



greater WELLINGTON
REGIONAL COUNCIL
Te Pane Matua Taiao

Public Transport Operating Model Procurement Probity Framework

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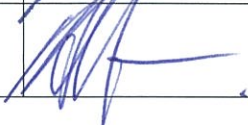
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Contents

1.	Introduction: About this document	1
1.1	GWRC's PTOM project	1
1.2	GWRC's expectations for this document	2
2.	Probity Management: Principles and Method	3
2.1	Probity and Probity Management	3
2.2	Probity principles and standards	3
2.3	Risk and Probity Planning	4
2.4	Framework objectives	5
3.	Key elements of probity management	6
3.1	Project governance and management	6
3.2	Probity risk management	10
3.3	Interests management	10
3.4	Management of interactions with tenderers and potential tenderers	18
3.5	Framework implementation in work streams	19
	Appendix 1: Applicable Good Practice	20
	Legal Requirements	20
	Good Practice Guidance	20
	Conflicts of interest and sensitive expenditure	21
	Appendix 2: Probity advice and probity assurance	23
	Role of the probity adviser	23
	Role of the probity auditor	24
	Appendix 3: Interest Declaration Form, Confidentiality Agreement and Management Plan	26
	Interest Declaration Form and Confidentiality Agreement	26
	Appendix 4: Probity Register - Confidentiality, Conflict of Interest and Management Plan	30

1. Introduction: About this document

This document establishes the probity framework for the Greater Wellington Regional Council ('GWRC'). The Framework was initially developed to carry out a series of consultation in relation to a new Regional Public Transport Plan ('RPTP'), and is now being used to maintain probity in a series of procurement processes for the operation of public transport services in relation to the Public Transport Operating Model ('PTOM'). The PTOM has been given statutory effect under the Land Transport Management Act 2003 ('Act'), as amended in 2013.

Probity management is a discipline designed to ensure ethical behaviour and procedural integrity in public sector procurement and related processes. This framework document describes:

- The principles and method for managing probity in New Zealand public sector procurements
- The organisational arrangements, tools, and processes for managing probity in the PTOM project
- The manner of implementation through a more detailed Probity Plan.

1.1 GWRC's PTOM project

The PTOM first requires GWRC to develop a new RPTP. The RPTP was adopted in June 2014, following public consultation. Integral to the RPTP is the design of a new bus network for the region, and the design and implementation of public transport units (as defined under the Act) for bus, rail, and ferry services. GWRC had also chosen to consult with existing bus operators in respect of the bus network and unit design, in advance of the public consultation process for the RPTP.

Following the adoption of the RPTP, the PTOM project involves a series of procurement processes in relation to rail services and the harbour ferry service (each of which comprise a single unit), and bus services (which form multiple units). The procurements are being carried out in accordance with the procurement requirements and guidance of the New Zealand Transport Agency ('Transport Agency'), consistent with GWRC's status as an 'approved organisation' under the Act.

Most of the processes involve competitive tendering. However, the transition to PTOM also allows for direct appointments to be made on a 'like for like' basis, in the case of existing services (previously registered under the Public Transport Management Act 2008) as commercial services.

A 'best practice' approach to probity management is essential throughout the project because of its scale and complexity, and the high expectations of public transport operators, the general public and other stakeholders.

1.2 GWRC's expectations for this document

Accessibility of this document will be a key element to the achievement of a 'best practice' approach. It is the intention that all GWRC Participants in PTOM procurements (ie, including Councillors, GWRC staff, contractors, and external advisers) will:

- Read this framework document
- Understand what GWRC wishes to achieve in terms of probity and why it is important
- Take individual responsibility for thinking about probity issues from the outset and applying the probity principles in the course of their work.

GWRC may also decide to make this document public, and/or disclose it to Respondents to any of the procurement processes (including Tenderers or prospective Tenderers). Disclosure increases the transparency of the PTOM processes, and also helps encourage a shared approach to probity management between GWRC and Respondents.

The project is substantial and will be delivered over a period of years. Accordingly, it is envisaged this framework will be a 'living document' which will be updated from time to time and used by all those involved in the project and the component work streams.

2. Probity Management: Principles and Method

2.1 Probity and Probity Management

At one level, probity management in a project (including the planning and preparatory stages) is concerned with ensuring that appropriate processes and systems are in place so that the integrity of the eventual outcome can be assured.¹

More broadly, public sector probity is about managing risks and ensuring value for money in public resourcing decisions, through ethical behaviour and procedural integrity.

Probity management does not therefore occur in isolation, but is a central element of achieving project outcomes and needs to be fully integrated into project governance, planning, and management.

2.2 Probity principles and standards

The following principles underlie the probity framework for the PTOM project and its component work streams.

2.2.1 Value for Money

- Probity expectations are embedded in project outcomes
- Probity is managed to optimise competition and drive the achievement of best value

2.2.2 Transparency

- Processes are well defined and documented
- Relationships are clear, with shared understandings

2.2.3 Fairness and impartiality

- Processes are applied lawfully and consistently, without fear or favour
- Unfair advantages are identified and addressed

2.2.4 Honesty and integrity

- Individuals and entities act appropriately and professionally
- Public sector standards of integrity and conduct are observed

¹ Australian National Audit Office, *Fairness and Transparency in Purchasing Decisions*, August 2007, 4.1

2.2.5 Addressing conflicts of interest or role

- Expectations about conflicts are clearly understood and articulated
- Conflicting interests and roles are identified, declared and managed
- Individuals and contracted entities avoid situations that could compromise their integrity or the integrity of the project

2.2.6 Confidentiality and security

- Confidences are respected, within clearly understood and documented limits
- Information is safeguarded

2.2.7 Accountability

- Information is available to assess performance, based on well-developed systems
- Strong project governance systems are in place
- Roles are clearly allocated, and parties are held responsible for their actions.

