



# **ORAL FLUID TESTING (OFT) EQUIPMENT PROCUREMENT**

## **Probity Auditors Report**

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# BACKGROUND

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## INTRODUCTION

The Land Transport (Drug Driving) Amendment Bill (LTA) has been passed and on 11 March 2022 given Royal Assent. NZ Police are required to implement an oral fluid testing (OFT) regime within 12 months. The OFT equipment selected will be used by Police to conduct OFT(s) in accordance with the legislation, manufacturer's instructions, and Police operational guidelines.

NZ Police undertook a procurement strategy that included:

- A one-step open competitive tender
- Two-envelope evaluation system, non-price, and price response
- Evaluation of the non-price responses
- Physical trial evaluation of shortlisted equipment
- Evaluation of the price responses
- Selection of the preferred equipment
- Gazetting (yet to occur)

In accordance with the OFT equipment procurement and in line with the Government Procurement Rules, Gemtech was appointed Probity Auditor and engaged to provide probity services over the tender, auditing the evaluation process of the OFT equipment procurement.

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## OBJECTIVES

The objective of probity is to assist the purchasing organisation, NZ Police, to achieve the best outcome through adopting principles that enable the organisation to carry out its procurement in a transparent, accountable, impartial, and equitable way.

The Probity Auditor is responsible for reviewing, observing, engaging with, and assessing the process to provide assurance that:

- The procurement processes are consistent with Government Procurement Rules and organisational procurement policies;
- Management of the procurement processes is sufficiently robust and follows the evaluation approach and criteria set out in the procurement plan;
- Fair, open, and transparent processes have been followed, so no parties are unfairly treated, the processes are conducted with integrity, and confidential information is appropriately managed;
- Probity risks and conflicts of interest have been appropriately managed during the procurement process; and
- Documentation is of sufficient quality to support decision-making and potential challenges.

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## SCOPE

### In-Scope Components

The scope of the Probity Auditor included the audit of the evaluation process of OFT equipment procurement from start to finish. This included:

- Review of the OFT procurement plans, processes, and management activities;
- Observing the Tender Evaluation Team's approach to evaluating written responses;
- Observing evaluators conduct a physical operational trial; and
- Observing the final evaluation to select the preferred equipment.

The scope was extended post-initial laboratory testing to include:

- Observing an evaluation revisit to re-assess responses that weren't initially shortlisted;
- Observing further evaluation meetings with internal and external providers to discuss independent scientific reviews on equipment submitted; and
- Observing evaluators conduct a second physical operational trial.

### Scope Exclusions

The Probity Auditor scope excluded providing assurance over:

- Pre-RFP market analysis, RFI and business case activities;
- Governance and Project Management of the OFT project; and
- Planned Gazetting, Due Diligence, and contract negotiation activities.

The scope also excluded the review of procurement documents from a legal perspective and the provision of any legal advice.

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## REVIEW TEAM

Team Member	Role
s9(2)(a)	Probity Auditor
s9(2)(a)	Internal Quality Assurance

# FINDINGS AND RECOMMENDATIONS

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## SUMMARY

The NZ Police, in line with their own code of conduct, adopted the following principles of probity in procurement:

- Fairness and impartiality;
- Accountability and transparency of process;
- Confidentiality and security of information and materials; and
- Effective management of conflicts of interest.

From a probity perspective:

- Probity activities were identified and managed throughout the procurement;
- Actual or perceived Conflicts of Interests were managed, and taken seriously;
- No interaction by or between NZ Police personnel was observed that would challenge the principles of probity;
- Appropriate arrangements for receipt of responses and security of tender information were established to ensure confidentiality and security of information and materials; and
- The evaluation approach applied by the evaluation team reflected the approach in the RFP.
- During the evaluations, the application of fair and unbiased individual and combined assessments were observed.

The outcome of independent scientific laboratory testing during due diligence challenged the suitability of the initial shortlisted devices, resulting in the need to revisit and have other suitable devices tested. The retesting of the initially shortlisted devices alongside the testing of the other suitable devices, with the same testing conditions has provided a fair baseline scientific assessment. Only two of the eight tested devices passed the laboratory testing. One fully conforms with AS/NZS 4760:2019 while the other did not meet the standards cut-off concentrations. None of the initially shortlisted devices passed testing.

