

South Australian Procurement Forum

The Hon. Bruce Lander Q.C.

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Adelaide Convention Centre

Establishment, Functions and Powers of ICAC

I took office as the Independent Commissioner Against Corruption when *The Independent Commissioner Against Corruption Act 2012* commenced in September of this year.

There are three core objectives of the ICAC Act, only one of which needs to be considered for today's address.

The Independent Commissioner Against Corruption has been created with functions designed to identify and investigate corruption in public administration; and to prevent or minimise corruption, misconduct and maladministration in public administration.

The functions of the Commissioner are very broad. In addition to investigating corruption, the Commissioner must:

- Assist inquiry agencies and public authorities to identify and deal with misconduct and maladministration in public administration;
- Give directions or guidance to inquiry agencies or public authorities;
- Evaluate practices, policies and procedures of inquiry agencies and public authorities;
- Conduct or facilitate the conduct of education programs to prevent or minimise corruption, misconduct or maladministration in public administration; and
- Review a legislative scheme at the request of the Attorney-General.

To perform the function of investigating corruption the Commissioner has been given extensive investigative powers. The Commissioner and the Commissioner's employees are to be regarded as a law enforcement body.

Definitions of Corruption, Misconduct and Maladministration

There is no offence of corruption but corruption is a generic word that includes a number of offences under the *Criminal Law Consolidation Act 1935*, the *Public Sector (Honesty and Accountability Act) 1995* ('the Honesty and Accountability Act') and the *Public Corporations Act 1993*. These offences include bribery, abuse of public office, and offences relating to appointment to public office, as well as various duties to act honestly.

Corruption also includes any offences committed by a public officer while acting in his or her capacity as a public officer.

No new offences are created.

A public officer cannot be said to have acted corruptly unless the public officer has committed an offence.

Misconduct occurs when a public officer contravenes a Code of Conduct or is involved in any other misconduct while acting in his or her official capacity.

Maladministration includes irregular and unauthorised use of public money or substantial mismanagement of public resources. It can also include substantial mismanagement in relation to the performance of official functions. It includes conduct resulting from impropriety, incompetence or negligence.

What is Procurement?

Section 4 of the *State Procurement Act 2004* (SA) ('the Procurement Act') defines 'procurement operations' in relation to a public authority to mean:

- the **procurement of goods or services** required by a public authority for its operations;
- the **management of goods** of a public authority including the care, custody, storage, inspection, stocktaking or distribution of goods of a public authority;
- the **management of a public authority's contracts for services**; or
- the **disposal of goods** surplus to a public authority's requirements.

The concept of procurement therefore extends far beyond purchasing and choosing a supplier. Procurements are not limited to purchasing goods or services but in respect of goods may include the leasing, hiring and even the borrowing of goods. Procurement includes the managing of goods of a public authority, irrespective of how the authority has come to possess those goods. It also includes the management of contracts for services that would involve evaluating services that have been supplied to ensure they meet the standards provided by the service agreement. It also includes the finalisation of a contract and disposing of surplus goods.

The 'procurement operations' as the process is called, inherently presents a number of risks. Both the Procurement Act and the Procurement Board exist to manage those risks. There is a risk that public officers will act where they have a conflict of interest and abuse their position of power. Significant amounts of money are expended that accentuates the risks. In its last Annual Report, the Procurement Board reported that the public authorities that are required to report to the Board, spent a total of **\$3.97 billion** on goods and services for the financial year ending 2013. It is therefore of the utmost importance that public authorities do all that they can to avoid and minimise risks in the procurement process.

State Procurement Board

The State Procurement Board which replaced the State Supply Board was established by s 6 of the Procurement Act and is an agency of the Crown. The Board consists of a presiding member and 8 other members (half of which come from public authorities and half of which do not) who have a practical knowledge of, and experience in procurement, private commerce or industry, industry development, industrial relations, information technology, risk management, environmental protection, communication services and social inclusion.

The Board has very wide functions.

Section 3 of the Procurement Act identifies the object of that Act, which is 'to advance government priorities and objectives by a system of procurement for public authorities directed towards:

- (a) obtaining value in the expenditure of public money; and
- (b) providing for ethical and fair treatment of participants; and
- (c) ensuring probity, accountability and transparency in procurement operations.'**

It is the last stated objective that I, in my role as the Independent Commissioner Against Corruption, will be most concerned. This is where the work of the Procurement Board and my office is likely to intersect.