The principles do not stand in isolation. There is an extensive amount of good practice material, both internationally and within New Zealand, which provides the basis for probity expectations and standards in public sector procurement (including activities preparatory to a formal procurement process).

A summary of the applicable practice is to be found in Appendix 1.

2.3 Risk and Probity Planning

Internationally, good practice recognises two fundamental elements of effective probity management:

- The identification of probity risk
- The development of plans to manage those risks.

To quote the Australian National Audit Office in relation to public sector procurement:

Probity plans are a central part of the management of more-complex and higher risk procurement. Taking into consideration the scale and

sensitivity of the purchase, a probity plan is a means to identify and manage probity risk.²

2.4 Framework objectives

This framework is the control document that establishes the central mechanisms and procedures for identifying and managing probity risks, and other probity-related aspects, of the PTOM project. The key elements are:

- The governance and management structure for the PTOM project, including but not limited to:
 - The respective responsibilities for overseeing and managing probity across the project and in work streams
 - The means by which team members and advisers are accountable for implementing the project consistently with the probity principles
 - The roles of the independent probity adviser and the probity auditor.
- The tools and processes for identifying and managing probity risk in the PTOM project, and integrating probity into broader project and work stream planning and management.
- The policy on conflict of interest management, and the systems for disclosing, assessing, and managing conflicts of interest or role.
- The means of managing probity issues in each work stream (ie, rail, bus and ferry) through detailed Probity Plans.

These elements are set out in detail in sections 3.1 to 3.4.

Key areas of probity risk for the PTOM project have been identified for each of the PTOM project work streams and documented in the Probity Plans specific to each of these work streams. Additional risks will be identified and included in the Probity Plan for each component work stream of the project as it is brought online. The risk areas will be updated regularly and at key milestones, from a top-down and bottom-up perspective and having regard to wider risk management. This approach will ensure this framework, and its component parts, functions as a 'living document'.

The **Appendices** to this Framework contain the following template documents:

² Australian National Audit Office, *Fairness and Transparency in Purchasing Decisions*, August 2007, 5.1

- Interest Declaration Form, Confidentiality Agreement and Management Plan (Appendix 3)
- Probity Register - Confidentiality, Conflict of Interest and Management Plan (Appendix 4)
- Gifts and Invitations Register (Appendix 5).

3. Key elements of probity management

This section describes the key elements of the probity framework, as listed in section 2.4 and drawing on the principles set out in section 2.2.

3.1 Project governance and management

3.1.1 Governance and management responsibilities

Strong and clearly defined project governance arrangements are essential to the integrity of a procurement process or other complex project, because they:

- Provide clarity to participants
- Promote transparent decision-making by, and accountability of, decision-makers and managers
- Enable probity issues to be addressed appropriately.

The governance and management responsibilities for the project are set out in the following description:

Governance

GWRC councillors: will be responsible for final decision-making, and also have ultimate governance responsibility for project management and reporting procedures and management of key stakeholders/interested parties.

GWRL board: will be responsible for final decision making in regard to the Rail Partnering Contract and for decisions related to assets owned by GWRL ie, the rolling stock fleets and related assets, station buildings (other than Wellington Station), EMU Depot and car park assets.

GWRC senior executives: are responsible for ensuring appropriate management and project management processes are in place.

PTOM Probity - The General Manager, Public Transport and General Manager, Corporate Services/Chief Financial Officer have ultimate responsibility over probity for the PTOM project.

Programme Director Bus Services Transformation (Programme Director): is responsible for the management of the Bus and Ferry procurement work streams within the PTOM project. The Programme Director may delegate any aspect of the performance of this function (including probity management) to members of the project team.

Manager Rail Operations: is responsible for the management of the Rail procurement work streams within the PTOM project. The Manager Rail Operations may delegate any aspect of the performance of this function (including probity management) to members of the project team.

Manager Bus and Ferry Operations: is responsible for the management of the Bus and Ferry procurement work streams within the PTOM project. The Manager Bus and Ferry Operations may delegate any aspect of the performance of this function (including probity management) to members of the project team.

Funder

The Transport Agency: its roles includes endorsing GWRC's Procurement Strategy for each component work stream; review and endorsement of GWRC's procurement documentation for competitive procurements; and involvement in the negotiation of 'like for like' contracts with incumbent bus operators.

Working Groups

PTOM Project Procurement Team: The members of the PTOM project procurement team who are working across both bus and rail services procurement are:

- Programme Director
- Financial Adviser

Rail Services Contract Implementation Team: The members of the team working on the rail services procurement are:

- Senior Legal Adviser, Rail
- Senior Commercial Adviser, Rail

Bus Services Procurement Team: The members of the team working on the bus services procurement are:

- Senior Commercial and Legal Adviser, PTOM
- Evaluation Manager, Bus
- Commercial Adviser, PTOM
- Analyst, PTOM
- Project Coordinator

Ferry Services Procurement Team: The Ferry Services Procurement work stream has not commenced and members of this work stream have not been appointed yet.

Evaluation and Selection Groups: are the groups formed to evaluate the tenders and make selection decisions (subject to Councillor approval) in each work stream.

External Advisers

GWRC has, and will continue to, engage a range of external professional advisers to assist with the project. All professional advisers, internal and external, will be expected to act in accordance with this Framework.

Probity Adviser and Probity Auditor

The independent Probity Adviser is Robert Buchanan (telephone (04) 499 9469, email robert@buchananlaw.co.nz). The Probity Auditor is Audit New Zealand (led by Peter Davies, Director, Specialist Audit and Assurance Services, telephone (021) 222 4824, email peter.davies@auditnz.govt.nz). Their respective roles are:

- The Probity Adviser advises GWRC on probity matters in the project; and assists GWRC to prepare and implement this Framework and the Probity Plan and protocols applicable to the PTOM implementation, and to manage probity risk
- The Probity Auditor provides independent probity assurance as required.

