Probity and Ethics in Tender and Contracts: Legal Issues Arising in Procurement Contracts and Management

(A paper presented by Judge Forde to the seminar "Probity and Ethics in Tender Contracts" at the Queensland Law Society 9 October 2008)

Synopsis

The involvement of legal practitioners in procurement management and contracts is growing.[1] It is becoming a more active area for the legal profession as government and private enterprise require more transparency, particularly in relation to procurement involving a tender process. A legal practitioner may be involved in drafting contracts or as a probity adviser or auditor. The talk today is about problems arising which may amount to a potential conflict of interest. The other aspect relates to the rights of the aggrieved party. The latter aspect looms large for various reasons. One reason is that for an aggrieved party to know on what basis the tender was granted, access to information is necessary. This may involve a Freedom of Information request. Another reason is that if a legal practitioner is involved in the tendering process, as an adviser or auditor, it is important to avoid any conflict of interest.[2] Such a conflict, if relevant to why a particular tender was given, may allow the aggrieved party to apply for injunctive relief or judicial review.

Contrasting Probity and Legal Issues

1. Probity is defined as 'integrity, uprightness, honesty'; uncompromising adherence to the highest principles and ideals. The term 'is often used in a general sense to mean a defensible process which is able to withstand internal and external scrutiny'. The process should achieve both accountability and transparency, and provide parties to the procurement process with fair and equitable treatment.[3]

---

1 See "*The Role of the Probity Adviser and Probity Auditor*" a paper delivered by Judge Forde DCJ to Women in Insurance on 22 April 2008

2 A definitive article "*Chinese Walls in Legal Practices*" was written by Ross Perrett and the paper delivered to the Symposium of the QLS on 2-3 March 2007

3 Box & Forde, *Probity and Managing Procurement: how to avoid corrupting the process*, LexisNexis Butterworths, 2007

When determining if someone has acted ethically with respect to procurement, issues arise such as conflict of interest cases. This involves both the probity area and the legal area. The need for transparency should override expediency or nepotism. In some cases, there are grey areas which may call for a legal opinion. It may be either a conflict of interest giving rise to a breach of fiduciary duty, or using confidential information which may breach the terms of the contract of employment, eg. *Public Sector Ethics Act 1994* (Qld), and/or a breach of fiduciary duty, *Chan v Zacharia*.[4] This case involved a medical practice, and the granting of a lease to the partnership. When the partnership was dissolved, one partner was found to hold the lease in trust, and to be accountable to the other for the benefit of the lease.

Even if a person may leave an organisation, there may be ongoing obligations in relation to confidential information. In *Glaxo*,[5] the undertaking given by its ex employee Mr Ritchie did not extend past his period of employment, so as to prevent him from exploiting his general skill and knowledge or know how as a development chemist and manager of research.[6] The plaintiff must properly identify the information sought to be protected.[7] It is an implied term of employment that an employee owes a duty of good faith and fidelity to the employer.[8] It can be used in appropriate cases to seek damages or an injunction against an employee who 'subverts his employer's business in furtherance of a competitor's or his own interest.' [9]

Role of Solicitor

2. It is also important to define the role of the legal practitioner in any procurement transaction. It may be relevant to the professional indemnity cover (depending on the extent of the cover) whether the practitioner is acting to prepare the contract, advising on problems which may arise in relation to disclosing information to

---

4 (1983 – 1984) 154 CLR 118
5 Glaxo Smith Kline Australia P/L v Ritchie & Anor (2008) VSC 164
6 [53]
7 See also [46].
8 [70]
9 Ibid.

those wishing to tender or whether the practitioner is retained to audit the process. Questions of legal professional privilege may be defined by the nature of the role. This is particularly relevant to in-house counsel and whether there is the necessary professional detachment when giving the advice.[10]

Case Studies

3. In order to provoke some thought and provide some practical applications, it is convenient to look at some case studies:

Case Study 1

A former client sought to restrain a law firm from acting for Optus. As soon as the conflict was alleged, the former client's file was placed in a locked cupboard in the probity manager's office. The probity manager held the only key to the cupboard, which was located on a separate floor to all practising solicitors. Each lawyer and staff member who had worked for the former client provided undertakings that they would preserve the client's confidences and would not perform work for Optus. Conversely, the team acting for Optus undertook not to seek or obtain access to the former client's file or to discuss any matter relating to it with any lawyer or legal secretary who worked on the file. These prompt but simple measures satisfied the court that there was a sensible and safe system in place to prevent disclosure.[11]