If there is a lack of probity, accountability or transparency in procurement operations by a public authority, this may give rise to a potential issue of corruption, misconduct or maladministration in public administration as defined in the ICAC Act.

The ICAC Act reaches out to all public authorities identified in Schedule 1 of the ICAC Act.

The definition of public authority in the Procurement Act is different to, and not as wide as, the definition in the ICAC Act. Whether that will mean that some public authorities that are answerable under the ICAC Act are not caught by the Procurement Act might need to be determined.

Section 19 of the Procurement Act requires all public authorities to comply with the policies, principles, guidelines, standards, etc issued or given by the Board and any other direction given by the responsible Minister on the advice or recommendation of the Board. Section 20 provides that the principal officer of a public authority is responsible for the efficient and cost effective management of procurement operations of the authority.

In May 2013 the Board published its most recent version of its Procurement Policy Framework which sets out the overarching policy for the operations of procurement in the Government of South Australia.

That policy framework has to be understood having regard to the requirements of the Procurement Act, the Boards purposes and functions and its policies and guidelines. It applies to all public authorities defined in the Act but not local government or universities.

The Boards Policies and Guidelines relate to 5 Procurement subjects:

- Governance
- Reporting
- Requirements
- Context
- Process

Public authorities must also be aware of the Boards Market Approach Guidelines and Probity and Ethical Procurement Guidelines. Time does not allow for a discussion of these documents all of which necessarily descend into considerable detail.

The failure of a public authority and its principal officer to comply with the policies, principles, guidelines, and standards of the Board or the responsible Minister will ordinarily, be relevant to an assessment that a matter raises a potential issue of misconduct or maladministration.

Indeed the failure may of itself amount to misconduct or maladministration.

I would encourage all public authorities to revisit all of the Board's policies, principles, guidelines, standards, and directions, to ensure that their authority's procurement practices comply with these policies.

Procurement Corruption

There are several specific criminal offences that can be categorised as corruption under the ICAC Act that might occur at any stage of a procurement operation.

It might be said that offences that come within the definition of corruption will be dealt with in the ordinary way, by the criminal justice system, commencing with a police investigation.

That was how it was before the ICAC Act.

But that is no longer how it is.

If a public officer engages in conduct that is a criminal offence of the kind recognised as corruption under the ICAC Act, I will have the responsibility of investigating the conduct.

I have coercive powers that the police do not possess. Because of these powers it is likely that offences that constitute corruption will be more likely to be detected. Public officers in South Australia should be aware of the significant changes that have been brought about by the creation of my office.

Bribery and Abuse of Public Office

Part 5 of the CLCA prescribes offences relating to public office that constitutes corruption. Section 249 prescribes the offence of bribery and section 251 the offence of abuse of public office. These offences encompass the public's common conception of corruption in public administration. The risk of a public officer being bribed or abusing the public officer's office during the procurement operation is undeniable. Where a public authority lets out a contract for tender, the procurement operation is likely to become extremely competitive and tenderers may seek to do everything they can, legally or illegally, to obtain an advantage over other tenderers. Similarly, public officers enjoy a degree of power when deciding whether a contract should be let out for tender, or when deciding to choose one supplier over another. Public officers will be confronted with temptations that raise serious ethical questions throughout all stages of procurement.

There are three elements that are common to both offences:

- acting *improperly*,
- the offering of, seeking or accepting a *benefit*, and
- the exercise of a *power or influence*.

Acting improperly

The notion of acting improperly is defined in section 238 of the CLCA. It applies to a public officer and a person who act in relation to, or deals with, a public officer.

A public officer or person acts improperly if he or she knowingly, or recklessly acts contrary to the standards of propriety that are generally and reasonably expected by ordinary, decent members of the community to be observed by public officers. Therefore, what is improper is to be assessed with regard to reasonable contemporary standards. It is necessary to consider the role and position of the public officer or person when determining whether their conduct can be said to be improper. This is a particularly important consideration in the

context of the procurement operation. The procurement of goods or services of significant value might ordinarily involve a number of persons. Public authorities should ensure that each person's role in a procurement operation is clearly defined and articulated at a very early stage in the process. It will assist my office to know the role each person played during a procurement operation in order to determine whether that person acted improperly. For example, if the alleged conduct was outside the scope of their identified role in the procurement process that may indicate that that person has acted improperly.

Benefit

The second element common to both a bribery and abuse of public office offence is the concept of a benefit. Part 7 of the CLCA does not define this term. A benefit takes on its ordinary meaning and is not to be construed narrowly.