Appendix 2 contains more detail about these respective roles, including in relation to probity concerns raised by Respondents in accordance with procurement documentation.

Other Key Players

Other persons and organisations directly involved in the project include:

Incumbent bus and ferry operators: all incumbent bus and ferry operators have had opportunities to contribute to network and unit design, including through the consultation process commenced in November 2013 as a prelude to public consultation on the new RPTP. Negotiations are being undertaken with NZ Bus Ltd and Mana Coach Services Ltd for direct appointment of units and additional DAU's under the 'like for like' provisions of PTOM. Ongoing relationships are required with incumbent operators in relation to business as usual operations. GWRC intends to enter into a Tender Participation and Transition Agreement with all incumbent operators.

Incumbent rail operator

Kiwi Rail Ltd: as the incumbent operator for the rail unit, will be required to assist with the provision of information to other tenderers for

the rail unit by means of the Tender Participation and Transition Agreement.

Kiwi Rail Holdings Limited: as Network Access Provider, will be required to assist with the provision of information to rail unit tenderers by means of the Tender Participation and Transition Agreement.

Other interested parties include:

- Minister of Transport
- Ministry of Transport
- Non-incumbent (ie, potential) operators
- The region's territorial authorities
- Persons required to be consulted under the Act.

3.1.2 Implementation of this Framework, and accountability

The General Manager, Public Transport and General Manager, Corporate Services/Chief Financial Officer will sign off future updates of this Framework.

Probity management is monitored regularly, to enable this Framework to be a living document which can be used as a basis for decision-making on probity issues. This Framework will be formally updated by the Programme Director (supported by the Probity Adviser) where the Framework needs to reflect any changes or developments to the project.

All staff referred to in the organisation chart, all professional advisers, and all other persons or representatives or organisations directly involved in the project (as detailed above including any additional professional advisers and other persons, representatives or organisations added or replaced as the project progresses) are expected to read and acknowledge this Framework prior to commencing work on, or being engaged or appointed to a role in, the project. These acknowledgments will be recorded in the Interest Declaration Form and Confidentiality Agreement (the template for this is in Appendix 3).

The Programme Director is responsible for probity risk management across the project, with the support of the Probity Adviser. This probity risk management includes the development of Probity Plans sitting under this overarching Framework, and the design of the associated systems and procedures. This will ensure an integrated approach to managing probity risks in all project work streams. Working group team members are also responsible for monitoring and assessing probity risks in their work stream/s, and must report to the Programme Director if mitigation action is needed.

The probity elements of the project are also monitored by the General Manager, Public Transport and General Manager, Corporate Services/Chief Financial

Officer, and will be the subject of briefings to GWRC senior management, GWRC councillors, the GWRL board and the Transport Agency if required. Probity issues must be specifically and regularly monitored through team meeting updates and project updates, and through the management of each procurement process.

Any decision to manage a probity risk inconsistently with this Framework or the relevant Probity Plan should be made by the General Manager, Public Transport and General Manager, Corporate Services/Chief Financial Officer, following advice from the Programme Director and the Probity Adviser and if necessary following legal advice and/or review by the Probity Auditor.

3.2 Probity risk management

A key objective of this Framework is to encourage early thinking by all participants in the PTOM project about probity issues, from a risk-based perspective. Probity risks need consideration separately from wider project risk, but then need to be integrated into project-wide risk management.

Consistent with this approach, the processes by which the Programme Director identifies and manages probity risks are:

- Active monitoring of the key areas of probity risk, described in each Probity Plan, and reporting on risk management through the forms of oversight listed in section 3.1 and with the advice and assistance of the Probity Adviser
- Use of probity checklists for the engagement of professional advisers, which includes the need for conflict of interest declarations, confidentiality agreements, attendance at probity briefings, etc
- Actively addressing probity issues in the development of project and work stream documentation including consultation plans, communication plans, and tender evaluation plans
- Use of the Probity Auditor for assurance on specific matters when needed
- Reporting of any identified probity issues to the Steering Group and others.

3.3 Interests management

3.3.1 Introduction

Management of interests is a key element of any public sector procurement process. It is inevitable that conflicting interests will arise in a small country like New Zealand, and with small markets of professional advisers. In some cases, conflicts arising from interests are unmanageable and require the conflicted person to withdraw from involvement. In other cases, a conflict can be 'managed' through a structured process based on objective assessment and independent review.

This section of the Framework uses the term 'Participant' as defined in the relevant Probity Plan. This will include.

- All GWRC personnel including elected members and GWRL board members (whether in a decision-making role or otherwise)
- All contractors and professional advisers engaged by GWRC in relation to the PTOM project
- In the case of a contractor or professional adviser that is an entity, all of its personnel who are directly associated with the provision of services.

Conflicts of interest take many forms. A conflicting interest could be:

- Financial (for example, a shareholding in an operator organisation) or non-financial (for example, arising from a family, personal, or business relationship)
- Direct (involving the person concerned and an interested organisation) or indirect (for example, involving a family member, friend, or business associate)
- Current, recent (for example, where a Participant has worked closely with, or for, an operator in the past), or potential (for example, where a firm contracted as an adviser to GWRC might in future also wish to advise an operator in relation to a procurement through another office or personnel)
- Actual or perceived (the test being not what the person concerned considers it a conflict but what an impartial observer would think).

For further examples of conflicts of interest and case studies, see the Auditor-General's guide *Managing conflicts of interest* (2007).

