NSW Government | The Treasury

NSW PUBLIC PRIVATE PARTNERSHIP GUIDELINES 2017

Preparation, Procurement and Contract Management

TPP17-07

Contents

1 Executive Summary

1.1 Overview of these NSW PPP Guidelines

The procurement of services and/or associated infrastructure through Public Private Partnerships (PPPs) by any NSW Government agency, including State Owned Corporations (SOCs), needs to comply with:

- the National Public Private Partnership Policy and Guidelines (the National PPP Guidelines); and
- NSW specific requirements in these NSW Public Private Partnership Guidelines (the NSW PPP Guidelines), as updated from time to time.

All NSW Government agencies, other than SOCs, are also subject to the NSW Government Procurement Policy Framework[1] and the associated Strategic Directions and Procurement Board Directions. SOCs are subject to the Commercial Policy Framework[2]. Local government councils are required to comply with separate guidelines as per Part Six of Chapter 12 of the *Local Government Act 1993*.

PPP projects procured through an unsolicited proposals process need to also comply with the Unsolicited Proposals: Guide for Submission and Assessment[3] (Unsolicited Proposals Guide).

PPPs can be broadly defined as long-term arrangements between the public and private sector for the delivery of service enabling public infrastructure. They include Social Infrastructure PPPs (e.g. availability payment PPPs in health, education, transport and roads), Economic Infrastructure PPPs (e.g. user fee PPPs in roads and water), joint financing arrangements and concession agreements.

In NSW, PPPs are usually joint financing arrangements as defined under the *Public Authorities (Financial Arrangements) Act 1987* (PAFA Act) and require the Treasurer's approval[4]. PPPs usually have the following principal features:

- create public service-enabling infrastructure assets through public and/or private sector financing;
- include a contribution by Government through land, capital works, availability payments, risk sharing, revenue diversion or other supporting mechanisms; and/or
- engage the private sector for a specified period for the delivery of related services.

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[1] Available at https://www.procurepoint.nsw.gov.au/
[2] Available at https://www.treasury.nsw.gov.au/information-public-entities/government-businesses/commercial-policy-framework
[3] Available at https://www.nsw.gov.au/contact-us/unsolicited-proposals/
[4] Also see *Public Authorities (Financial Arrangements) Act 1987*, especially Section 5A (meaning of joint financing arrangement).

Any “related services” contracted to the private sector should be determined on a project by project basis at the early planning stage of each infrastructure project. Government retains the overall responsibility to meet its service delivery objectives and goals, regardless of any PPP entered into with a private sector entity.

These Guidelines provide a transparent mechanism to competitively pursue innovative solutions to deliver improved services and better value for money. This is primarily achieved through optimal risk allocation, management synergies, encouraging innovation in operations, design and construction, efficient asset utilisation and integrated whole-of-life asset management. The achievement of “off balance sheet” transactions is not the motivation for the Government to deliver PPPs.

These Guidelines are based on the following principles:

- ensure PPPs are procured in a professional and transparent manner, minimising bid costs and providing fair opportunity to all prospective private sector participants;
- ensure consistency of risk allocation between NSW PPPs, except where there are project specific reasons to depart;
- ensure stability of PPP delivery structures, with sustainable debt financing and robust commercial and financial structures;
- the Government will not guarantee private sector borrowings;
- encourage innovation in the provision of infrastructure and service delivery; and
- ensure the timely disclosure of information on contracts and tenders.

In NSW any public infrastructure project with a total estimated capital value exceeding $100 million must be assessed for possible PPP procurement having regard to value for money drivers. This threshold also applies to smaller projects that may be bundled together, for example, a number of new and/or brownfield school projects.

Agencies should consult NSW Treasury as early as possible when developing a business case or procurement strategy for a likely PPP or an infrastructure project with a total estimated capital value exceeding $100 million. This consultation should occur prior to engaging external consultants preparing a procurement options analysis, preliminary risk allocation or commercial principles or engaging with the market. NSW Treasury maintains pre-qualified lists of consultants with PPP, financial, legal, accounting, and probity expertise.

All major capital works projects which include PPP components or procured via a PPP have an exemption from TC16/11: Mandatory Principal Arranged Insurance for all major capital works projects, and are exempt from undertaking Principal Arranged Insurance from icare (Insurance & Care NSW) Self Insurance.

