public sector?**

CASE STUDY 1: A LACK OF EXPERTISE

The ICAC investigated a public employee, 'Tony', who was the procurement manager in charge of a tender evaluation committee (TEC). Tony corrupted the tender process by awarding the contract to a firm in return for a bribe. During the tender process he entered into negotiations with the firm and got the TEC to approve a change in the scope and value of the contract that benefited the firm.

The other two members of the TEC were from a technical area. Neither had received any procurement training. One had also never participated in a tender before, but was sent as a replacement for his manager because his manager was too busy to participate. Both technical representatives had concerns about the process, but accepted the procurement manager's word that everything he was suggesting was okay.

The Commission found that Tony engaged in corrupt conduct. It also concluded that the two technical members' inexperience was a major contributing factor to the corruption that occurred. Had they been trained they would have known that a TEC cannot unilaterally change a project's scope. They would also have been more likely to challenge Tony and go to a more senior person to check that the process adopted was correct.

3. See submissions to *Contracting out of Government Services: Second Report*, Senate Finance and Public Administration References Committee of the Australian Government, Canberra, May 1998.

2. Relationships

Relationships between public officials and suppliers, including friendships, business dealings, family relationships and personal (e.g. sexual) relationships, are at the core of much of the corruption that occurs in public sector procurement. The link between relationships and corruption is mostly related to conflicts of interest that are not declared or are poorly managed.⁴

A typical conflict of interest scenario involves a public official improperly favouring or showing disfavour to someone with whom he or she has a personal relationship. For example, a public official might allocate a contract to a mate, accept fraudulent invoices from him, or give him confidential pricing or specifications information. This is often done in return for a bribe or gift, although sometimes the public employee may simply be doing a favour. A public official might also *not* award a contract because of prejudice against the supplier based on a personal issue.

All sources of information emphasised the corruption risk posed by conflicts of interest. Public sector agencies surveyed by the Commission considered conflicts of interest to be their most serious corruption risk. Allegations of a failure to disclose a conflict, or an abuse of a conflict of interest, are the fifth most common matter reported to the Commission. Undeclared conflicts of interest were identified as a factor in 46% of ICAC investigations into corruption in procurement where corrupt findings were made (the 10th most common factor overall). Focus groups reported that conflicts of interest pose particular risks in rural areas and for local government because of the often tightly interwoven network of personal relationships between people in smaller communities.

The public sector emphasis on relationships and corruption is different from that in the private sector, where relationships are considered a problem but not to the same degree. In KPMG's *Fraud Survey 2009*, senior executives of private companies ranked "collusion between employees and third parties" and "collusion between management and third parties" as the fourth and fifth factors (out of six) that "most enable" fraud and misconduct to occur.⁵

Despite their perception that relationships and conflicts of interest create a corruption risk, public agencies do not always take action to try to manage or minimise those risks. The Commission's procurement survey found that about one-third of organisations do not provide any training in conflicts of interest to specialist procurement staff who are permanent public employees, and about half do not provide training in conflicts of interest to contractors/consultants (including project managers) with procurement responsibilities. One reason why training might not be provided is that agencies assume that staff recruited to perform procurement functions already know that conflicts of interest should be declared so a strategy to manage them can be put in place.

Suppliers had a different perspective on relationships. They said they often lacked good relationships with public agencies, commenting on the "limited contact with human beings" that occurs because so much of the tendering process is now electronic via websites. Suppliers felt strongly that more communication with the individual public employees they have to work with was desirable, although there was recognition that communication should be limited during the tender submission and assessment stage. Frequent communication gives suppliers certainty about how their goods or services are viewed by their client, and reassures suppliers that they have the latest knowledge on new developments. One supplier commented that a long-term business relationship with a client gives them "a better feel for the nature of the services required", that is, a long-term relationship gives suppliers confidence that they are providing the right service. Good relationships involving frequent communication, it was claimed, give suppliers opportunities to inform their clients of new or updated products or technology.

One supplier focus group commented that suppliers are in the "relationship game", and they wanted to know more about how they should be managing relationships with their public sector clients. Suppliers said that because they aim to provide good customer service to clients that buy their goods and services – customer service that in their minds involves frequent friendly discussions – they felt confused when public servants told them that meetings, coffee or lunch were somehow unethical or contrary to the rules.

4. A conflict of interest refers to a conflict between the public duty and private interests of a public official, where the public official has private interests which could improperly influence their official duties and responsibilities.

5. *Fraud Survey 2009*, KPMG LLP, 2009, p. 6.

QUESTIONS FOR SUBMISSIONS

- 2.1 Would written guidance on agency-supplier interaction about procurement (outside of established tender communication processes) be useful?**
- 2.2 What topics should written guidance address?**

3. Management of procurement staff

Public sector procurement is afflicted by another problem related to lack of expertise: poor management. Poorly trained managers who are ignorant about procurement or incapable of getting their staff to comply with policies and procedures are a corruption risk.

Lack of managerial expertise often manifests as inadequate supervision and checks on staff activities. In turn, these result in improper, non-compliant and corrupt behaviour going undetected and create opportunities for corruption. When staff members present as being particularly competent, managers often perform even less supervision and checks. As ICAC investigations into TransGrid, the Roads and Traffic Authority and RailCorp have found, there are corruption risks around such staff who are 'resident experts' in the workplace, precisely because they are more loosely managed due to their perceived expertise.

'Tick and flick' approvals, where paperwork is casually signed off without any checks, of procurement decisions by managers can also diffuse accountability to the point where no single manager takes responsibility for any particular decision. Chains of 'tick and flick' approvals can create the impression that the procurement is compliant and proper, when in fact the most basic checks were never done in the first place but managers kept signing the paperwork based on the fact that it was signed by the person below them in the hierarchy.