3.3.2 Principles and outcome

The following principles apply to conflict of interest management in the Project:

- A person who has a potentially conflicting interest is under a duty to disclose it, applying a precautionary approach ('if in doubt, declare')
- Procedures exist, and information is available, to enable all individuals and entities participating in the project team to disclose interests on a consistent and informed basis, at the outset of their involvement with the Project, and then on an ongoing basis.
- Individuals and entities can each have interests, and the interests of an entity may be different from those of its office holders or employees
- An individual or entity that has and discloses an interest is not responsible for assessing whether the interest amounts to a conflict of interest in relation to the project.
- The Programme Director on advice of the Probity Adviser is responsible for determining:

- Whether a conflict of interest exists based on an individual's or entity's declaration
 - Whether the interest requires disqualification or is capable of being managed through conflict mitigations
 - The nature of any such mitigations
- A conflict of interest management plan will be based on clearly identifiable, measurable, and enforceable mitigations that are relevant to the particular circumstances of the person concerned and the needs of the project
 - The intended outcome of GWRC's management of conflicts of interest is that all relevant interests in relation to the Project will be identified and disclosed, and conflicting interests identified and managed, in an objective and consistent manner that will withstand legal and public scrutiny.

3.3.3 Practical application

Conflicts of interest will be managed during the project in relation to all personnel and entities who are Participants.

Conflict of interest management will also be reflected in procurement documentation, with Respondents being required to declare interests including their associations (and those of their personnel) with GWRC's personnel and PTOM project advisers. Conflict of interest management will be the subject of probity assurance from the Probity Auditor as necessary.

The following practical steps will be taken to give effect to the Framework.

3.3.4 Declaration requirements

All Participants must complete an Interest Declaration and Confidentiality Agreement in accordance with the template in Appendix 3.

The Programme Director must request that all Participants review and reaffirm their conflicts bi-annually including at key milestones, and after the closing of responses to procurement documentation, by involved Participants (especially those who will be involved in the evaluation of responses or in an advisory or decision-making role).

The Programme Director is responsible for issuing regular reminders.

Participants will also have a positive duty to report immediately any actual or potential conflicting interests arising at any other time, to the Programme Director.

Conflict of interest management will also be reflected in all procurement documentation, with respondents being required to declare any relevant interests (including their associations with Project Participants and other GWRC personnel).

3.3.5 Assessment and management of conflicts

Each declaration will be assessed as follows:

1. A declaration by a member of an evaluation or selection group will be assessed by the Chair of the group
2. A declaration by an employee, contractor, or subcontractor of a professional adviser that is an entity (for example, a consulting or law firm) will be assessed by the Programme Director as identified in the contract of engagement
3. All other declarations will be assessed by the Programme Director and/or the General Manager, Public Transport Group as required and following advice from the Probity Adviser
4. In all cases the assessment will take place with assistance, where required, from the Probity Adviser, who will in any case:
 - Review all declarations and their assessments, in conjunction with the Programme Director or General Manager, Public Transport Group
 - When considered appropriate, recommend that independent assurance be sought from the probity auditor.

All declared interests and their assessments will be recorded in the Probity Register - Confidentiality, Conflict of Interest and Management Plan held by the Programme Director. The template for the register is in Appendix 4.

If a declared interest is assessed to conflict with the person's role in relation to the Project, the Programme Director will consider (with advice from the Probity Adviser) whether the interest is capable of being managed or requires disqualification from the Project, and make a recommendation accordingly to the General Manager, Public Transport and General Manager, Corporate Services/Chief Financial Officer.

The standards applied for assessing whether a conflict of interest exists will be those in the Auditor-General's 2007 guide, and the applicable case law on bias. As 'rules of thumb':

- A financial interest in an operator (whether direct or indirect) is likely to require disqualification or withdrawal from the Project, unless it is insignificant or remote
- Relational interests involving immediate family members and dependants, and professional colleagues, may require disqualification or withdrawal only

if the other person is in a position of influence (for example, a director or senior manager of an operator organisation)

- Historical interests with an operator (for example, as a former employee or adviser, whether directly or through a family member) will require disqualification if the interest ceased within the preceding three years, unless effective steps can be taken to manage the impact of the conflict. However, it is desirable for all such interests within the past five years to be disclosed so they can be appropriately assessed
- in the case of professional advisers, account will be taken of any applicable ethical rules, internal conflict management processes, etc, to the extent considered appropriate, but GWRC will reserve the right to determine the acceptability of a conflict or a proposed conflict management mechanism (such as an information barrier).

Where the General Manager, Public Transport and General Manager, Corporate Services/Chief Financial Officer agrees that a conflict can be managed, the Programme Director will prepare and implement a Conflict of Interest Management Plan in accordance with Appendix 3. The conflicted individual or firm must sign and/or undertake to comply with the Plan, which must also be regularly monitored.

Conflict of interest management is the subject of probity assurance from the Probity Auditor as necessary, in accordance with the Probity Auditor's terms of engagement (see Appendix 2) or on the advice of the Probity Adviser.

3.3.6 Appointment of advisers

The following steps will be implemented when appointing external advisers to the project:

1. A copy of the Probity Framework will be provided to an adviser before appointment, with particular reference to the probity principles (section 2.2 of this Framework), the conflict of interest principles (section 3.3.2), and the 'rules of thumb' listed above.
2. Inquiry will be made of whether an adviser firm has any actual or potential intention to advise an operator, supplier (including any subcontractor to an operator or supplier) that is likely to be participating in the relevant procurement process.
3. Any potential conflict issues will be addressed in the terms and conditions of engagement.
4. All adviser personnel must be given the Probity Framework and relevant sections of the relevant Probity Plan, and participate in probity briefings for Participants.