As the Probity Auditor, Gemtech is satisfied that all parties were treated fairly, with no supplier disadvantaged or treated differently during the tender process. The decision to reassess all the devices physically submitted to NZ Police as part of this RFP, and require a successful laboratory test be achieved, was an appropriate adjustment to the evaluation stage of the procurement process. The Tender Evaluation Report (TER) reflects the evaluation process and the final ranking of products to put forward to the Equipment Procurement Governance Board.

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## FINDINGS

### Procurement processes

The procurement plan and processes adopted for the OFT procurement follows the Government Procurement Rules and accepted good practice. The latest Government

Procurement Rules, however, do require Agencies to consider, and incorporate where appropriate, Broader Outcomes when purchasing goods, services or works. We have not sighted any evidence of consideration of Government Broader Outcomes / secondary benefits (environmental, social, economic, or cultural benefits) generated from the OFT procurement activity. This absence from the OFT procurement has not impacted this procurement outcome but should be considered for all future procurement activities.

*NZ Police should ensure consideration of broader outcomes in future procurements and maintain a record of such considerations, to be retained as part of each tender.*

NZ Police advised that the NZ Police Procurement Policy is under review; as such we have not assessed the OFT procurement against internal organisational procurement policies.

*Future procurement plans should include references to NZ Police policy, standards, and procedures to leverage detail held elsewhere and demonstrate organisational alignment.*

The due diligence section of the procurement plan included a verification matrix to be used as part of the evaluation and due diligence process. This included reference to product testing, which resulted in NZ Police having several devices undergo independent scientific laboratory testing.

Laboratory testing was conducted on the shortlisted devices, with unexpected results. A decision was made to scientifically test other devices, and the previously tested device, putting all devices through the same lab test baseline using the same laboratory and synthetic saliva. The final lab results concluded that only two of the eight devices performed satisfactorily, though one did not meet the relevant standard, AS/NZS 4760:2019 cut-off concentrations.

The RFP stated that NZ Police is seeking a solution that can preferably meet the requirements of 71G “Approval of oral fluid tests and oral fluid testing devices” contained in clause 21 of the Land transport (Drug Driving) Amendment Act 2022. A key requirement of 71G is subsection 2(C) that it requires the Minister of Police to be satisfied that any device proposed return a positive result only if the device detects the presence of a qualifying drug at a level that indicates recent use of a specified qualifying drug. 71G subsection 3 requires the Minister to have regard to any relevant New Zealand Standards or joint Australian/New Zealand Standards in determining whether a device will return a positive result only if the device detects the presence of a qualifying drug at a level that indicates recent use of a specified qualifying drug.

*The use of “preferably” in the RFP should not have been used as it implied that 71G, and adherence to relevant standards (such as AS/NZS 4760:2019) were not mandatory. Our assessment is that 71G should have been mandatory.*

An excerpt extracted from clause 21 of the Land Transport (Drug Driving) Amendment Act 2022 was included in the RFP.

We consider the above, and the requirement of the manufacturer (bidder) to provide evidence that verifies the claimed threshold, sensitivity, and specificity levels in their submission, demonstrated that the RFP process included reasonable steps to identify a device that meets requirements. Unfortunately, the laboratory testing was too late in the

evaluation process, as such necessitating a second round of laboratory testing and operational trial.

*Incorporate the lessons learned during the OFT procurement, such as test compliance first, into future procurements of devices that procure devices that need legislative or relevant standard compliance.*

While not stated as mandated in the RFP there is a sufficient position to support the additional steps undertaken by NZ Police to validate the accuracy of devices, compliance with relevant standards and their suitability for operational use.

### **Management of the procurement processes**

The OFT procurement has been well managed and followed the procurement plan. Some latitude was given to extend supplier's product delivery timeline, but those that failed to meet the date of the trial evaluation were excluded from the first operational physical trial.

The evaluation approach followed the approach and criteria set out in the procurement plan. Gemtech attended and provided probity oversight over the following key procurement activities:

- Evaluation by the Tender Evaluation Team (TET) of the non-price written responses;
- Physical trial evaluation of shortlisted OFT equipment by a second TET;
- Evaluation of the price response of the final shortlisted OFT equipment; and
- Final moderation sessions.