The degree to which management of procurement staff is a problem is, however, perceived inconsistently across sources of information. Analysis of past ICAC investigations found that inadequate supervision and monitoring was a factor in 81% of those investigations, the equal second most common factor. "Failures of senior management" was also the fifth most common factor in procurement-related investigations. By contrast, procurement practitioners – senior managers themselves – did not mention inadequate management as a factor in corruption.

Two conclusions can be drawn from these inconsistencies within the information. First, the problems caused by poor

management are not always appreciated or admitted. Second, when there is poor management of procurement staff the consequences can be serious, often precipitating an ICAC investigation. Inadequate supervision and monitoring are also a major concern in the private sector. Senior executives surveyed by KMPG in its *Fraud Survey 2009* considered these factors to be the single most significant factor enabling fraud and misconduct.

QUESTIONS FOR SUBMISSIONS

- 3.1 Other than through training, how can managers' gaps in knowledge about procurement best be addressed to ensure procurement is proper and efficient?**
- 3.2 What role could specialist procurement committees or individuals play in taking over some approval responsibilities from managers?**

4. Public/private sector differences

In the public sector, procurement must focus on cost and quality, but it is also underpinned by principles of accountability and transparency in the processes through which public money is spent. By contrast, procurement in the private sector is largely dictated by cost and quality alone; the process by which procurement occurs is less important as long as the company gets a good deal.

These differences have consequences when private sector staff move to the public sector. In the private sector it is not unusual for suppliers to offer and pay for gifts and benefits for clients as part of creating favourable attitudes in the client towards the supplier, and for facilitating relationships. The giving of gifts was once also a common practice in the public sector, but it is now considered contrary to best practice and is banned for all gifts and benefits of more than token value.

Several sources of information confirmed that some procurement personnel coming from the private sector struggle to accept that their previous practices are no longer acceptable and are, in fact, considered inappropriate and possibly even corrupt in their new workplace. Some public employees also continue to accept gifts and benefits from suppliers, as demonstrated by recent ICAC investigations such as one involving Ku-ring-gai Council in which an agent for a property developer gave gifts to a council employee in an attempt to gain a favourable outcome for their development application. Some suppliers also continue to offer or give gifts or similar personal benefits to public officials engaged in procurement transactions.

Dealing with gifts in terms of developing a policy on gift-giving, getting staff to declare gifts and deciding what to do with gifts that they cannot accept and that cannot be returned, is a challenge for agencies. Public officials may also like receiving gifts and benefits, and persuading them not to do so can be difficult.

A key reason for tension or confusion on the part of former private sector staff who have moved to the public sector is that public sector ethics or rules are often poorly communicated and enforced. Several sources told the Commission there is a need to improve understanding and appreciation of the role that public sector ethics and probity standards – especially those around accountability and impartiality – play in underpinning procurement that involves public money. Few suppliers were aware of the provisions of the NSW Government Procurement Policy or the associated Code of Practice for Procurement, although some were aware of public sector ethics.

QUESTION FOR SUBMISSIONS

4.1 How can public agencies ensure that suppliers and individuals moving from the private sector to the public sector understand the practical implications of operating within a public sector governance framework?

Systems and processes

5. Information about procurement policy

Many staff do not understand or follow procurement policies or procedures because they cannot easily find helpful information about them. This is a systemic problem across the public sector: sources of information about procurement can be difficult to find, are multiple and confusing, and the information they contain is sometimes outdated or contradictory, or both. Lack of access to good information hampers good procurement practice. It also facilitates corruption because of confusion about what is acceptable. Staff, especially managers, with inadequate expertise can be tricked or confused by information presented to them by corrupt individuals. Information about procurement itself can be inherently complex and confusing, making it difficult for managers to work out whether procurement complies with proper procedure.

In focus groups with public officials and suppliers, as well as discussions with procurement experts, the Commission was told that it can be difficult to find information about NSW procurement policies and processes, that information can be difficult to understand, and that the websites of the DSTA and its dedicated NSW Procurement website can be difficult to use. The Commission's procurement survey found that fewer than half the respondents (46%) found it "easy" or "very easy" to obtain information about government policy requirements for procurement. Only 28% of respondents said it was "easy" or "very easy" to obtain best practice advice.

Public sector agencies surveyed by the Commission were asked to nominate "the one most important thing that could be done to make it easier for staff to find government policy requirements and/or best practice advice regarding procurement". While most respondents provided at least one suggestion, 15 indicated there was no need for any improvement. The most frequently suggested improvement was the creation of a single comprehensive website that consolidated policy information from both Treasury and the DSTA, followed by: better communication to agencies (presumably from the DSTA) on where to find relevant sources of information; training and education to improve awareness of procurement best practice and policy requirements; and simplification or standardisation of processes.

Suppliers wanted more and clearer information on tendering procedures, specifications for the goods and services, and information on probity issues and related issues (such as environmental and occupational health and safety policies). Quality information does exist on these topics, including on the DSTA and other NSW government websites, but suppliers find it difficult to access this information.

Suppliers also commented that subcontractors received almost no information from government contractors about fraud and corruption, even though there was recognition that this should occur and that codes of practice were linked to contracts. When asked what information she received about probity issues, one supplier replied "Nothing!". Others thought that probity information was often "buried". Suppliers reported that when they are first put on a State Contracts Control Board panel they receive lengthy documentation but no face-to-face briefing as a matter of course about what is expected of them in terms of practices and ethics.

QUESTIONS FOR SUBMISSIONS

- 5.1 How can public officials and suppliers best obtain information about public sector procurement policies and procedures?**
- 5.2 How can existing sources of information about procurement, such as websites, be improved so they are more accessible and easier to use?**

6. Tight timeframes

The imposition of tight timeframes creates corruption risks related to procurement planning, compliance and scrutiny of decisions. The key problem is pressure on decision-makers to make a quick decision. There may be several causes for this pressure, but this research identified three: the CEO (or minister) sets an unrealistic deadline; inadequate planning leaves insufficient time to consider all relevant factors; and staff claim there are emergency or special circumstances when there are not. Tight timeframes are also often created by genuine emergencies, but advance planning should ensure adequate corruption risk management around such procurement.

