Probity When Engaging Private Sector Consultants

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INTRODUCTION

Probity: uprightness, honesty - Concise Oxford 6th edition.

Most Government agencies are going through a downsizing phase. In order to maintain workloads there has been a corresponding increase in use of external consultants. Nowadays every case of consultant engagement could be subject to allegations of bias or corruption. Probity must be present, and be seen to be present in every selection process.

I work in the Strategic Procurement Services Group (SPS) of the Department of Public Works and Services (DPWS). The SPS Group are responsible for the investigation all complaints concerning tendering across the NSW Government. My area of responsibility covers all matters dealing with consultants such as:

- Allegations of corruption,
- Advice of tendering
- Tender assessment
- Commercial conditions or consultant agreements
- Consultant performance.

NSW GOVERNMENT PROCESSES

The overarching document containing rules for engaging consultants is "Guidelines for the engagement and use of consultants" issued March 1996. This document was prepared by Public Employment Office of NSW (PEO). At DPWS this document has been expanded in the Tendering Manual and Consultant Management Manual.

PEO Guidelines state "The NSW Government expects that the professional expertise of public employees will be used as a first option in preference to engaging consultants. Consultants should only be engaged when the required professional expertise is not available internally or cannot be provided in a more cost effective manner than can be obtained by engaging a consultant.

That is, within DPWS our own staff get first option on each job.

The key principles to be satisfied when engaging consultants concern:

- value for money,
- proper and impartial process,
- proper and ethical practices by consultants, and
- accountability.

Value for Money

Value for money is pursued through fair and effective competition. The levels of competition should be consistent with the financial value of the project.

Following the engagement of a consultant value for money should be pursued through monitoring their performance and an evaluation of their services. Would you be happy to work with this company again?

Proper and Impartial Process

The skill, knowledge and experience of those staff engaging consultants should be appropriate to the nature and complexity of the engagement.

Rigorous procedures for inviting and assessing bids will safeguard against favoritism, improper practices and opportunities for corruption.

Commercially sensitive information should be treated confidentially. In July 1996 the NSW Government issued the **Code of Tendering**. This Code explains the obligations of both the Government as client and the supplier or consultant. A key feature of the Code is that the Government will not cause the industry to unnecessarily incur tendering costs. This will be elaborated more later when discussing the minimum number of bids to be sought when tendering.

Accountability

Executives, Managers and others involved in the tender process for either procurement or disposal must be aware of their responsibilities and should be able to account for their actions and responsibilities. They should also be able to account for the actions of their staff.

Each officer should keep records of all procurement or disposal decisions including the reasons for such decisions. The records must be kept in a manner such that they can be audited.

As mentioned earlier all complaints concerning tendering against NSW Government agencies are managed or investigated by SPS Group on behalf of Chairman of State Contracts Control Board

Government agencies are to record and report on expenditure for consultants as required by the Annual Reports Acts.

TENDERING

Minimum Number of Bids

The optimum level of competition should obtain the best value for money without imposing undue costs on industry. Minimum levels of competition as recommended in PEO Guidelines are:

Estimate of fee less than $20,000: One (1) written proposal (where fee is reasonable and consistent with the market)

Estimate of fee $20,000-$100,000: Three (3) written proposals

Estimate of fee above $100,000: Expression of interest or open tender

Cases where the number of bids sought varies from the above should be documented.

The NSW Government Code of Tendering places certain obligations on both the Government and consultant. These include

Government Obligations

- Tendering method: Government should use their best endeavours to select a tendering system best suited to the project.
- Fair Dealing: Government should not call tenders without a firm commitment and capacity to proceed. Negotiations cannot be entered into where 'bid shopping' takes place. Confidentiality of tender information should be observed throughout the tender process.
- Project definition: Government should ensure sufficient has taken place to enable the proper preparation of tender documents.
- Tender procedures: Procedures should be in place to address advertising, enquiries by tenderers,, addenda to tender documents, evaluation and negotiation with tenderers.
- Outcomes of tender: Debriefing should be available for unsuccessful tenderers.