3.3.7 Conflicting engagements involving professional services firms

The market of professional services firms with expertise in transport is small. Many firms involved in the New Zealand market have a national or multinational presence, and such firms are likely to have current or previous commercial relationships with public transport operators. There can also be strong commercial incentives for firms engaged by GWRC to assist with PTOM and other transport projects to accept other engagements with operators, suppliers or potential operators or suppliers, albeit on non-PTOM matters and using separate personnel and information barrier controls.

Alternatively GWRC may find that, having engaged a firm to assist it with a PTOM procurement process, the firm discloses that it also acts, or has previously acted, on other matters for an entity that emerges as a potential operator during that process.

It is important for GWRC to anticipate such problems when engaging large firms. Multiple engagements of the types described are not in themselves unacceptable, provided GWRC gives its fully informed consent and sufficient controls exist to protect each client's interests and information.

In taking on such risk, GWRC can rely to some extent on the firm's professional and ethical obligations to ensure it discloses the other engagements concerned and, to the extent that those obligations require, obtaining GWRC's informed consent to them. However, in a public sector context it is important that GWRC also retains strong control of such situations and is in a position to dictate the level of controls it considers necessary and, where necessary, to refuse its consent to the firm acting for a potential operator or supplier.

Such controls should include enhanced confidentiality declarations, conflict declaration requirements (both for the firm and for the individual personnel engaged on GWRC's account), and review procedures. These should supplement the key elements of an information barrier, the minimum requirements for which should be:

- Separation of personnel and (unless impracticable) office space or location
- File security and access protocols (for both hard copy and electronic files)
- Controls to prevent inadvertent disclosure of information to the other client (for example through social interaction in the office or misdirected emails)
- Accountability requirements, with a senior partner or executive of the firm having assigned responsibility for implementing the protocols
- Reporting requirements in case of breach, together with dispute resolution and escalation procedures.

All such arrangements should be formally documented in formal deeds or correspondence between GWRC and the firm in question. In some cases, the commercial realities may require GWRC to assume a greater level of probity risk that might otherwise be appropriate in order to retain a firm whose services are essential to achieving project outcomes. The Probity Adviser should be asked to advise in all such cases, with guidance and review being sought from the Probity Auditor where appropriate.

The Programme Director will maintain the Probity Register - Confidentiality, Conflict of Interest and Management Plan (see Appendix 4), which will be used to record the following information in respect of all Participants in the Project:

- Probity briefing received, where applicable
- Date that Confidentiality Agreement is signed
- Interests Declaration provided and assessed (including updates as required)
- Conflict of Interest Management Plan developed, signed and implemented (if applicable).

3.3.8 Avoidance of predetermination

Besides conflicts of interest, probity issues can also arise from evaluators and decision-makers not approaching their responsibilities with an open mind. This is known as predetermination under the law relating to bias. Predetermination can arise from a predisposition towards or against a particular person or situation, a perception arising from something previously said or done, or an evidenced failure to apply the correct evaluation or decision-making approach.

Predetermination can also arise from previous knowledge of a person or entity, including through previous or existing contracts with GWRC and a role in managing those contracts.

An evaluator or decision-maker is not prevented from participating just because of a previously expressed opinion on a matter, or previously arising knowledge of a respondent to a procurement process. In other words, what is required is an 'open' not an 'empty' mind. However, difficult judgments can be required and this is an area of significant risk of legal challenge. The test is always what a reasonable bystander would consider to be the case, not what the person concerned thinks they are able to do.

This Framework and each Probity Plan provides for the following steps to be taken to address this risk:

- All Participants are required to read and understand the Probity Framework and relevant Probity Plan
- Predetermination issues will be covered in probity briefings
- GWRC Councillors and other decision makers (i.e. GWRL board) will be reminded of the need to avoid predetermination situations (whether actual or

perceived) in balancing their political roles with their responsibilities as decision-makers in each procurement process. Valuable guidance is available through case law summaries included in the Auditor-General's guide on the Local Authorities (Members' Interests) Act 1968

- Evaluation teams, and any group responsible for considering the recommendation of an evaluation team, may include members who have previous knowledge of a tenderer, including through a contract management role in relation to a previous or existing contract, but only where the nature of that knowledge will not (in an objectively assessed sense) prevent the individual concerned from approaching their task with an open mind in accordance with the requirements of the evaluation plan. Where such persons who have previous knowledge of a tenderer can be included in an evaluation team or in some other capacity, it is essential that the team or group includes personnel (preferably external members) who have not recently been, or are not currently, involved in management of previous or existing contracts.³

Participants transferring to Operators and Potential Operators, or other stakeholders

Conflicts of interest of a different kind may arise where a Participant decides to cease working for GWRC and become an employee or contractor of an operator, supplier or potential operator or supplier, or another stakeholder in the project. The Participant may have a conflict of interest in his or her new role, because of information or knowledge in his or her possession that relates to the project and could be advantageous to the operator or supplier.

Managing such conflicts may be outside the control of GWRC, but it is nevertheless important to minimise the risks of sensitive information becoming available to an individual's new employer. This can be done by requiring surrender of records (whether hard copy or electronic) and written undertakings to maintain confidentiality of GWRC information. In extreme cases it may require GWRC to seek representations from the new employer that the individual will not be involved in work relating to the PTOM project.

Operators should be required to declare any conflicts of interest of this nature when proposals or tenders are submitted.

The process in all such cases will be for the potential interest to be drawn to the attention of the Programme Director, and for the Probity Adviser to be asked for advice on how to handle the matter. Where appropriate, a conflict of interest

³ See *Problem Gambling Foundation v Ministry of Health* [2015] NZHC 1701 (23 July 2015). This case found that persons with existing knowledge gained from contract management activities should not have been included in a tender evaluation team, but on the basis that the government rules applicable to the procurement at that time required conflicts of interest to be 'eliminated', rather than the current applicable rules requiring conflicts to be 'managed'. The decision is currently under appeal.

management plan will be developed in a form similar to that contained in Appendix 3.