In interviews and focus groups, practitioners said that deadlines imposed by ministers, in particular, result in systemic problems that hamper good procurement and create corruption risks. Focus groups also mentioned the Australian Government's stimulus package for funding construction projects in schools as a recent example of unrealistic deadlines that resulted in short cuts to proper process.

Practitioners said that urgency and time constraints are sometimes used by agencies and individual public officials to justify non-compliance with policy and procedures, when in reality the excuse of an 'emergency' may be used to cover up deliberate non-compliance. Managers may face pressure to rush sign-off on decisions by staff in order to facilitate improper procurement. Officials in agencies that have continuous operations may also demand instant sign-off from managers on procurements because of the pressing needs created by continuous operations. The end result in agencies that operate around-the-clock can be systemic non-compliance with procurement policies and procedures and the creation of opportunities for corruption.

Genuine emergencies, such as a natural disaster, can also create tight timeframes within which goods or services must be procured as part of government's response to the disaster. Even though such emergencies may be genuine, the tight timeframes still create a corruption risk. Suppliers may take advantage of public officials' substandard scrutiny of products, and corrupt public officials may purchase goods from their friends assuming that their decisions will not be reviewed due to the emergency.

Focus groups identified the following reasons for short timeframes:

- unrealistic deadlines imposed for reasons of political expediency by ministers;
- end-of-financial-year pressures to spend money (as not spending it would mean that the money is returned to Treasury);
- agencies not being sufficiently organised to allow enough advance preparation time to meet the deadline.

There are two challenges for corruption prevention posed by tight timeframes. First, agencies have to be able to recognise 'fake emergencies' and therefore when short cuts are unnecessary or possibly part of a corrupt scheme. Secondly, agencies must be able to respond adequately to genuine emergencies in a way that ensures government still gets good value for money.

QUESTION FOR SUBMISSIONS

- 6.1 Are there simple checks managers can make when being asked to sign-off on a procurement in emergency circumstances? What are they?**

7. Direct negotiations

"Direct negotiations" refers to discussions between public officials and suppliers about a good or service that is to be delivered. Sometimes the purpose of the discussions is to determine price; other times it is to decide whether a contract should be extended. While direct negotiations are a legitimate and useful method for negotiating a contract, they can also be problematic.⁶

Face-to-face contact between public official(s) and a supplier creates opportunities for favouritism, gifts and benefits. A recent ICAC investigation into RailCorp found

6. For more detailed analysis of the corruption risks associated with direct negotiations see the Commission's publication *Direct Negotiations: Guidelines for managing risks in direct negotiations*, ICAC, Sydney, May 2006.

that maintenance contracts for air-conditioning in stations were repeatedly and improperly extended to a third year through direct negotiations that were conducted by a RailCorp air-conditioning maintenance engineer. The negotiations were never scrutinised, controlled or otherwise scripted by managers or a panel.

By far the largest proportion of respondents to the procurement survey (73%) considered direct negotiations to be the procurement procedure most vulnerable to corruption. Direct negotiations can allow a public official to make improper extensions or variations to projects after contracts are signed – what one practitioner termed “project creep”. Direct negotiations can also be used to legitimise the continued use of firms who do a good job through constant rolling-over of a contract rather than going out to tender. This is in contrast to panel contracts where the choice of supplier is restricted, or tenders which are better regulated and scrutinised, or even non-tendered quotations which are of lower value.

QUESTION FOR SUBMISSIONS

7.1 How can good processes for conducting direct negotiations (including variations and extensions) be established and enforced?

8. Use of subcontractors

The role of subcontractors presents a particular set of problems for the public sector procurement system. Subcontracting is necessary as contractors often do not have all the expertise required to perform a job. The problem is that public sector agencies sometimes do not know if a contractor is using subcontractors and this creates risks.

Recent ICAC investigations have focused on corrupt arrangements around subcontracting, including investigations into tendering and payments in relation to NSW Fire Brigades capital works projects (2008), bribery and fraud at RailCorp (2008), corrupt conduct associated with RailCorp air-conditioning contracts (2007), and schemes to defraud the Roads and Traffic Authority and RailCorp in relation to provision of traffic management services (2006).

Forty-two per cent of surveyed agencies “always” require contractors to both record subcontractor usage and ask permission to use subcontractors. However, 58% of organisations “never” or only “sometimes” require contractors to record subcontractor usage and request permission to use subcontractors. These survey results are cause for concern given that reporting and requesting information about subcontractors is both straightforward and an effective way to detect and deter corruption in subcontracting.

CASE STUDY 2: HIDING CORRUPTION IN SUBCONTRACTING ARRANGEMENTS

The ICAC investigated a public employee, ‘Mike’, who was the technical representative on a tender evaluation committee (TEC). The TEC awarded a contract to a specialist fencing supplier, ‘Rob’, to provide palisade fencing around a site. During the course of the contract it became necessary to get a subcontractor to undertake some road works. The agency should have called for a public tender, but instead instructed Rob to subcontract the necessary road works.

Suppliers who are directed by an agency to hire subcontractors are in a position to improperly manipulate this process to their own advantage. The supplier knows the public agency needs the work done, and may inflate the quotes or obtain fictitious quotes to satisfy the requirement of a quoting process. Another concern is that if the supplier is ignorant of the type of work required by the subcontractor, this creates opportunities for corruption on the part of the subcontractor and any colluding public official, as the supplier may not know if the good or service being provided is suitable.

In this case, because the supplier did fencing, not road works, Rob asked Mike if he knew of suitable firms. Mike recommended a company owned by a mate, which was asked to submit a quote. The agency obtained some other quotes as a comparison, but it is likely that Mike interfered with these as well. At any rate, the road works subcontract was given to Mike’s mate’s firm. This corruption was never discovered by the agency because it was hidden by the subcontracting arrangement.