Case Study 2

The NSW Treasurer suggested that the chairman of Transgrid, the state-owned electricity transmitter, had acted improperly. A complaint was made by the minister to ICAC that the chairman had sought to direct the contract for a new CEO of Transgrid to his own consultancy firm. It turned out that the process for the appointment occurred in-house. An expert on corporate governance

---

10 *Rich v Harrington* [2007] FCA 1987 per Branson J at [58]

11 *Asia Pacific Telecommunications v Optus Networks Pty Ltd* [2005] NSWSC 550 referred to by Perrett op cit at p 12

suggested that "it was not unusual for a non-executive director to offer professional services to a company".[12]

4. This raises the issue as to whether there should be a tender process to ensure that the services provided are necessary and that the charges are reasonable. It is not uncommon for solicitors and accountants who sit on boards to have the legal and accounting work done by their firms. With the ever increasing need for transparency, the firm which obtains the work should be subject to a procurement process supervised by an in-house team or, even better, an independent process audit. In the case of Transgrid, it was suggested by the expert that approval could have been obtained from the other directors once they were fully briefed with the relevant information. That method does leave the other directors open to criticism if problems occur, as they did with Transgrid between the government and the former chairman.

Government Requirements

5. Section 9 of the *Public Sector Ethics Act 1994* (Qld) contains an obligation placed upon public servants to "maintain and enhance public confidence in the integrity of public administration" and to avoid any conflict of interest. Also, the Better Purchasing Guide is supported by the joint publication of guidelines by the Queensland Crime and Misconduct Commission and ICAC and warns officers to be aware of any suspicion of a conflict of interest between their public duty and their private interest.[13] The Integrity Commissioner for Queensland, Mr Gary Crooke QC, expressed grounds for concern about former ministers moving into corporate jobs which had previously been relevant to their portfolio:[14]

> *You can't have an ethical culture unless the leaders embrace that ethical culture, more so than anyone else. Their behaviour is under the microscope, they set the standards, and if they depart from the standards the damage is terrible…*

---

12 *The Australian* 27-28 January 2007, p 10 referred to by Box and Forde, op cit at p 76

13 Box and Forde at p 85

14 *Courier Mail*, 18-19 November 2006, pp 54-55

Rights of Redress

6. One of the topics often forgotten in tender contracts is the rights of the unsuccessful tender. For commercial reasons, a tender who has lost out may not wish to pursue its rights. However, in some instances, the failure to ensure that the tender process was properly followed creates so much controversy or dissension that a tender may wish to know how it missed out. The decision making process may be somewhat obscure or there may be perceived a conflict of interest or even a breach of the tender contract. There is an implied term that there will be fair dealing if a public sector entity is concerned.[15] In order to obtain the necessary information, the unsuccessful tender may seek to obtain information from the government body involved. This may require an application under the *Freedom of Information Act 1992* (Qld) ("the FOI Act") if there is a reluctance to make full disclosure. The FOI Act specifically excludes from its operation decisions of a corporatised corporation carrying out what are defined as excluded activities.[16]

7. The right of redress against a government entity may be available under the *Judicial Review Act 1991* (Qld). In order to review the decision of a government entity, the decision must be of an administrative character and made under an enactment.[17] Such a decision may include:

   (a) the exclusion of certain contractors from a tender list;
   (b) the decision by government as to how to go about the process of contractor selection; and
   (c) the decision of involving the award of the contract.

8. The court in *Concord Data Solutions* was required to deal with the threshold question relating to whether the decision by the Director-General of Education to refuse the tender for software to schools was one made under an enactment. The court held that the State Purchasing Policy was not a statutory enactment, it was

---

15 *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1
16 *Freedom of Information Act 1992* (Qld) ss 11A, 11B
17 *Concord Data Solutions Pty Ltd v Director of Education* [1994] 1 Qd R 343

merely a policy approved by Cabinet which was to relate to all forms of procurement except real property transactions. There may have been alternative relief at common law for breach of contract but that decision preceded the *Hughes Aircraft Systems* case. In any event, judicial review is more expeditious.[18]

Whistleblower legislation

9. It is probably desirable to start any discussion of this issue by quoting from the former head of the Whistleblowers Australia:

> *There are no effective whistleblower protection laws in Australia. There is not one single case of anyone who has ever been prosecuted for reprisals against whistleblowers. Presently, the Federal Government imposes criminal sanctions on those public servants who disclose information in the public interest.*[19]

10. A whistleblower is a person "who publicly discloses unlawful, improper or wasteful activity that is occurring within the workplace." [20] If a public servant or a "public officer" discloses misconduct in the tendering process, for example, it is feasible to do so without jeopardising their employment.[21] One important requirement is that the whistleblower must make the disclosure to the person stipulated in the legislation as authorised to receive such information. That does not include a journalist! There are penalties under the legislation for so doing.