The benefit that most readily comes to mind, particularly when considering a bribery offence, is a monetary benefit. It would, however, be naïve to think that benefits are limited to monetary benefits. The Australian Concise Oxford Dictionary defines 'benefit' to mean 'a favourable or helpful factor, circumstance; advantage, profit; or to receive an advantage or gain'. A benefit could therefore be in many different forms that result in a positive circumstance by placing a person in a better position. I will give you an example. During a tender process, a tenderer offered the CEO of the public authority a position on the Board of a subsidiary company of the tenderer when the CEO retired from his or her public office, in return for being awarded the contract. The position on that Board is a benefit to the CEO. Another example is after a tender process the successful tenderer offers the CEO of the public authority season tickets to all the Crows games at the refurbished Adelaide Oval, as a 'gift' for the tenderer being awarded the contract. The season tickets are a benefit to the CEO.

Benefits extend to gifts, however small or insignificant they might be. Gifts undoubtedly influence a person's decision-making, even if it be subconscious influence. In its 2011 report on corruption risks in NSW Government Procurement, the New South Wales ICAC reported that a particular supplier told the Commission that its sales representatives were trained to offer small novelty items. The rationale for the offer was that people feel psychologically indebted to the sales representative if they accept items and are thereby more likely to buy products.¹ That conduct by the sales representatives constitutes grooming and is unacceptable behaviour.

The purchase of printer toner cartridges in *Victoria* was investigated by the Victorian Ombudsman in 2011.² Over four years a project officer employed by Arts Victoria purchased 129 toner cartridges. This was enough to last for the next 40 years. Each cartridge had a life span of about 2 years. As a result, the majority of the cartridges would necessarily be wasted. The project officer made these purchases so she could obtain gift cards given by the supplier to those who placed orders with them. Over the four years, she received a total of \$8,300 worth of gift cards. The department was put to a cost of more than \$80,000 than what it needed to spend on toner cartridges.

The Victorian Ombudsman discovered that there was an accepted culture at Arts Victoria of staff receiving gifts and benefits in the form of free tickets to art shows including operas, theatres and ballets. Although the department had a clear policy prohibiting staff from accepting any gift or benefit from people or organisations with whom staff might make decisions involving procurement, and the department maintained a gift register, that register did not contain any record of any gift for the whole of the 9 month period over which some of

¹ NSW ICAC, *Corruption Risks in NSW Government Procurement*, December 2011, pg 4: http://www.icac.nsw.gov.au/documents/doc_download/3852-corruption-risks-in-nsw-government-the-management-challenge-december-2011

² Victorian Ombudsman, *Corrupt Conduct by Public Officers in Procurement*, June 2011, pg 13: http://www.ombudsman.vic.gov.au/resources/documents/corrupt_conduct_by_public_officers_in_procurement_june_2011.pdf

the officer's conduct allegedly occurred. The culture within the department clearly influenced the officer's behaviour.

I have already been approached by three organisations who deal with local government expressing their concern at the local government's reaction to the creation of my office.

I have been told that a significant number of persons in local government are refusing to accept small gifts, free meals and entertainment.

I think I was being accused of being responsible for this change in behaviour.

I hope I am responsible.

Local government introduced a Code of Conduct on 29 August 2013 that applies to members of local government in anticipation of me commencing my appointment on 1 September 2013. That addressed among other things, gifts and benefits. Those involved in local government, both members and employees who have accepted a culture of accepting gifts and benefits from persons with which the local council has contractual obligations, must now comply with the Member's Code of Conduct and the soon to be introduced Employee's Code of Conduct..

Exercise of power or influence

The third element common to these offences is the exercise of a power or influence a public officer has by virtue of being a public officer. Public officers involved in a procurement operation possess for the time being a significant amount of power. This extends to public officers who make the ultimate decisions about whether a contract is awarded to one tenderer over another and to public officers who merely have access to information relating to the procurement of goods or services. For the purpose of these offences it is not a

requirement that it be a *significant* power or influence; it suffices that the source of the power or influence is derived from the person's position as a public officer.

Dishonestly Dealing with Documents

As I have said, section 5(1)(c) of the ICAC Act includes in the definition of 'corruption in public administration' as "any other offence committed by a public officer in the public officers capacity as a public officer". There is one particular offence that I think is directly relevant to procurement practices and processes. Section 140 of the CLCA makes it an offence for a person to dishonestly deal with a document. The circumstances in which a person might dishonestly deal with a document includes creating a document that is false, falsifying an existing document, possessing, producing, publishing or using a document knowing it to be false, or destroying, concealing or suppressing a document. If that person is a public officer and is dishonestly dealing with a document in his or her capacity as a public officer, in order to

- deceive or exploit the ignorance of another;
- to benefit himself or herself or another person; or
- to cause detriment to another, then that constitutes an offence, which constitutes corruption in public administration under the ICAC Act.