1.2 What's new in these Guidelines?

This version of the NSW PPP Guidelines, compared to the 2012 version of the NSW Guidelines, includes the following changes and/or new additions:

- New title reflecting the fact that the NSW PPP Guidelines now provide greater detail across all project phases, from business case, through key procurement phases and throughout contract management (construction delivery and ongoing operations).
- A clearer requirement to involve NSW Treasury in all project phases, including from the initial business case and procurement decisions for likely PPPs to facilitate efficient and effective project delivery and management of contractual issues. PPP procurement is to be considered as a procurement option for any capital project greater than $100 million.
- Greater clarity and integration of the Government Approvals process and key project steps to related Treasury Circulars and Policies as well as the Infrastructure Investor Assurance Framework (IIAF), including the NSW Gateway Review System, and the Environmental and Planning Approval (EPA) process. The updated approval processes remain consistent with the processes outlined in the National PPP Guidelines and the 2012 NSW PPP Guidelines.
- Clearer guidance on required Treasurer's approvals under the PAFA Act for new and existing joint financing arrangements and any associated new or existing Guarantee of a Responsible Agency's financial contractual obligations.
- Greater clarity around any overlaps with the Unsolicited Proposals Guide. Variations to existing PPPs are to be treated within the NSW PPP Guidelines as contract variations, if the existing contract provides for variations or if there is no new infrastructure or service. Unsolicited proposals for a new PPP concession need to be assessed under the Unsolicited Proposals Guide and the NSW PPP Guidelines.
- Updated and revised Fiscal Impact Tables and Negotiation Parameters (Appendix 2) required to be prepared during the Planning and PPP Procurement and Delivery Phases, and recognising TPP 15-02: Budgeting for Availability based PPPs.
- Early establishment of the Governance Framework in consultation with NSW Treasury and including appropriately experienced Steering Committee or Advisory Board Members, Project Director, and key advisers.
- Refined procurement processes, consistent with the objective of minimising bid costs, including the requirement:
    - to use the PPP Toolbox (a suite of PPP templates and pro-forma documents) when preparing PPP Governance Plans, Probity Plans, Confidentiality Deeds, Adviser Request for Proposals (RFPs) and evaluations, Expression of Interest (EOI) documentation and evaluation, RFP documentation and evaluation, and PAFA Act Approvals. Agencies wishing to use an alternative template must receive approval from NSW Treasury.

  - to comply with the NSW Treasury template social infrastructure PPP contract documents and the PAFA Act Guarantee Deed Poll, and to seek approval from NSW Treasury for any departures.
  - for Responsible Agencies to prepare a Market Communication Strategy documenting the process for communicating with potential and short-listed bidders, and ideally including key project objectives and priorities, a realistic project timetable, and the process for communicating project delays or accelerations. This Strategy is to be updated at each key project phase shown in Figure 3.1, including prior to EOI and RFP issue.

- Where possible, Responsible Agencies should procure geotechnical site investigation information, extent of utilities and other reports on the basis that short-listed bidders can rely on the findings and factual information, but not necessarily inferences from those findings. Ideally the scope and nature of the investigations is to be determined in consultation with bidders.
- Early (pre-RFP) bidder interaction to gain bidder reactions to certain output specifications and risk allocation requirements, within the project probity framework.
- Responsible Agencies submitting EOI and RFP documentation checklists to NSW Treasury to ensure quality consistent documents are released, minimal but necessary information requirements, and that the project team is adequately prepared to manage the tender process.
- Electronic submission of bids and ensuring all evaluators have appropriate experience and training in PPP evaluation.
- Greater guidance on value for money bid evaluation based on a detailed assessment of all aspects of price, financial and non-price information and criteria. A proposal is value for money if it achieves the required project objectives in an efficient, high quality, innovative, and cost-effective way with appropriate regard to the allocation, management and mitigation of risks. Value for money takes into account quantifiable and non-quantifiable benefits, costs, and risks. A formulaic approach which can place undue emphasis on price is not to be used.
- Use of a Public Sector Comparator (PSC) and/or a Shadow Bid Model (SBM) during the Business Case and Procurement stages to inform likely value for money drivers and to inform the procurement method decision. During procurement the SBM will be used to interrogate the reasonableness of bidders' financial models.
- Clearer and more detailed guidance on Contract Management Delivery and Operations, highlighting the early engagement of a Delivery Project Director (prior to contract signing), the role of an experienced inter-agency Delivery Steering Committee or Board, the need to manage key Delivery and Operational risks and project budgets (including specific provisions for contingencies).
- Inclusion of the requirement to comply with the Treasury Circular TC15-16: Managing PPP Contracts, including consulting with NSW Treasury for any proposed material changes to commercial and/or contractual arrangements and, in some cases obtaining Cabinet/Ministerial approvals for certain changes.