Case Study 3

A former Commonwealth officer disclosed details of a report which reflected badly on security at airports throughout Australian. He was charged with unlawfully communicating information as a former officer. The Commonwealth

---

18 For a further discussion of this case and related cases see Box and Forde op cit Ch 8

19 C. Merritt, 'Prejudice', The Australian, 13 April 2007 p 23 quoted by Box and Forde op cit at 8.28

20 See Sch 6 of the *Whistleblowers Protection Act 1994* (Qld)

21 Box and Forde at [8.27]

Government subsequently spent some $200m. to establish proper surveillance for Customs. The Customs Department wanted to discourage whistleblowers.

Freedom of Information

11. Access to the relevant documents may allow a more informed decision to be made as to how the tender process occurred and whether the process was corrupted in some way. Government Business Enterprises are excluded from FOI. The rationale for excluding GBE's from the FOI process is that they are part of a competitive market and as such are subject to sufficient controls. GOC's in Queensland excluded form the FOI process include Queensland Rail and the Queensland Investment Corporation. There is presently being prepared new legislation which is intended to broaden the availability of information from government. It followed the Solomon report.[22]

Alternative discovery of information

12. If an action is commenced, then a party is entitled to discovery of documents. This would not normally occur until after pleadings are closed. Early discovery can occur.[23] This is what occurred in *Hughes Aircraft Systems International v Civil Aviation Authority* (1995) 217 ALR 303. Hughes Aircraft Systems had some cause to believe that CAA had possession of documents which would assist it in making a decision to obtain relief against Airservices Australia.[24] Hughes had been the unsuccessful tenderer in a two party bid for the award of the Australian Advanced Air Traffic System. Hughes sued Airservices Australia for breach of contract, a breach of the *Trade Practices Act 1974* (Cth), for negligence and equitable estoppel.

---

22 Right to Information paper, by David Solomon AO, 10 June 2008

23 See 15A r 6 of the Federal Court Rules; UCPR (Qld) r 214(2)(a)

24 op cit 146 ALR 1

Injunctive relief

13. It is open for an unsuccessful tenderer or employer to seek injunctive relief. In relation to the latter, the case of *Glaxo Smith Kline Australian Pty Ltd v Ritchie & Anor*.[25] In Glaxo, the undertaking given by the former employee, Mr Ritchie, was not broad enough to prevent him from using his general know how. Before an injunction could be granted, it is necessary to properly identify the information sought to be protected. Glaxo failed to do so. An injunction will be granted to prevent an employee from subverting his or her "employer's business in furtherance of a competitor's or his own interest." [26]

14. In relation to an unsuccessful tenderer, it is more problematical for different reasons. If an injunction is to be granted, the party seeking same is required to give an undertaking as to damages which may flow from such an undertaking. In that event, if a project is delayed whilst the litigation progresses, it may result in significant damages being awarded if the injunction is given but the unsuccessful tenderer loses the case. It leads to uncertainty for all involved. Judicial review is more desirable if a government tender is involved. It is more expeditious and some finality can be achieved without the exposure to damages.

Public and private rights

15. As has been mentioned, judicial review is available where a government entity is involved and a decision made under an enactment.[27] Where a dispute arises in the private sector, an action for damages for breach of contract or a breach of the *Trade Practices Act 1974* is available.[28] Of course, an action can be brought against the government for breach of contract. However, there are certain difficulties applying the *Trade Practices Act* where the government entity is not a trading corporation.[29]

---

25 (2008) VSC 164 is relevant

26 op cit at [70]

27 *Concord Data Solutions op cit; Hawker Pacific Pty Ltd v Freeland* (1983) 52 ALR 321

28 See *Hughes* case op cit

29 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1; *J S McMillan Pty Ltd v Commonwealth* (1997) 174 ALR 419