You are all familiar with the amount of documents that can be created during a procurement operation. They are created by a number of different parties. Proper record-keeping and documentation throughout the procurement process is crucial in ensuring transparency of the process. Procurement documents should not be created for the sake of simply creating a document. The documents must be meaningful. Public officers must understand what is to be included in procurement documentation and who has the responsibility to complete the documentation.

A case that points out the importance of meaningful documents was identified in an investigation by the New South Wales ICAC in 2011.³ The Commission investigated the conduct of a person who posed as a researcher that resulted in two hospitals losing almost \$700,000. The “researcher” convinced clinical and administrative staff at the hospitals that she was a post-graduate university student undertaking clinical trials on the use of a new device as part of her medical research. She was neither a post-graduate student nor a researcher. She prepared requisitions and orders that falsely purported to be signed by various doctors in order to procure payment to three companies controlled by her and her sister. The services purported to be related to the clinical trial but no work was ever performed.

The researcher was able to succeed in having these invoices paid because it was almost impossible for the accounts payable clerks to check that every single invoice was appropriately signed by a person with the correct financial delegation. The clerks could not possibly know what the signatures of all those with delegation looked like or the names of the managers or doctors. So, they simply looked for a scrawl at the bottom of the invoice.

Theft

If a public officer commits an act of theft while acting in his or her capacity as a public officer that offence would constitute corruption for the purposes of the ICAC Act. There is a relatively high risk of theft in the procurement process. An example is where a public officer who is responsible for receiving goods from a supplier dishonestly records that less goods were received than were in fact delivered so that he or she can steal the goods not recorded.

³ NSW ICAC, *Corruption Risks in NSW Government Procurement*, December 2011, pg 20:
http://www.icac.nsw.gov.au/documents/doc_download/3852-corruption-risks-in-nsw-government-the-

Duty to Act Honestly

Section 26 of the Honesty and Accountability Act requires all public sector employees to act honestly at all times in the performance of the employee's duties. A failure to act honestly amounts to corruption for the purposes of the ICAC Act. The conduct involved must not be merely of a trivial character and must have resulted in significant detriment to the public interest. The terms used in this offence provision are not defined in the Honesty and Accountability Act. What might amount to a failure to act honestly will depend upon the particular facts and circumstances of each case and whether the impugned conduct falls short of the standards of honesty and accountability that the community would ordinarily expect. A failure to act honestly might occur at any stage of the procurement process. Two examples: if a public officer knowingly misleads a particular tenderer or, where a public officer discloses confidential tender information to another tenderer to give that tenderer a competitive advantage. Unlike the offences of bribery or abuse of public office, a benefit to a person is not an element of this offence. The key element for this offence is whether the conduct resulted in a significant detriment to the public interest. It is arguable that in cases where significant public monies are to be expended and the process for expending those monies is tainted, the public interest will have suffered a significant detriment.

Contractors

The position of contractors should be addressed. Although the function of the Procurement Board does not appear to extend to scrutinising the conduct of contractors, my jurisdiction does extend to contractors in certain circumstances.

Schedule 1 of the ICAC Act identifies public officers, and public authorities responsible for those officers, to whom the Act applies. A person performing contract work for a public authority or the Crown is a public officer for the purpose of the ICAC Act. 'Contract work' is defined in section 4 of the Act as 'work performed by a person as a contractor or as an

employee of a contractor or otherwise directly or indirectly on behalf of a contractor'. If the work is performed for a public authority, then that public authority is responsible for that contractor. In any other case, the Premier is the public authority responsible for that contractor.

The important thing is that for the ICAC Act, a contractor is a public officer and therefore within the remit of the ICAC Act.

Section 29 of the Honesty and Accountability Act requires persons performing contract work to act honestly at all times in the performance of the contract. Section 30 of the same Act requires persons performing contract work to disclose all potential and actual conflicts of interest to the authority with which they are contracted.

These offences will be corruption under the ICAC Act. If a public authority or public officer reasonably suspects a contractor to have engaged in conduct in breach of these provisions, the authority or officer is obliged to report the conduct to the OPI.