3.4 Management of interactions with tenderers and potential tenderers

3.4.1 Introduction

This section of the Framework addresses the need to control interactions with participants in the PTOM procurement processes (both before and after their commencement) so as to ensure that:

- Perceptions of probity and good public sector conduct are maintained at all times
- All Respondents or potential Respondents (including incumbent and non-incumbent operators) are provided with the same information
- The potential for inappropriate disclosures of information, other than through the prescribed processes, is reduced as far as possible that and instances of inadvertent interactions or disclosures are disclosed and managed
- Councillors and senior GWRC managers are protected from attempts at lobbying or other forms of influence, including through the acceptance of hospitality.

3.4.2 Controls

The following controls will apply across all PTOM procurement activities:

GWRC's policy on the receipt or acceptance of gifts and hospitality is applicable to all Participants. The Sensitive Expenditure Policy may be found on the GWRC intranet at: <http://gwennie/job-tools-and-guides/policies-and-procedures/official-policies/>.

The nature of the Project is such that Participants or other GWRC personnel could receive approaches by an operator (existing or potential), its staff or representatives or advisers, or any other person who is known to have connections with the operator. All such approaches (whether solicited or unsolicited), and however received, must be disclosed to the Programme Director and offers of gifts or invitations recorded in the Gifts and Invitations Register (see Appendix 5).

Participants and other GWRC staff and contractors must avoid communicating with the public, existing or potential operators, (including their staff, advisers, representatives, or others known to have an association with them), or other interested persons regarding any aspect of the Project, except when they are expressly authorised to do so as appropriate by the Programme Director.

Any inadvertent or unplanned communications of that nature must be disclosed to the Programme Director and the details recorded including, what was disclosed, the circumstances, who was involved and GWRC's response. .

Prior to the commencement of a formal procurement process, all communications between GWRC and any potential tenderer will be documented, with file notes taken.

In the case of communications with incumbents, GWRC will ensure that communications relating to the future procurement is separate from 'business as usual' communications.

When a formal procurement process is under way, it is essential that all communications between GWRC and any tenderer take place only in accordance with the applicable procurement documentation and through GWRC's authorised representative.

3.5 Framework implementation in work streams

This Framework will be used as a basis for preparing a detailed Probity Plan for each project work stream. The Probity Plan will be used to manage probity issues during the procurement phases of each project work stream.

The Probity Plans will outline the practical steps for managing each area of major probity risk in the work stream.

Appendix 1: Applicable Good Practice

New Zealand local authorities are responsible for their own purchasing decisions under the Local Government Act 2002. However, local authorities are also expected to meet good practice standards in respect of procurement in the same way as other New Zealand public sector agencies. A strategic approach to procurement can be guided by the following principles⁴:

- Plan and manage for good results
- Be fair to all suppliers
- Get the right supplier
- Get the best deal for everyone
- Play by the rules.

The following is a summary of the legal and best practice requirements and standards for local authority procurement in New Zealand, which will be applied in the PTOM project.

Legal Requirements

Local authorities are ‘approved organisations’ under the Land Transport Management Act 2003, and as such must comply with the Transport Agency’s procurement procedures and other applicable guidance. A fundamental principle of the Land Transport Management Act is that competitive processes can achieve best value outcomes.⁵

As a local authority, the GWRC is also required to comply with the Local Government Act 2002. The principles relating to local authorities (section 14) require a local authority to ‘undertake any commercial transactions in accordance with sound business practice’.⁶ GWRC must also comply with Part 6 of the Local Government Act, including in respect of:

- Decision-making and consultation
- Financial management and funding practices.

There is a range of guidance available from Local Government New Zealand and the Society of Local Government Managers to support Councils in meeting these obligations.

Good Practice Guidance

To undertake commercial transactions in accordance with ‘sound business practice’ (as described above), a local authority should take account of the guidance that is available for public sector organisations in general, both in New Zealand and (to the extent applicable) in Australia and elsewhere.

⁴ Principles of Government Procurement: see www.business.govt.nz/procurement/for-agencies/key-guidance-for-agencies/principles-rules-and-the-law.

⁵ Land Transport Management Act 2003, section 25(1), (2).

⁶ Local Government Act 2002, section 14(f).

The primary source of good practice guidance on public sector procurement in New Zealand is that of the Office of the Auditor-General:

Achieving public sector outcomes with private sector partners (2006);

Procurement guidance for public sector entities (2008); and

Public sector purchases, grants and gifts: Managing funding arrangements with external parties (2008).⁷

The New Zealand Government's procurement website (www.business.govt.nz/procurement) also has extensive guidance on procurement, including the *Government Rules of Sourcing*⁸. The Rules are not binding on local authorities, but represent the government's standards of good practice for procurement planning, approaching the market, and contracting, and are designed to enable New Zealand to meet its international obligations in respect of public sector procurement practice. They contain useful reference material supplementing that of the Auditor-General.

The key sources of good practice guidance on probity management in New Zealand public sector procurement are from Australia. The most influential publications are:

Independent Commission Against Corruption (New South Wales): *Probity and Probity Advising* (2005)⁹; and

Australian National Audit Office: *Fairness and transparency in purchasing decisions: Probity in Australian government procurement* (2007)¹⁰.

Guidance on expected standards of probity in the New Zealand context is best found in the Auditor-General's library of inquiry reports into procurement and other failures: see www.oag.govt.nz/reports/purchasing-contracting. The most recent significant report on that site is the *Inquiry into the Government's decision to negotiate with SkyCity Entertainment Group Limited for an international convention centre* (February 2013).