Due to unexpected laboratory test results, Gemtech attended and provided probity oversight over the following additional key procurement activities:

- The reassessment of responses not initially shortlisted, evaluation meetings with internal and external providers to discuss independent scientific reviews on equipment submitted; and
- Physical trial evaluation of shortlisted OFT equipment (passed laboratory testing for at least one drug) by a third TET; and
- Final moderation sessions (a desktop assessment of pricing evaluation was performed)

During the above, no interaction between evaluation members, facilitators, or observers were witnessed that would challenge the principles of probity. The evaluators conducted each evaluation individually and then discussed viewpoints openly and fairly as a group, sharing individual scores and rationale before moderating the scores.

### **Fairness, openness, and transparency**

The procurement approach, and actions of those involved, were followed in a manner that:

- No parties were unfairly treated;
- The processes were conducted with integrity; and
- Confidential information was managed appropriately.

At each stage, a record of key actions and outcomes has been maintained, providing a transparent record of the key procurement activities leading to the recommended product.

### **Management of Probity risks and conflicts of interest**

NZ Police recognises the need to demonstrate ethics and integrity in its procurements. NZ Police included within the OFT Procurement Plan how probity will be managed as part of the OFT procurement.

Probity risks and conflicts of interest have been appropriately managed during the procurement process, with actions undertaken as either a risk or conflict arose. Initial and inherent risks were identified at the onset of the project and captured in the procurement plan.

*An area of improvement could be the use of a Risk Register; however, the absence of such a project management tool has not impacted the OFT procurement process.*

As part of the probity risk management strategy, an internal Assurance Manager was to ensure information is accurate and processes are followed, as outlined in the RFP, and an external Probity Auditor [Gemtech] was to be involved throughout the evaluation process to ensure thorough and fair evaluation of responses and equipment. Gemtech understand internal assurance advice was given pre-RFP, but not during the tender. No formal assessment report was provided by NZ Police's internal assurance resources. The absence of internal assurance activity evidence and deviation from the agreed probity risk management strategy does not appear to have impacted the OFT procurement process.

*From an evidential record perspective, there is a gap. Any internal assurance activity evidence (emails, memo's etc) that exists, and is appropriate, should be included in the final tender records to be retained. Future probity risk management strategies that leverage internal or external assurance resources should require a formal report deliverable.*

A strategy to manage Conflict-of-Interest (COI) risks was implemented, and a register was maintained. Declarations were completed by voting and non-voting evaluation team members prior to being provided with supplier response material or any engagement in the evaluation process. We sighted evaluation member declarations, but not all the volunteer or governance member declarations.

*For completeness of OFT's audit records the COI Management Plan section of COI form should be completed for all those with a potential or actual conflict, any outstanding COI declarations completed and the COI Register finalised.*

COI status was reconfirmed by the TET chair at various stages of the evaluation process, observed at the commencement of the non-price Response Form evaluation, the Field Testing and Price response evaluation stages. The majority of personnel declared no conflicts exist. All potential conflicts raised had appropriate mitigations agreed or were subsequently not considered a conflict.



## Documentation

Overall, the documentation sighted is of sufficient quality to support decision-making and respond to any potential future challenge. Key documents, such as the RFP and Procurement Plan, were reviewed by NZ Police personnel in operational, procurement and governance roles.

The individual TET member assessments have been retained by the OFT procurement project team. After each evaluation session, a record of the moderation key points and outcome has been produced. The session record, supported by the individual TET member assessments, will form the backbone of audit evidence, and support the Tender Evaluation Report (TER).

NZ Police procurement team managed the supplier communication during the OFT procurement process. This detail should be incorporated with other documentation to be retained.

A few documents had yet to be finalised, for example, not all COI Declarations were counter-signed. While these have not impacted the procurement process, they do impact the completeness of the procurement records.

At the time of this report, the tender pack to be retained for audit purposes has yet to be agreed. The procurement plan refers to managing supplier tenders received, retaining, and destroying copies once the tender process ends.