Procurement Misconduct

The Public Sector Code of Ethics mentions one particular type of "procurement misconduct" that I would like to draw to your attention. The Code of Ethics prohibits a public sector employee engaging in outside employment where that employment potentially or actually conflicts with the public sector employee's work as a public sector employee. This section of the code also requires public sector employees who leave the public sector to work with a non-government employer to avoid situations which would result in an unfair advantage with the new employer. The code then specifically exemplifies the case where the non-government employer is bidding for a government contract or is competing for a grant or similar disbursement of public moneys.

I note the Procurement Board's standard bidding rules require that suppliers identify actual or potential conflicts of interest, presumably at the point a supplier makes its bid for the contract.

Sections 29 and 30 of the Honesty and Accountability Act deal more specifically with conflicts of interest at the point where tenderers actually become suppliers. I would encourage all public authorities to seek to identify any conflict of interest or unfair or improper advantage a tenderer might have *at the point of a bid being entered*. This will assist in stamping out corruption at the beginning of the process.

The Six Stages of Procurement

1. Identifying a need

The first step in any procurement process is identifying a need for a good or service. This requires a proper analysis of precisely what is needed, why it is needed and when it is needed.

Public authorities should also give some thought as to the person within the agency who is to be responsible for identifying needs. In its 2011 report, the New South Wales ICAC identified that at one local council, the lowest paid employee, a storeman, was responsible for 60% of the value of the council's procurements, excluding all capital works expenditure.⁴ If there is only one person charged with identifying the agency's needs, the agency is exposed to the risk that the agency's needs might be tailored to what that one person's associates can provide. Further, as the New South Wales ICAC states, if corruption at this very early stage

⁴ NSW ICAC, *Corruption Risks in NSW Government Procurement*, December 2011, pg 4:
http://www.icac.nsw.gov.au/documents/doc_download/3852-corruption-risks-in-nsw-government-the-management-challenge-december-2011

is not detected, the rest of procurement can follow proper process and appear compliant when, in fact, the whole process was corrupt from the very start.⁵

The procurement process must be created upon a real need basis, not simply a “it would be nice to have” basis.

Sometimes a special need or an emergency requirement is used to justify adopting a single stage approach or negotiating directly with just one supplier. Public authorities should guard against the false creation of a special need or emergency by identifying the criteria to be satisfied in order for a need to be considered special or urgent. Another mechanism might involve a review by a senior officer who has the responsibility of independently assessing whether a need is special or urgent.

2. How to get what is needed

The Procurement Board in its “Market Approaches Guideline” outlines several methods by which a public authority might obtain goods and services from the market. I would like to mention briefly the ‘single stage approach’ and ‘direct negotiation’.

The Board in its Guideline appropriately identifies that a single stage approach carries an increased risk in relation to unethical practices or conflicts of interest. Direct negotiations give public officers greater opportunity to engage in corrupt conduct by, for example, giving a supplier additional work in the hope of a kickback; splitting an excessive profit margin; or obtaining work for a favoured subcontractor.⁶

⁵ NSW ICAC, *Corruption Risks in NSW Government Procurement*, December 2011, pg 14: http://www.icac.nsw.gov.au/documents/doc_download/3852-corruption-risks-in-nsw-government-the-management-challenge-december-2011

⁶ NSW ICAC, *Corruption Risks in NSW Government Procurement*, December 2011, pg 19: http://www.icac.nsw.gov.au/documents/doc_download/3852-corruption-risks-in-nsw-government-the-management-challenge-december-2011

I have no difficulty in accepting that there may be many instances where it is appropriate for a public authority to approach only one particular supplier. Indeed in the Board's last Annual Report the Board noted that 37.4% of contracts valued over \$110,000 were negotiated directly with one supplier.

A public authority should ensure that where a single stage market approach is adopted it is well placed to support the procurement decision with clear and comprehensive evidence. My office may need to carefully consider a public authority's decision to negotiate directly with a single supplier and any evidence supporting the need for the single market approval will assist in such consideration. Transparency is the key for this type of process.

In relation to letting out a contract for tender, a public authority should be vigilant in ensuring its officers do not have the opportunity to stage a failed tender. In its 2006 report, the ABD/OECD Anti-corruption Initiative for Asia and the Pacific identified examples of this process by a corrupt public officer setting inadequate bidding conditions, including short or unrealistic bidding periods, or unrealistic or contradictory requirements, specifications, or budgets, or by insufficiently publicising the bid opening.⁷

False tender failure can be addressed by ensuring the tender is made known to the wider number of suppliers possible. As the ABD/OECD note, a higher number of bidders diminishes the risk of collusive bidding cartels as well as reducing opportunities for favouritism and nepotism. Publishing a tender widely therefore assists in averting corrupt practices.