The investigation found Rob gave Mike \$40,000 in cash payments in return for assisting him with his tenders, and both Mike and Rob were found to have engaged in corrupt conduct.

QUESTIONS FOR SUBMISSIONS

- 8.1** What strategies are available to manage the corruption risks associated with the use of subcontractors?
- 8.2** What transparent but non-onerous systems should agencies use to require suppliers to declare and manage subcontractors?

QUESTIONS FOR SUBMISSIONS

- 9.1** How can the lack of a genuine (competitive) market for a good or service required by the public sector be identified?
- 9.2** What strategies are available to manage the corruption risks associated with lack of market knowledge on the part of public officials, including ascertaining a reasonable price for the good or service in question?

Markets – where to buy and what to pay

9. A lack of competitive markets – determining price

A recent ICAC investigation into bribery and fraud at RailCorp⁷ focused on the corruption problems that can be caused by a lack of genuine markets.

A lack of market competition makes it difficult for government to find out what a reasonable price is when there is no other good or service to which the required product can be compared. For example, unlike routine services such as office supplies or cleaning services, there are no competitive markets for the provision of passenger rail services or for additional lanes on unique bridges. There may be *international* markets for these services and goods, and there may also be domestic markets for certain aspects of both rail services and the construction of additional lanes, but there are no competitive markets for the complete product in NSW.

The corruption problem is that a public official can collude with a supplier to take advantage of decision-makers' ignorance about what a fair price should be. Suppliers can also collude with each other to increase their quotes and plan who will win the contract, knowing that the client agency will have no alternative options to source the good or service. When there is no genuine market, the agency needs to work harder to obtain other price information, such as developing an internal quote against which to measure the prices tendered by others.

10. Outsourcing – determining agency need and what is delivered

Whereas the lack of a genuine market creates opportunities for corruption around determining price, outsourcing creates opportunities for corruption around determining what the agency needs and what actually gets delivered.

Outsourcing is a form of procurement that involves contracting an external organisation to perform all or part of an organisation's functions. It may involve a partial or complete transfer of staff or resources, or both. It does not include routine service contracts, such as cleaning. Thirty-eight per cent of surveyed NSW public sector agencies outsourced some primary functions, and another 34% outsourced only what they regarded as non-primary functions.

Outsourcing has some inherent problems. Determining what is delivered can be particularly difficult, especially in the case of services where delivery may include less tangible and quantifiable aspects such as client well-being (e.g., the health of inmates) or customer satisfaction (e.g. easy-to-follow application processes for a service). Outsourcing also creates opportunities for cover-ups by the contractor of poor performance or poor handling of complaints and mistakes, as well as for falsification of records such as performance data. Outsourced functions need special risk management strategies to ensure opportunities for corruption are minimised.

The key corruption-related issue in the literature is how governments can be held to account when the contractor does something dishonest, unethical and/or corrupt, for example, submitting false performance data to optimise

7. *Investigation into bribery and fraud at RailCorp: Eighth report – Corruption prevention*, ICAC, Sydney, December 2008.

payments or cover-ups of poor service delivery (e.g. mistreatment of prisoners, service cuts or damages).⁸

Four of the ICAC investigations focused on corruption in training and certification functions outsourced to private firms. The corruption involved the issuing of certificates in return for bribes, without adequate training or testing having taken place – there were no allegations of corruption in the decision to contract-out the function, the selection of the provider or the preparation of the contract. The investigations related to:

- registered training organisations (2009), involving the exposure of training organisations that improperly gave certificates of security industry training in return for bribes;
- the Office of Fair Trading and TAFE (2005), involving the exposure of schemes to fraudulently obtain building contractor licenses;
- WorkCover NSW (2005), involving the exposure of WorkCover officials issuing certificates in return for bribes, without the applicants having undergone any assessment process and the sale and dissemination of false certificates through a network of distributors; and
- WorkCover NSW (2004), involving the exposure of assessors contracted to WorkCover NSW who were improperly certifying operators of heavy plant and equipment in return for bribes.

In these investigations the Commission found that monitoring of contracted assessors by the government agency was inadequate and facilitated the corruption that occurred.

Some focus groups considered the outsourcing of functions to NGOs rather than to private companies to be a problem. The key issue was that public sector agencies do not view NGOs as contractors, possibly because of their historical community role, and therefore have lower expectations for accountability. Some NGOs also have fewer internal resources (such as financial expertise) than private companies, meaning they are not always capable of accounting for and managing expenditure. Government agencies were said to do less performance management of NGOs, compared to their performance management of

private contractors. An argument advanced in the research literature is that inadequate performance management is ignored by government if it reflects poorly on the original political decision to outsource.⁹

QUESTIONS FOR SUBMISSIONS

- 10.1 Are there functions that have not been outsourced because of corruption or probity concerns? If yes, what are they?**
- 10.2 In the context of a non-competitive market, how should an agency reach a decision to either outsource a function or provide it in-house?**
- 10.3 What strategies are available to agencies to ensure the effective management of corruption risks associated with outsourced service delivery?**
- 10.4 If contracting-out and outsourcing continues in the form of public-private partnerships, are there corruption risks distinct to this approach? If yes, what corruption prevention measures can minimise these risks?**
- 10.5 What are the corruption risks distinct to outsourcing services to non-government (non-profit) organisations? What corruption prevention measures can minimise these risks?**
- 10.6 What are the corruption risks distinct to hiring consultants, such as IT specialists, legal advisers or project managers? What corruption prevention measures can minimise these risks?**

8. See, for example, *Probity in the Public Sector: Combating Fraud and Corruption in Local Government*, UK Audit Commission, London, 1993; Alan Doig, "Mixed Signals? Public Sector Change and the Proper Conduct of Public Business", *Public Administration*, Vol. 73, Summer, 1995, pp. 191-212; *Fighting Corruption and Promoting Integrity in Public Procurement*, Organisation of Economic Co-operation and Development, Paris, 1995; and Richard Mulgan, "Government Accountability For Outsourced Services", *Australian Journal of Public Administration*, vol. 65, no. 2, 2006, pp. 48-58.