Conflicts of interest and sensitive expenditure

The primary guidance on managing conflicts of interest in the New Zealand public sector is the Auditor-General's publication *Managing conflicts of interest: Guidance for public entities* (2007). For members of local authorities, the Auditor-General has published *Guidance for members of local authorities about*

⁷ See www.oag.govt.nz. The third publication in this list (on public sector purchases, grants, and gifts) is of particular relevance to the appointment of advisers.

⁸ October 2013, updated 1 July 2015. See www.business.govt.nz/procurement/for-agencies/key-guidance-for-agencies/the-new-government-rules-of-sourcing.

⁹ See www.icac.nsw.gov.au/publications-and-resources.

¹⁰ See www.anao.gov.au/uploads/documents/ANAO_Probity_BPG.pdf.

the local authorities (Members' Interests) Act 1968, which deals with the disclosure and management of pecuniary interests.¹¹

See also the Independent Commission Against Corruption (New South Wales) publication *Managing conflicts of interest in the public sector: Guidelines* (2004).

The Auditor-General's guidelines on sensitive expenditure¹² deal with a range of matters including the recommended approach to receipt of hospitality and gifts, which pose significant risks in a procurement context.

Guidance on public sector ethics and conduct generally is available from the State Services Commission.

¹¹ See www.oag.govt.nz/2010/lamia.

¹² *Controlling sensitive expenditure: guidance for public entities* (February 2007); see www.oag.govt.nz/2007/sensitive-expenditure.

Appendix 2: Probity advice and probity assurance

The engagement of independent probity advisers and/or auditors is now standard practice in the New Zealand public sector, especially for processes involving commercial interactions with third parties in the course of a structured process (usually, but not always, some form of procurement) where the activity is complex, high value, or sensitive.

There are differences between the role of a probity adviser and a probity auditor. A probity adviser, while independent, works with the project team to develop a probity framework and advise on the management of probity risks. A probity auditor is an independent assurance provider, who operates at arms-length from the entity's team and provides assurance on project implementation.

Probity advisers and auditors do not transfer risk away from the entity. The entity remains accountable for project or project outcomes, and a probity adviser and/or auditor should not be seen as a substitute for the deployment of skilled personnel or for the use of sound project planning and management disciplines.

In particular, a probity adviser or auditor cannot be expected to protect against errors in decision-making, or assist in managing commercial risk. Instead, their engagement should be seen as a means of enhancing and complementing existing processes.

Role of the probity adviser

A probity adviser is an individual or organisation engaged to observe, review and provide guidance on the entity's management of probity throughout a project.

A probity adviser's primary concern is the integrity of the procedures and processes adopted by the entity for designing and implementing the project. The advisory role is essentially preventive. For this reason, a probity adviser is usually engaged at an early stage to assist with project establishment and before any serious procurement integrity issue may develop.

The adviser may also be asked to confirm, in writing, whether proposed (or actual) project actions are (or have been) consistent with the entity's probity plans and general probity principles. This may include, for example, advice on the entity's assessment of conflicts of interest. If probity requirements are not being or have not been met, the adviser may suggest solutions and then assist the entity to monitor their implementation.

Consistent with that approach, the role of the Probity Adviser in the PTOM programme will be to:

1. Assist and advise GWRC in the preparation and updating of this Probity Framework and the Probity Plan
2. Review and advise on probity risk management processes, including through the project's wider risk management processes, and assist with the design of relevant documentation and procedures and the engagement of the probity auditor

3. Provide independent advice on probity-related issues and risks, including those identified in the Probity Plans, so GWRC can establish procedures which meet recognised probity standards and ensure that any problems or questions are dealt with satisfactorily
4. Advise specifically on the management of incumbency issues in respect of the rail, bus and ferry units, and their potential impact on procurement outcomes
5. Provide independent advice and reports to Councillors, the Steering Group, the General Manager, Public Transport and General Manager, Corporate Services/Chief Financial Officer and the Programme Director as they require, on any problems or complaints relating to the management of probity and related risks and recommended resolutions
6. Act as the first point of contact for Respondents wishing to raise probity concerns in accordance with RFT documentation.

The Probity Adviser will act independently, under the general direction of the Programme Director.

Role of the probity auditor

A probity auditor acts as an assurance provider under the applicable auditing and assurance standards, and with regard to best practice in probity management.

With the assistance of the Probity Adviser, GWRC will determine the scope of the Probity Auditor's engagement based on the nature of the assurance needed to manage identified project risks and to address the interests of particular stakeholders at each stage of the project. Within the defined scope at each stage, the Auditor will independently determine what audit procedures should be performed, based on his or her own assessment of audit risk.

Assurance could be provided using evidence obtained from:

- *Ex ante* review of systems and controls, including the systems for identifying and managing probity risk, assessing and managing conflicts of interest, and ensuring commercial confidentiality in the negotiation process
- 'Real-time' review, which may for example involve sitting in on project meetings and interactions with third parties, observation of evaluation panel meetings and review of evaluation forms, or review of conflict of interest assessments
- *Ex post* review of documentation; or
- A combination of the above.

GWRC and the Auditor will seek agreement on the assurance approach through the process of engagement, with the aim of targeting the activity at the area of greatest need and delivering the most cost-effective assurance. Assurance will be provided in accordance with applicable audit and assurance standards promulgated in New Zealand under the Financial Reporting Act 2013, to the extent they are applicable to this form of assurance.

The terms of engagement may provide that the Probity Auditor will provide interim and final assurance over each component of the project, but may also report to GWRC at any time.

The Probity Auditor may also be asked to review any aspect of a procurement process which gives rise to a complaint or expression of concern by a tenderer. The RFT documentation will specify, in each case, the process for Respondents to raise probity concerns during a procurement process and the role of the Probity Auditor in that process. If a matter is referred to the Probity Auditor, the Auditor will report to GWRC with any recommendations as to action. These can then be assessed and implemented with legal advice, where necessary, and the assistance of the Probity Adviser.