3. Choosing the Supplier

It is important to have a detailed knowledge of the supplier who is to become the contractor. A public authority must by due diligence ensure that it is aware of exactly with whom the public authority is contracting which will reduce the risk of corruption. There are two good reasons for ensuring that the public authority or agency is aware of exactly who the contractor is.

First, having a solid understanding of a supplier will allow a proper assessment as to whether the supplier can deliver on the contract in the terms of the contract. If a supplier submits a low bid in a tender process it may be because it does not in fact have the ability to meet all of the terms of the contract but is pretending that it can . Referee checks may uncover any inabilities of the supplier.

Secondly, knowing exactly who is supplying the goods or services will assist in identifying any hidden associations and conflicts of interest. A supplier can be apparently independent but be no more than a front for the public officer in charge of the tender process.

It is necessary therefore to know the structure of the tenderer, including sometimes its Directors and Secretary, often its ultimate beneficiaries.

A public authority needs to know who is entitled to the benefit of the contract into which the authority intends to enter. Experience shows that procurement officers do award contracts to entities that are fact fronts for relatives and friends and which pay the procurement officers for the benefits bestowed.

⁷ ABD/OECD Anti-corruption Initiative for Asia and the Pacific, *Curbing Corruption in Public Procurement in Asia and the Pacific - Progress and Challenges in 25 Countries*, 2006, pg 16:

4. Sealing the deal

This stage involves carefully drafting the terms of the contract and a contract management plan. This assists in informing the later stages of the procurement process. The subject matter of the procurement i.e. what is to be supplied, the how, the when and to whom it is supplied should be precisely identified in respect of all procurements. The terms and conditions of the contract must also be clear and free of contradictions.

If the contractual arrangements are loose or vague the opportunity for persons to take advantage about what, when and at what cost it is supplied will be increased. It almost goes without saying that no procurement should be pursued, unless it be at cost of a few dollars, without clear documentary evidence of the terms relating to the procurement.

5. Are you getting what you paid for

Verifying delivery is crucial. There are obvious reasons why a public authority should know exactly what is provided and comparing that provided what was agreed to be provided. I give another example from New South Wales.

I suppose it would be inappropriate to observe that New South Wales seems to be able to provide as many examples of corruption as are needed.

In 2004 the New South Wales ICAC investigated a regulatory agency which was responsible for certifying operators of heavy machinery and plant and equipment and which had outsourced the competency assessment.⁸ The investigation revealed that six assessors issued tens of thousands of notices of satisfactory assessment without having properly conducted an assessment. In some cases no assessment was ever carried out. The

<http://www.oecd.org/site/adboecdanti-corruptioninitiative/37575976.pdf>

⁸ NSW ICAC, *Corruption Risks in NSW Government Procurement*, December 2011, pg 17: http://www.icac.nsw.gov.au/documents/doc_download/3852-corruption-risks-in-nsw-government-the-management-challenge-december-2011

assessors were being bribed to issue competency notices. The audits carried out by the regulatory agency had failed to identify almost all instances of the corrupt conduct. There were no proper mechanisms of quality control to validate the claims of competency made by the outsourced agency. Therefore, the regulatory agency had no way of actually knowing if it was getting that for which it was paid.

6. Did you get what you paid for and what to do with surplus

At the end of every contract, especially a contract of significant value, it is necessary to determine whether the agency has received what it in the first stage, identified it needed.

A proper procurement process requires the responsible person to certify that the five stages of the process have been complied with and in the sixth stage to certify that the authority has now received, on time, at the agreed price, from the supplier with which it contracted, what the authority and ordered which was what the authority identified it needed.

Not only does that certification provide a rough audit it is a useful history of the public authority's dealing with that supplier. If the public authority cannot tick all the boxes the public authority should examine both its own performance and that of the supplier.

If surplus goods have been provided for whatever reasons these must be disposed of appropriately and at as little cost to the public authority. An asset disposal schedule should be part of a thorough audit process at this stage.

Some Risks

The QLD Crime and Misconduct Commission identifies on its website the major corruption risks in procurement. I will refer to five of these major risks.