9. David Hayward and Ron Aspin, *Contracting Out: Time for a Policy Rethink?*, research paper for the Swinburne Institute of Social Research, Melbourne, 2001.

Structures – the way procurement is organised

11. Bypassing the DSTA

Various sources of information provided conflicting accounts of the role of the Department of Services, Technology and Administration (DSTA), an agency that is critical to public sector procurement.

Some procurement practitioners criticised the central role of the DSTA in the NSW public sector procurement system because of the way the DSTA as an agency, and its individual officers, interact with other agencies. Agencies have to work with the DSTA because policy requires that they do, they sometimes need its expertise and systems to procure goods and services, or because it has information they require. Eighty-five per cent of surveyed agencies said they had approached the DSTA for procurement advice in the last three years. However, some officials stated that the DSTA complicates procurement by insisting on things that are not really necessary, that individual DSTA staff can be unhelpful and that the DSTA's criteria for selecting suppliers do not always address agencies' needs.

A consequence of agencies' or individual officials' frustration with DSTA is that they can try to bypass the DSTA in order to run their own procurement processes. This is not a problem if an agency has the authority to conduct its own procurement and has sufficient procurement expertise, but some individuals in some agencies lack such expertise. By avoiding the DSTA and doing procurement themselves, agencies can create opportunities for corruption.

QUESTIONS FOR SUBMISSIONS

- 11.1 What would encourage public officials to use the DSTA for procurement and not bypass it?**
- 11.2 Are there aspects of the DSTA's role in procurement that, if changed, would improve the management of corruption risks associated with procurement? If yes, what are they?**

12. Discretion

While some focus groups and practitioners argued that there is too much formalisation in procurement – that is, rules and procedures to guide everything – others focused on public employees being given too much discretion.

Discretion, it was argued, gives public employees the potential to deviate from policy and procedures. While public officials need some discretion to perform their job, too much discretion creates opportunities for corruption.

“High levels of discretion” was a factor in 58% of the ICAC investigations, the seventh most common factor. One supplier focus group stated that too much discretion on the part of public officials is a problem. Procurement practitioners did not mention discretion as a problem.

A supplier focus group discussed sign-off on the delivery of goods as an example of unregulated discretion. As sign-off on delivery is often not under delegation, any public official receiving goods can use his or her discretion as to whether what has been delivered is correct and sign-off on delivery. This creates a corruption risk because receipt of goods is not very well controlled. Several suppliers said they have had an experience where they have delivered goods and had them signed for by a public employee who happened to be nearby, only for the agency to claim that they are unable to locate the goods. The suppliers suspect that the public employees who signed for the goods stole them.

Too much discretion, or poorly exercised discretion, is also a problem in the private sector. KPMG's *Fraud Survey 2009* found that 47% of senior executives considered “management override of internal controls” to be a factor enabling fraud and misconduct. The different emphases on discretion as a problem suggest there is a disjuncture between perception and reality. Practitioners may not be aware that employees have as much discretion as they have, whereas the Commission becomes aware of this through investigations. Practitioners may not be aware that discretion is a significant risk because it is crowded out by competing risks that seem more immediate or are accorded greater priority than an employee who is loosely controlled. Alternatively, practitioners may know discretion is a risk but not understand fully the opportunity it creates for corruption.

QUESTIONS FOR SUBMISSIONS

- 12.1 What types of procurement are more vulnerable to corruption risks caused by public officials having discretion over procurement?**
- 12.2 How can agencies ensure the effective management of corruption risks associated with discretion in procurement?**

3. Procurement: aspects most vulnerable to corruption

Knowing what aspects of procurement are most vulnerable to corruption is essential in identifying priority areas for corruption prevention. With this in mind, the Commission asked procurement practitioners and focus groups about particular areas of vulnerability. It also reviewed past reports from corruption investigations for any patterns. Vulnerabilities were identified in six different areas as follows.

Stages of the procurement process

There are several different stages in any procurement process. Simple procurements have fewer stages. The Commission's procurement survey asked about the relative vulnerability of six stages: needs analysis, budgeting, advertisement of bidding opportunities, assessment of bids, contract management and contract evaluation. Contract management was ranked most vulnerable to corruption, and the assessment of bids ranked the second most vulnerable.¹⁰ Budgeting and advertising for bids were ranked least vulnerable.

Types of procurement process

Different processes are used for procurements, depending on their type and value. The Commission's survey asked about the relative vulnerability of four processes: tendering to win a contract (as opposed to tendering to be placed on a panel); procurement via non-tendered quotations (e.g. three quotes); tendering to be put on a contractor panel; and direct negotiations. Organisations overwhelmingly responded that direct negotiations were the most vulnerable process (73% of respondents ranking it first), followed in order of vulnerability by non-tendered quotations, panel contracts, then tenders.

10. Sixty-two per cent of respondents ranked contract management as the most or second most vulnerable to corruption. Forty-six per cent ranked assessment of bids as the most or second most vulnerable to corruption.

In contrast to the lack of emphasis on panels in the Commission's procurement survey, supplier focus groups considered there to be significant distinct risks posed by panels. Suppliers said that panels can make corrupt allocation of contracts appear legitimate, because a public employee could give all the work available to a favoured firm listed on a panel and ignore other listed firms. Panels can make it easier for corrupt public officials to improperly award work to a favoured firm once it is on a panel, and to not award work to other firms. Panels may also stay in place for years, resulting in inadequate competition by suppliers to remain qualified and offer competitive prices.