*Define the tender pack to be retained for audit purposes, check for completeness and address any gaps that may exist.*

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## RECOMMENDATIONS

The following recommendations, specifically related to the OFT procurement, are provided. A priority rating has been applied to each recommendation:

- Low** Optional or minor improvement.
- Medium** Tender process deviation/weakness observed, or a probity concern exists that may alter the tender outcome.
- High** Tender outcome is at risk, or NZ Police are exposed to potential third-party challenge.

ID	Recommendation	Priority
01	Ensure all COI declarations are completed, including signoffs, and the COI Register is finalised.	Medium
02	Define the tender pack to be retained for audit purposes, check for completeness and address any gaps that may exist.	Medium
03	Document any internal assurance evidence (emails, memo's etc) that may exist, including those of value in the final tender records to be retained.	Low

During the OFT procurement, we noted opportunities for improvement that relate more generally to NZ Police. NZ Police should consider for other future procurements the following recommendations:

ID	Recommendation	Priority
04	Future procurement activities should consider testing for compliance first, or early in the procurement process as part of the shortlisting process.	Medium
05	Future procurement activities should consider Government Broader Outcomes / secondary benefits. A record of such considerations should be retained as part of the investment and tender process.	Medium
06	Future procurement plans should include references to NZ Police policy, standards, and procedures to leverage detail held elsewhere and demonstrate organisational alignment.	Medium
07	Consider requiring Project Managers undertaking tenders to use a Risk Register to manage risks during the procurement process.	Low

## REFERENCES

### ASSOCIATED DOCUMENTS

Document Name	Date of Issue	Version
OFT Procurement Plan FINAL	No internal date	No version number
OFT RFI Report attached to Procurement Plan	Memo April 2022	No version number
OFT Programme_Indicative_Lean_Business Case v2.1 Final OFTGB Endorsed_Signed AC O'Brien	15 March 2022	v2.1
Code of Conduct Ngā Tikanga Whakahaere FINAL_0	No internal date	No version number
OFT Equipment Procurement PGB Terms of Reference	24 March 2022	1.0
OFT Procurement Project GB Minutes 02032022- Final_Accepted	02 March 2022	Final
Approved - Memo - OFT Equipment Procurement Nov 2021 v1.0	30 Nov 2021	v1.0
TN22_12 Procurement Approval coversheet final	22 March 2022	No version number
GETS _ New Zealand Police - RFP TN_22_12 - ORAL FLUID TESTING	23 March 2022	RFP published on GETS Ref TN2212
RFP TN 22 12 - Oral Fluid Testing - Final	23 March 2022	RFP published on GETS Ref TN2212
RFP TN2212 - Oral Fluid Testing - RFP Response Form1 Non Price	23 March 2022	RFP published on GETS Ref TN2212
RFP TN2212 - Oral Fluid Testing - RFP Response Form2 – Price RFP TN2212 - Oral Fluid Testing - Section 6 Terms	23 March 2022	RFP published on GETS Ref TN2212
OFT Tender Evaluation Summary	06 May 2022	No version number
OFT Evaluation Summary [including Trial results]	No internal date	No version number
OFT Shortlisted Q&As	No internal date	No version number
OFT Moderation Summary 02.06.22	02 June 2022	No version number

Tender Evaluation Report (TER) - OFT Equipment v0.1	20 June 2022	v0.1
AS_NZS for OFT (Appendix A)	2019	AS/NZS 4760:2019
eval_onsite_OF_06092022_IFC	06 September 2022	No version number
IFC Expert Report_220227	07 September 2022	No version number
OFT Evaluation Revisit Agenda & Summary 070922	07 September 2022	No version number
Independent Forensic Consulting Advice (email)	29 September 2022	No version number
OFT Tender Evaluation Summary 13102022	13 October 2022	No version number
OFT Evaluation tam Device Testing Outcome Decision Mtg Minutes	17 October 2022	No version number
IFC Expert Report 25102022	25 October 2022	No version number
Tender Evaluation Report (TER) – OFT Equipment	27 October 2022	V0.2

## DOCUMENT SIGN-OFF

Initial Draft	s9(2)(a)	21 June 2022
Draft Review	s9(2)(a)	22 June 2022
Final 1.0	s9(2)(a)	01 July 2022
Final 1.1	s9(2)(a)	02 November 2022