1. Lack of accountability and transparency mechanisms

It is a major risk that might infect all stages of procurement. A public authority must have in place proper and meaningful mechanisms that will reveal any corrupt activity. This will involve creating a strong paper trail because a paper trail often reveals dishonest activities. In other instances, an accountable process will require more than one person being involved in each stage of the process.

2. Conflicts of interest

Conflicts can also occur at any stage of the procurement process. Conflicts can arise in many diverse ways; a friend or family member who becomes a beneficiary of the government contract. Where there is an actual or potential conflict of interest, it is important that public officers know that they are required to disclose that conflict and in fact disclose the conflict. The responsibility is upon senior officers of an agency to create a culture of disclosure and to ensure all public officers are aware of what interests might conflict or be perceived to conflict with their work as public officers.

3. Perceived favouritism

Public officers and suppliers can develop close associations over a period of time simply by working together. The development of close working relationships is natural but those relationships cannot be allowed to interfere with or be seen to interfere with the procurement process. In order to minimise this particular risk, public authorities should treat all suppliers or tenderers fairly and equally. This will involve communicating with each supplier in the same way by giving each supplier the same material, advice and timelines. It will also involve using

the same process of offers and evaluation. Any deviation from standard practice should be needed to be justified. It also means that those with procurement responsibilities might need to be routinely moved from their positions so that new persons are introduced to old suppliers.

4. Integrity of suppliers

The risk of contracting with an unethical or corrupt supplier is high. Unethical suppliers will attempt to influence the procurement process to gain an unfair advantage. They might collude with other suppliers or make false and multiple bids under different business names. The conduct is hard to detect. However, public officers need to be trained to identify such behaviour by generating a culture of curiosity in relation to suppliers. Public authorities should learn as much as possible about the suppliers to build up an internal database of suppliers or potential suppliers. A public authority will then be able to track a supplier's performance over time and will be able to detect any changes in the supplier's performance that might suggest untoward behaviour.

5. Gifts and benefits

Generating a culture and creating an expectation that all employees should refuse gifts and benefits, no matter how insignificant, is the only way to effectively prevent this risk. It avoids grooming which is an incipient risk.

Reporting Obligations - Directions and Guidelines

The ICAC Act requires a system to be established for the receipt by OPI, of complaints about public administration.

I was obliged by the ICAC Act to prepare Directions and Guidelines governing reporting to OPI of matters that an inquiry agency, public authority or public officer, reasonably suspects

involves corruption, misconduct or maladministration in public administration. I complied with that obligation and the Directions and Guidelines were published on 1 September 2013 on the ICAC website. A copy of the Directions and Guidelines is available at the Office for Public Integrity.

An inquiry agency is the Ombudsman, the Police Ombudsman and the Commissioner for Public Sector Employment.

A public authority is defined in Schedule 1 of the ICAC Act to include the Governor, the Ministers of the Crown, the Legislative Council, the House of Assembly, Statutory Authorities, Public Sector agencies, Local Government Bodies, the Commissioner of Police, and public authorities responsible for public officers. My office has identified more than 400 public authorities in this State that are subject to the ICAC Act.

A public officer is also defined in Schedule 1 and includes some of those who are also public authorities; the Governor, Ministers of the Crown, Judicial officers, Members of Statutory Authorities, all Public Sector employees, councillors and employees of local council, police officers and importantly persons performing contract work for a public authority or the Crown.

I have attempted to explain in Section 6 of the Directions and Guidelines what is meant by the term 'reasonably suspects' or 'forming a reasonable suspicion'.

Those Directions and Guidelines specify the matters required to be reported, and how they should be reported.

They also specify the reporting of matters, even if those matters have been referred to an inquiry agency or public authority.

The ICAC Act requires all inquiry agencies, public authorities, and public officers to report to the OPI in accordance with the Directions. It would be misconduct for a public officer to fail to comply with the reporting obligations.

The Directions and Guidelines distinguish between those matters which inquiry agencies, public authorities and public agencies must report to OPI and those that they may report. The Directions and Guidelines also provide for the manner in which those reports should be made.

The effect of the Direction and Guidelines is to make it mandatory for inquiry agencies, public authorities and public officers to report conduct that occurred after 1 September 2013, that those bodies or persons reasonably suspect involves corruption.

The Directions and Guidelines also oblige inquiry agencies to report serious or systemic misconduct or maladministration to OPI that occurred after 1 September 2013.

Public authorities and public officers must report serious or systemic maladministration to OPI unless the public authority or public officer knows that the matter has already been reported to an inquiry agency.