Value of procurements

Procurement in the NSW public sector ranges from pens and paper clips at one end of the price spectrum to service contracts worth hundreds of millions of dollars at the other end, and price is a factor in vulnerability to corruption. In terms of value, procurements worth around \$1 million to \$2 million are reported to be most vulnerable. Unlike larger projects (e.g. around \$5 million to \$10 million) that are better resourced in terms of time, money, personnel and oversight, smaller procurements are managed and administered by staff who may have less experience and overall expertise in procurement. Smaller procurements also fall 'under the radar' of agencies in terms of monitoring and oversight. This seems to be because they are deemed low risk as relatively small budgets are involved.

Contrary to some perceptions that very large procurements are particularly vulnerable to corruption because so much money is involved, contracts worth hundreds of millions or billions of dollars tend to receive greater scrutiny. Professional probity advisors may be appointed precisely because the value is so high. It is when procurement is not so valuable that agencies can become lax. For example, the Commission's 2008 investigation into bribery and fraud in RailCorp focused almost exclusively on procurement related

to asset management, all of which involved low-value, high-volume maintenance work that received little scrutiny.

Risks created by staff

In 21 years of operation the Commission has exposed many public employees who have taken advantage of their colleagues' ignorance or trust. Some colleagues, however, make it easier than others for corrupt individuals to engage in improper behaviour. Procurement undertaken by technical staff was considered to be vulnerable because these staff may focus more on the product rather than on following proper procurement process. Short cuts create opportunities for corruption. By contrast, specialist procurement staff are more likely to ensure that procurement complies with policy and procedure, rather than just specifications.

Suppliers commented that when agencies use consultants to develop specifications and tender documents, there is a risk that the consultant has preferred firms and develops the tender brief with these suppliers in mind. Suppliers thought that this risk is easier to control if tenders are developed by in-house staff. Some focus group participants also thought that using contracted staff to perform mainstream functions created risks, although it was not clear if this was because of factors such as a lack of expertise, lack of induction and training, or reduced background screening at the recruitment phase.

Decentralised procurement

Procurement processes and decisions can be developed and controlled in a centralised fashion and conducted by specialist procurement staff. In other circumstances, procurement is decentralised, and those making procurement decisions, who are often not procurement specialists, have more discretion. Procurement in NSW public sector agencies can also be a combination of these types.

One focus group reported that decentralised procurement was more vulnerable to corruption, because conflicts of interest are likely to be more common, reported less often and not managed properly (the assumption was that decentralised procurement occurs in rural areas or at the local government level where conflicts of interest are more common). Another concern is that the higher levels of discretion in a decentralised system allows public employees to bypass proper procedure. One practitioner commented that decentralised procurement environments need specific probity features, such as a numbering system for tracking orders and contracts so that regional areas (the example he gave) cannot work outside the system altogether.

Local government

When asked if some agencies were more vulnerable to corruption than others, practitioners and focus groups agreed that local councils are most vulnerable because:

- Local councils have more risks because of the closeness of councils to communities and the complexity of relationships, for example, involving

DOES CORRUPTION CHANGE SUPPLIER BEHAVIOUR?

Suppliers in focus groups were asked whether actual or perceived corruption changes the way they do business with government, such as if they had suspicions about the fairness of a tender process. Most responded that they would still apply for tenders "because we have to!" That is, they have to keep getting new work to stay profitable as a company. One supplier said that in 13 years his company had never applied for work with RailCorp because of concerns that relationships could become difficult, possibly including improprieties. Another participant said that if he suspected corruption he would be more likely to walk away from contracts with individual agencies because the hassles would be too great, but he would not walk away from state contracts through the State Contracts Control Board because these are too important.

Suppliers also commented that if they did suspect something corrupt was occurring they would be most likely to walk away from the tender or contract, rather than report it. This was because they thought reporting it to the agency would create problems for them and jeopardise future tendering opportunities. Few suppliers considered reporting corruption to the ICAC, and many did not appear to be aware that they could do this. Many suppliers in focus groups wanted information about what their options are if they suspect a tender is corrupt.

councillors, the general manager, council staff, and community members. These factors can create conflicts of interest and inhibit reporting.

- Risks are even greater in rural and regional areas where there are fewer suppliers. The ramifications for corruption of limited markets where there are few suppliers were not clearly described, but it may be that favouritism becomes easier to justify. (Overall, metropolitan councils were thought to be better at procurement, including doing better planning and keeping better records).
- A lot of council procurement is low-value, so there is less scrutiny compared to the large procurements of mainstream government departments.
- There are often more conflicts of interest in smaller communities, such as in rural and regional areas. Rural councils are also more vulnerable to contract splitting – making a procurement look smaller than it is – to avoid tendering and to favour known contractors.
- Some suppliers focused on mayors as points of vulnerability for corruption, stating that it was easier to improperly influence a local council mayor (or similarly important local council official) than an official in a mainstream government agency. Other suppliers also focused on mayors, but thought the opposite: that it was easier for people to complain to a local council mayor about corruption and that this can improve accountability to the community.