- Post Implementation Reviews to be conducted consistent with the Gateway Review System and IIAF for Tier 1 projects and 1-2 years after operations have commenced. A separate PPP specific Post Implementation Review process is no longer required as this would largely duplicate the IIAF process.

- New requirements for producing PPP Project Summaries (formerly known as Contract Summaries), to improve readability, consistency with other jurisdictions, and to ensure Summaries are produced in a cost effective and timely manner. This includes:

  - Placing the responsibility of accurate production of the Project Summary on the Responsible Agency and legal experts (for those components of the summary relating to the Contracts). The Auditor General is no longer required to audit the Project Summary. This change is made cognisant of the fact that redacted Project Contracts are now released under the *Government Information (Public Access) Act 2009* (GIPA Act) and given the costs and time involved for the Auditor General to audit the Project Summaries.

  - Streamlining the required content of Project Summaries to be more reader friendly, less technical and with a more balanced approach to documenting Project and Contract information.

  - The Project Summary will continue to be placed on the NSW Treasury PPP website but will no longer be tabled in Parliament.

2 Using these Guidelines

2.1 Relationship to other guidance materials

These Guidelines are designed to provide Government agencies, the private sector, advisers and other stakeholders a streamlined guide on the NSW specific requirements for PPP preparation, procurement and management and aim to complement the National PPP Guidelines.

These Guidelines also recognise the following specific NSW Guidelines, Circulars and Policies:

- TC 17-03: NSW Gateway Policy
- TC 16-09: Infrastructure Investor Assurance Framework
- TC 15-16: Managing PPP Contracts
- TC 14-29: Management of Contingency Provisions for Major Projects
- TC 12-19 Submission of Business Cases
- TPP 17-01: NSW Gateway Policy
- TPP 15-02: Budgeting for Availability based PPPs
- TPP 08-05: Guidelines for Capital Business Cases
- TPP 06-08: Accounting for Privately Financed Projects
- C2014-09: Governance Framework for Major Transactions
- M2014-11: Additional Evaluation Criteria for Procurement of Major Projects Valued Above $100 million
- M2007-01: Public Disclosure of Information Arising from NSW Government Tenders and Contracts
- NSW Government Procurement Policy Framework and the associated Strategic Directions and Procurement Board Directions (NSW Government Procurement Directions)
- NSW Government Unsolicited Proposals Guide for Submission and Assessment (Unsolicited Proposals Guide)

These NSW PPP Guidelines take precedence over other NSW Guidelines, Circulars and Directives where there is an inconsistency.

These NSW PPP Guidelines do not replace the need for agencies to be aware of all the detailed aspects contained in these Policies and Circulars, as well as other Policies, Guidelines, and Treasury Circulars and Premier’s Memoranda.

As these Guidelines apply to a wide range of projects, and in the spirit of efficient procurement and minimising transaction costs, there may be cases where it is appropriate to depart from the processes set out in these Guidelines. In such cases, the Responsible Agency should seek prior approval from NSW Treasury. Depending on the circumstances, approval from the Treasurer or Cabinet sub-committee may be necessary.

Any reference to the “Relevant PPP Authority” in the National PPP Guidelines refers to NSW Treasury (as the authority responsible for the application of PPP policy within NSW), unless otherwise specified.

NSW Treasury will periodically review these Guidelines and update them as required.

2.2 Roles of agencies in PPP procurement and delivery

Generally, the Responsible Agency has overall responsibility for procuring and delivering a PPP consistent with these NSW PPP Guidelines and for ensuring the project will meet its service requirements. Agencies that are not accredited by the Department of Finance, Services and Innovation under the NSW Government Procurement Guidelines for either the planning, procurement or delivery phase may be required to engage external support, depending on the risk profile of the project.

Where more than one agency is involved in a project’s service delivery outcomes, the Secretary of NSW Department of Premier and Cabinet will appoint an agency to lead the project and convene a project Steering Committee. The other agencies will be represented as members on that committee. Committee membership may differ depending on whether the project is in the procurement (tendering and negotiations) phase or the post-contract signing delivery phase (which includes construction and operations).