The intent of the Directions and Guidelines is to ensure that all conduct that anyone in public administration reasonably suspects involves corruption is reported to OPI. The further intent of the Directions and Guidelines is that all conduct, that anyone in public administration reasonably suspects involves misconduct or maladministration, is reported either directly to OPI or indirectly to OPI through an inquiry agency.

The end result is that if inquiry agencies, public authorities and public officers comply with the Direction and Guidelines, the OPI should become aware of all conduct that is reasonably

suspected to be corruption or serious and systemic misconduct or maladministration in public administration in the State including conduct of that kind at local government level.

The obligation to report includes the obligation to self-report. If a public authority reasonably suspects that it or someone has engaged in corruption or misconduct or maladministration within its own organisation which is serious or systemic, the public authority must report that conduct to the OPI.

The reason that the obligation is limited to conduct post 1 September 2013 is a practical one. If the Direction and Guidelines required an inquiry agency, public authority or public officer to report any impugned conduct that occurred before 1 September 2013, there would be no limit to their obligations. Those subject to mandatory reporting obligations would have to address conduct that may have occurred many years before the ICAC Act came into force and was conduct that was no longer relevant. The reporting obligations would be too onerous.

However, that does not mean that any of those bodies cannot report conduct of that kind to OPI. The Directions and Guidelines permit reports of conduct that occurred prior to 1 September 2013 to be brought to the attention of the OPI. Indeed, almost all of the complaints and reports that have so far been received by OPI, relate to conduct before 1 September 2013. That is of course unsurprising. The ICAC Act only commenced just over 3 months ago.

A closer reading of the Directions and Guidelines will reveal that the Directions and Guidelines do not apply to some public authorities and public officers, where those authorities or officers have learned of conduct only by reason of the discharge of their duties. For example, the Director Public Prosecution does not have to report conduct that he reasonably suspects involves corruption, misconduct or maladministration where he has

learnt of that conduct, only because the DPP is prosecuting a person in relation to the conduct.

If the Directions and Guidelines have been complied with by other public authorities and public officers, that conduct will have already come to the attention of the OPI.

The Procurement Board is a public authority under the ICAC Act and is therefore bound by the Directions and Guidelines that I have issued pursuant to section 20 of the ICAC Act. In accordance with section 10 of the Directions and Guidelines, the Procurement Board is required to report to the OPI any matter that the Board reasonably suspects involves corruption in public administration. The Board is also required to report to the OPI any matter that the Board reasonably suspects may involve **serious or systemic** misconduct or maladministration in public administration, unless it knows the matter has already been reported to an inquiry agency.

I expect all public authorities to comply with the Directions and Guidelines. If it becomes known to me that a public authority has failed to report as it is obliged, I will report as much to Parliament.

Can I raise a matter of concern.

During the investigations that are already being carried out by my investigators, they have often been asked who and what is the Independent Commissioner Against Corruption. That is concerning especially when it is a comment by middle management.

All public officers should be made aware of the existence of my office and the OPI. If they have not that is the fault of the public authority that employs them. There are two

consequences if public officers remain uninformed. First the deterrent effect of the creation of my office is lost. Secondly, they cannot possibly know of their reporting obligations to OPI.

Education

I have not said anything about education. The most cost effective way of dealing with corruption, misconduct and maladministration is by preventing that conduct.

Education is the most effective way of implementing a culture which embraces prevention.

It is one of my duties to minimise corruption, misconduct and maladministration by educating those involved in public administration.

I will deal with IPPA and the Procurement Board to establish educational programs to assist those involved in public administration to develop ethical and moral standards in the procurement process that makes for good governance.

Culture and Probity

I would like to finish by briefly mentioning the concept of 'probity'. The Australian Concise Oxford Dictionary defines probity to mean "uprightness and honesty". In the context of the procurement practices of public authorities, this largely translates into transparency. The public must have confidence in the operations of its government. In turn, the government must do all that it reasonably can to ensure it enjoys the highest levels of public confidence. This requires all organs of government to be able to explain their operations, especially operations that involve substantial expenditure of public monies. This is part of what my office will hope to achieve - greater levels of public confidence in procurement practices by identifying and dealing with such practices where they might raise issues of corruption, misconduct or maladministration.

In order to achieve the highest level of probity in public administration, I urge all public authorities to consider the culture within its own organisation which is largely informed by the quality of its management and the morality of its staff. Statement of policies are important but more important is the carrying out of these policies. Managers and senior public officers have a crucial role to play in that regard. The effect of leading by example cannot be underestimated.