4. Conclusion

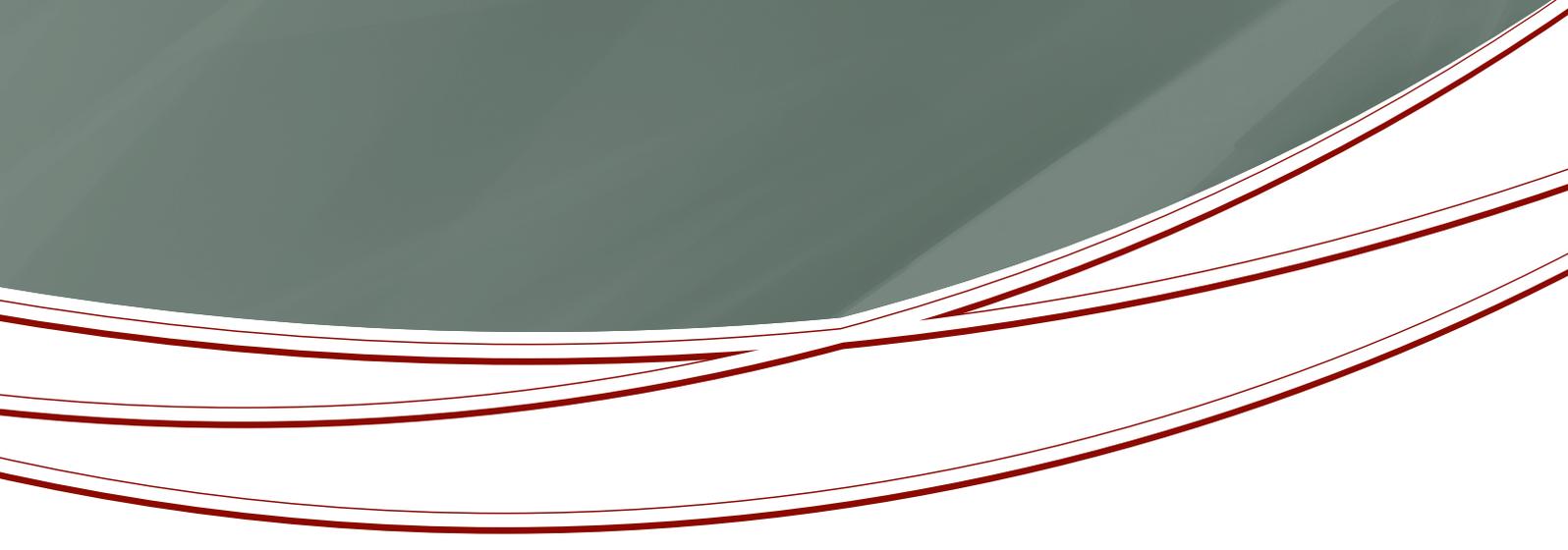
Procurement is essential for service delivery and proper functioning of agencies. Decisions about procurement are carried out in hundreds of locations by thousands of people on a daily basis, and they need to be. But procurement also needs to be efficient and the NSW public needs to be confident that their money is being spent in a responsible and fair manner.

The research findings contained in this consultation paper suggest there are 12 key problem areas that create opportunities for corruption in public sector procurement and disposal. These areas were identified and clarified using a variety of methods in order to confirm their significance for public sector officials and suppliers. The Commission welcomes submissions on the solutions to corruption-related problems in these areas. Below are some final broad questions regarding corruption prevention across procurement and disposal in the NSW public sector.

GENERAL QUESTIONS FOR SUBMISSIONS

- 13.1** What would encourage suppliers to report corruption, or suspected corruption?
- 13.2** Are the measures needed to prevent corruption in procuring services different from those needed in procuring goods? If yes, what are the measures needed to prevent corruption in procurement of services?

- 13.3** Is there a need to review, refresh or consolidate the *Code of Practice for Procurement (2005)*, the *NSW Government Procurement Policy (2004)* and the associated *Implementation Guidelines for NSW Government Procurement (1999)*? If yes, why?
- 13.4** How can the Commission best assist agencies to manage corruption risks associated with their procurement activities?
- 13.5** What role can NSW Treasury and the DSTA play in assisting agencies to better manage corruption risks for procurement?



5. Making submissions

The purpose of this paper is to present the corruption risk issues identified by the Commission in relation to public sector procurement and ask for submissions about solutions. The Commission encourages all those interested in this subject to contribute to this research by making a written submission addressing the issues identified in the issues paper and raising any relevant additional issues for consideration. Submissions should be guided by the questions that appear throughout the text and are listed again in Appendix B.

A copy of this consultation paper is available on the Commission's website at www.icac.nsw.gov.au/publications-and-resources.

Submissions in response to this consultation paper should be emailed to the Commission at procurement@icac.nsw.gov.au, with "Submission on NSW public sector procurement" in the subject line, by **20 August 2010**.

If you want all or some of your submission to be kept confidential, you must clearly state that in your submission. The Commission will consider your request.

Please direct further enquiries to Michael Nest, Senior Corruption Prevention Officer, on telephone (02) 8281 5739 or mnest@icac.nsw.gov.au.

Appendix A: Sources of information

Focus groups

The Commission conducted six focus groups. Three involved public sector procurement specialists (24 individuals in total) and were held in May 2009 in the Sydney CBD, Parramatta and Newcastle. Three involved suppliers of goods and services to the NSW public sector (22 individuals in total) and were held between October and November 2009 in the Sydney CBD, metropolitan (Rooty Hill) and regional (Bathurst) locations.

Survey

In order to better understand NSW public sector procurement, the Commission's research task group needed to obtain a broad, high level perspective. To achieve this, it developed a written survey which sought information about the scope of an organisation's procurement activities, corruption risks associated with procurement, mechanisms used to manage these corruption risks, and the external sources organisations rely on for procurement advice.

The survey provided a definition of "procurement" to guide responding agencies:

All activities involved in acquiring goods or services, either outright or by lease (including disposal and lease termination).

This includes acquiring consumables, capital equipment, real property, infrastructure, and services under consultancies, professional services, facilities management and construction. This also includes the outsourcing of functions and subsequent contracting.

The survey was distributed in hardcopy form to all local councils and state government agencies, except those classified as very small.¹¹ Responses were received from

153 organisations. Responses were anonymous, although some organisations chose to provide their names.

Discussions with procurement practitioners

Discussions were held with representatives from five public agencies (DSTA, NSW Treasury, Local Government Procurement, DLG, and NSW Health) and one private consulting firm that provides consultancy services related to probity and procurement. The purpose of the discussions was to gain advice from expert procurement practitioners regarding the direction and focus of this research initiative, as well as information about practices, risks, challenges and corruption prevention responses to corruption in public sector procurement.