Tenderer's Obligations

- Tenderers should not submit proposals without a firm intention to carry out the work.
- Tender's should thoroughly review documents before submitting a proposal.
- Formulation of proposals: The tenderer should comply with all statutory and legal obligations (no secret commissions etc..). The proposal should address the tender documents. Tenderers must not engage in uncompetitive behavior (ie secret agreements between tenderers etc..).
- Tenderers must lodge their tenders as advised.
- Tenderers should address al client enquiries.
- Tenderers should make themselves available for Government meeting concerning the tender.
- All information supplied by Government through tender documents should be treated confidentially.

COMMON PROBLEMS

The Group I work in provides expert advice on tendering and tender assessment. I will outline some of the problems I see when working in this area.

Brief

The Brief is the source of most problems when engaging a consultant. Whether entering a simple engagement or a service level agreement, most problems occur with a poor description of the outputs to be delivered and the criteria against which their proposal will be judged. Nearly all staff preparing a Brief are under considerable pressure to hurry the process, get through the tendering and onto the 'real' job of executing their duties under the contract.

Most complaints received from consultants concerns the quality of the Brief they have been asked to submit a proposal for.

Assessment criteria

- The criteria for assessing submissions should be clearly defined.
- Any mandatory criteria should be highlighted.
- The criteria should be listed early in the Brief.
- Weightings for criteria should be resolved and recorded before tenders close.

Tender Box

Use a tender box whenever submissions have been called from more than one consultant. Government officers cannot defend themselves from allegations of corruption when tenders close on an officer's desk instead of a tender box.

Late tenders are thoroughly dealt with in the NSW Government Code of Tendering. In short, late tenders are usually not accepted unless the cause of the lateness was outside of the control of the company making the submission. This excludes any excuse by couriers or broken facsimiles etc. Commercial considerations are not an accepted reason for considering late tenders.

Assessment of Proposals

Staff reviewing proposals are usually asked to read and sign an ethics/confidentiality agreement. This is a statement that describes their role during tender evaluation and explains their responsibility with regard to confidentiality and any conflicts of interest.

When proposals are to be assessed by a review team make sure all team members read the Brief. Then make sure all the team members read all the submissions!

My Department usually conducts interviews with those firms making submissions when the estimated fee is above $150,000. The assessment combines the material submitted through the tender box as well as what is said at interview.

Any qualifications from what was requested in the Brief should be resolved with the consultant before scoring any proposals.

Tenderers are scored against each criteria through consensus of the team.

The best overall proposal is recommended for acceptance.

The person or team who recommend a consultant firm is never the person who approves the engagement. Approval always come from someone outside the assessment process.

Feedback

DPWS provides feedback to any unsuccessful tenderer who requests a debriefing. The feedback covers the shortcomings of that company's proposal rather than the details of the winning proposal. DPWS do not disclose the winning fee but rather talks about all the assessment criteria. Where there are multiple assessment criteria (experience, past performance, program and price), the submission with lowest fee is successful in only about 60% of tenders.

Engagement

The contract for the engagement of the consultant comprises

- The Brief
- The proposal
- Letter of engagement

The letter of engagement should tie the brief and proposal together to ensure that all outputs listed in the brief will be delivered. Any discrepancies between the Brief and a proposal should have been resolved during the evaluation of the proposals. Variations, copyright, payment and dispute resolution are covered by the commercial clauses or general conditions of engagement.

Performance

DPWS monitors the performance of all its suppliers. Details of all engagements are entered into a computerized management system. Companies with a record of poor performance are noted and may have their opportunities to tender limited.

CONCLUSION

As you can see, tendering is not rocket science. However many Government officers fall into considerable difficulty in not taking the time to work thoroughly through the necessary steps. When investigating complaints from dissatisfied tenderers, Government executives rarely agree that the urgency of a project was sufficient reason to compromise the probity of the tender process.