Appendix 3: Interest Declaration Form, Confidentiality Agreement and Management Plan

Interest Declaration Form and Confidentiality Agreement

Interest Declaration

I, _____ hereby declare that, to the best of my knowledge, I do not have any:

- financial interest (for example, a shareholding) held by myself, my spouse or partner, or a close family member in an entity which is:
 - currently involved in the delivery of transport services to the GWRC;
 - is a potential appointee for, or tenderer in any procurement process being run by GWRC in relation to, a public transport unit in the Greater Wellington Region; or
 - has an interest (whether direct or indirect) in any such appointment or process;
- current or recent employment or contractual relationship with such an entity (previous relationships over the past 5 years should be disclosed);
- relatives or close friends who are currently connected with such an entity (for example, as an office-holder, contractor, or employee, in whatever capacity); or
- personal bias, inclination, personal obligation, allegiance or loyalty that could in any way affect my ability to remain impartial when carrying out my role in association with the PTOM Project,

Except as set out below:

I undertake to make any further declarations detailing any actual or potential interest that may arise during the duration of my involvement with the PTOM Project that could give rise to a conflict of interest.

I agree to accept GWRC's assessment of a conflict of interest, and where appropriate to co-operate with its actions in managing the conflict through a Conflict of Interest Management Plan.

Confidentiality Responsibilities

All of the Public Transport Operating Model (PTOM) Bus procurement project's discussions, meetings and material (written and electronic) are confidential (excluding information about GWRC or the Project already made generally available to the public) and I agree to keep this information safe. I acknowledge that my obligation to maintain confidentiality will continue after I leave the PTOM project. I will not give this information to anyone outside the immediate tender team without prior approval from the Programme Director.

I will comply with all the information management protocols set out in the Probity Plan for the Project.

Contact with Operators

During the PTOM Project up until formal announcement of the successful appointee, I will not:

- pass on any information or make any comment to;
- receive any gift, gratuity, hospitality or any other form of inducement from; or
- meet with any existing or potential operator in relation to the PTOM Project, unless formally authorised to do so as part of the procurement process.

I will notify the Programme Director of any communication, gift, or hospitality I receive from any existing or potential operator relating to the PTOM project for recording in the appropriate register and managing in a formal way as set out in the GWRC Sensitive Expenditure (gifts and invitations) Policy.

I acknowledge that I have access to a copy of the Probity Framework and Probity Plan.

In signing this undertaking, I understand the importance of the need to safeguard myself and other GWRC staff and contractors against any allegations of commercial or professional impropriety.

Signed by:

Name:

Title

Role in the procurement activity:

Date:

Reviewed by Programme Director (and/or General Manager Public Transport if required)

Signed by:

Name:

Date:

Assessment of interest (where applicable), e.g. Nil/perceived conflict/conflict

Action required e.g. none/management plan/Schedule for refresh in X months:

Conflict of Interest Management Plan - only to be completed by the Programme Director and/or General Manager Public Transport where GWRC determines a conflict.	
Analysis	
<p>Nature of Conflict</p> <p><i>Describe the conflict of interest and the parties concerned with the conflict.</i></p>	
<p>Implications and Consequences</p> <p><i>Describe the implications of the conflict of interest: Any impact the conflict has already had (actual or perceived) on: GWRC and the PTOM Project specifically. Any potential (future) impact or conflict risk.</i></p>	
<p>Options for Managing</p> <p><i>Describe the options available to manage the conflict of interest. Options may include:</i></p> <ul style="list-style-type: none"> • <i>Sanction - Enquire and gain consent from all affected parties about the conflict.</i> • <i>Oversight - Impose additional oversight or review over the party, person or area.</i> • <i>Withdraw - Withdraw from discussions or voting on a particular item.</i> • <i>Exclusion - Exclusion of certain parties from activities of the Project, and/or from access to certain information.</i> • <i>Information Barriers – Exclusion of certain personnel within an adviser entity from Project information. More detail on the contents of an information barrier is available from the Probity Adviser.</i> • <i>Agreement - Agreement or direction not to do something from the parties in question.</i> 	
<p>Recommendation</p> <p><i>Recommend the most appropriate option from those described above and provide rationale.</i></p>	
<p>Monitoring</p> <p><i>Who will be the owner of the Conflict of Interest Management Plan. Note any delegation of ownership.</i></p>	

Recommendation Approved by	
Date	
Acceptance	
Plan agreed by participant	
Date	
Monitoring of Plan	
<p><i>Detail the monitoring of the Plan. Identify key milestones in the implementation of the Plan and what on-going reporting and monitoring will be performed. This should where appropriate include reporting dates of the reports.</i></p> <p><i>This section should then be used to record the monitoring steps and any modifications that are made over time.</i></p>	

Appendix 5: Public Transport Gifts and Invitations Register

This register is maintained by the Executive Assistant to the General Manager Public Transport.

The Register records details of any gift or invitation offered by or received from:

- An existing or potential transport operator
- An employee or representative of such operator (whether known to be authorised to make the communication or approach, or otherwise); or
- A person who is known to be associated with, or could be expected to communicate information to, such operator, outside the requirements established by any procurement documentation released to the market.

The purpose of the register is to enable to GWRC to be aware of, and take steps to control and mitigate the effects of, any such contacts; and to avoid any party obtaining an improper or unfair advantage in a procurement process.

Description of gift or event <i>(Write a brief description of the gift or event invited to)</i>	Date of Function	From <i>(Giver's name and organisation)</i>	To <i>(Recipient's name and department)</i>	Estimated \$ value	Accepted /declined	Reason for accepting/ declining	Signature of Manager of recipient
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