Analysis of policy, regulatory and legislative framework

Policies, regulations and legislation that govern procurement by government departments, state owned corporations and local councils were analysed. The purpose of the analysis was to ensure that the legislative and regulatory environment that shapes NSW public sector procurement was clearly understood.

Review of procurement training by DSTA

Training courses in the Procurement Certification Training program (Levels 1-4) offered by the DSTA were reviewed to ascertain what content relating to probity, corruption and corruption prevention issues was included in the training. As part of a separate initiative, new training material was developed for the DSTA and improvements were recommended and incorporated into the revised curriculum.

11. For example, local Aboriginal land councils, county councils and livestock health and pest authorities.

Past ICAC investigations

Analysis was undertaken of 26 previous ICAC investigations that made findings of corrupt conduct relating to procurement and disposal. The public reports on these investigations were analysed to understand what types of corrupt behaviour were most common (e.g. collusion, undisclosed conflicts of interest, and bribery) and what underlying causal risk factors were found when corrupt behaviour was identified. Where this paper refers to “ICAC investigations”, this refers to these 26 investigations only – not all ICAC investigations.

Allegations made to the Commission

Every year the Commission receives over 2,000 allegations of corrupt conduct. Past complaints received between 1 August 2007 and 29 July 2009 were analysed to understand the workplace activities and types of conduct that were common to allegations involving procurement.

Research literature

Selected literature on corruption in public sector procurement in Australia, as well as some overseas publications, was reviewed. The review included academic articles, government reports, and submissions to government inquiries on outsourcing. A key focus of literature that focuses on corruption in procurement is contracting-out and outsourcing of government functions. There was a wave of research on this topic from the mid-1990s, when there was a trend by governments towards contracting-out or outsourcing certain functions. There is limited recent literature on corruption, procurement and contracting-out, but analysis from the 1990s remains relevant.

Appendix B: Problem areas and questions for submissions

1. Expertise of procurement staff

- 1.1 Who should receive compulsory procurement training?
- 1.2 What training should be provided to those public officials who only occasionally do procurement?
- 1.3 What accreditation is needed for staff with responsibilities for procurement?
- 1.4 Which agencies or organisations are best placed to provide training in procurement? Why?
- 1.5 What should suppliers be expected to know about procurement in the public sector when they first start contracting to NSW public agencies?
- 1.6 What is the best way to communicate to suppliers the things they should be expected to know about procurement in the public sector?

2. Relationships

- 2.1 Would written guidance on agency-supplier interaction about procurement (outside of established tender communication processes) be useful?
- 2.2 What topics should written guidance address?

3. Management of procurement staff

- 3.1 Other than through training, how can managers' gaps in knowledge about procurement best be addressed to ensure procurement is proper and efficient?
- 3.2 What role could specialist procurement committees or individuals play in taking over some approval responsibilities from managers?

4. Public/private sector differences

- 4.1 How can public agencies ensure that suppliers and individuals moving from the private sector to the public sector understand the practical implications of operating within a public sector governance framework?

5. Information about procurement policy

- 5.1 How can public officials and suppliers best obtain information about public sector procurement policies and procedures?
- 5.2 How can existing sources of information about procurement, such as websites, be improved so they are more accessible and easier to use?

6. Tight timeframes

- 6.1 Are there simple checks managers can make when being asked to sign-off on a procurement in emergency circumstances? What are they?

7. Direct negotiations

- 7.1 How can good processes for conducting direct negotiations (including variations and extensions) be established and enforced?

8. Use of subcontractors

- 8.1 What strategies are available to manage the corruption risks associated with the use of subcontractors?
- 8.2 What transparent but non-onerous systems should agencies use to require suppliers to declare and manage subcontractors?

9. A lack of competitive markets – determining price

- 9.1 How can the lack of a genuine (competitive) market for a good or service required by the public sector be identified?
- 9.2 What strategies are available to manage the corruption risks associated with lack of market knowledge on the part of public officials, including ascertaining a reasonable price for the good or service in question?

10. Outsourcing – determining agency need and what is delivered

- 10.1 Are there functions that have not been outsourced because of corruption or probity concerns? If yes, what are they?
- 10.2 In the context of a non-competitive market, how should an agency reach a decision to either outsource a function or provide it in-house?

- 10.3 What strategies are available to agencies to ensure the effective management of corruption risks associated with outsourced service delivery?

- 10.4 If contracting-out and outsourcing continues in the form of public-private partnerships, are there corruption risks distinct to this approach? If yes, what corruption prevention measures can minimise these risks?

- 10.5 What are the corruption risks distinct to outsourcing services to non-government (non-profit) organisations? What corruption prevention measures can minimise these risks?

- 10.6 What are the corruption risks distinct to hiring consultants, such as IT specialists, legal advisers or project managers? What corruption prevention measures can minimise these risks?

11. Bypassing the DSTA

- 11.1 What would encourage public officials to use the DSTA for procurement and not bypass it?

- 11.2 Are there aspects of the DSTA's role in procurement that, if changed, would improve the management of corruption risks associated with procurement? If yes, what are they?

12. Discretion

- 12.1 What types of procurement are more vulnerable to corruption risks caused by public officials having discretion over procurement?
- 12.2 How can agencies ensure the effective management of corruption risks associated with discretion in procurement?

13. General questions

- 13.1 What would encourage suppliers to report corruption, or suspected corruption?
- 13.2 Are the measures needed to prevent corruption in procuring services different from those needed in procuring goods? If yes, what are the measures needed to prevent corruption in procurement of services?
- 13.3 Is there a need to review, refresh or consolidate the *Code of Practice for Procurement* (2005), the *NSW Government Procurement Policy* (2004) and the associated *Implementation Guidelines for NSW Government Procurement* (1999)? If yes, why?
- 13.4 How can the Commission best assist agencies to manage corruption risks associated with their procurement activities?
- 13.5 What role can NSW Treasury and the DSTA play in assisting agencies to better manage corruption risks for procurement?



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