In certain circumstances, the Premier may authorise Infrastructure NSW (via Projects NSW) under Part 5 of the *Infrastructure NSW Act 2011* to “step in” to procure and deliver major projects.

Projects NSW, a specialist unit in Infrastructure NSW, will manage the procurement and delivery of nominated priority infrastructure projects by performing the Project Director role.

Infrastructure NSW also plays a role as the Gateway Coordination Agency for capital projects and administers the IIAF. As part of adhering to the protocols of the IIAF, the Responsible Agency is required to register with Infrastructure NSW a project valued at an estimated total cost (ETC) of $10 million and above. Registration includes a risk self-assessment to determine preliminary Project Tier, which is part of the process that determines the level of assurance and reporting applied to a project, proportionate to its Project Tier.

NSW Treasury is the first point of contact in NSW for PPPs, potential PPPs and major structured financing transactions that may involve the private sector. NSW Treasury can advise Responsible Agencies on any aspect of these NSW PPP Guidelines and the National PPP Guidelines.

NSW Treasury assists Responsible Agencies with all aspects of planning, procuring and managing PPP contracts. NSW Treasury should be involved as early as possible for any project greater than $100m or any project that would likely be procured as a PPP. NSW Treasury can provide best practice templates for PPP documentation, including pre-procurement documentation, EOIs and RFPs, and PAFA Act approvals.

NSW Treasury should be involved in selecting commercial, financial and legal advisers and can provide templates for requesting proposals from advisers and evaluating such proposals. NSW Treasury also specialises in providing advice on commercial/financing aspects of PPPs, and the preparation of the PSC and SBM. Experienced NSW Treasury members should be part of the Steering Committee and Project Teams and be involved in all interactive tendering and commercial discussions with potential, short-listed and preferred bidders.

NSW Treasury should be consulted on various aspects of managing PPP contracts, consistent with TC15-16: Managing PPP Contracts.

Other agencies, such as the Department of Premier and Cabinet, may also be involved in a PPP. This will be determined on a case by case basis.

3 Approval processes

3.1 Overview

The NSW Government approval process and an overview of required documentation[5] for each project phase is illustrated in Figure 3.1. In general, Government PPP-related approvals are required:

- at the investment (business case) stage to approve project funding (including contingency and provision for foreign exchange), irrespective of whether the project is to be procured as a PPP, consistent with standard infrastructure investment policies;
- at the procurement decision stage;
- prior to approaching the market with a formal PPP EOI invitation and only after project funding and the procurement method have been approved by Cabinet;
- at specific points throughout the PPP procurement tender process including prior to RFP issuance and prior to selecting a preferred proponent and executing contracts;
- for material changes to key commercial principles, risks, State Budget impacts, level of any user fees (e.g. tolls) and funding sources;
- to reimburse bid costs or to terminate a procurement process; and
- after contract execution, for certain material changes to commercial terms or contracts, if certain material and costly risks materialise, or to terminate a PPP contract.

As part of the broader Government approval process, Gateway Reviews at relevant gates should be conducted prior to obtaining Cabinet approvals, consistent with Figure 3.1 and the IIAF and Gateway Review System. Infrastructure NSW and NSW Treasury are able to assist in ensuring Gateway Reviews are conducted in a timely way, if provided with appropriate notice of an upcoming Cabinet approval point.

Generally, in NSW, a Cabinet sub-committee with specific mandates provide approvals at various project milestones. However, Cabinet has discretion over whether a full Cabinet approval is required for a particular project, aspect or milestone of a PPP transaction. Responsible Agencies should contact NSW Treasury or Department of Premier and Cabinet if they require further guidance relating to a Cabinet sub-committee approval process.

5 Detailed documentation requirements at each decision point are provided in chapters 4, 5 and 6 of these Guidelines, and in the more detailed National PPP Guidelines.

Separate Cabinet approvals can be combined in some cases. For example, the approval for funding and PPP procurement may be combined where they are linked (e.g. a road PPP funded by tolls), and approval to select a preferred proponent and execute contracts may be combined on the condition that final contracts are substantially in the same form as when the preferred proponent is selected. Also Cabinet approvals may be linked in the case where the Responsible Agency already has advanced project planning and documentation (perhaps because the project is similar to an existing PPP).

Responsible Agencies should contact NSW Treasury for guidance as to when Cabinet approvals can be combined or when additional Cabinet approvals are required (e.g. for material commercial or contractual changes).

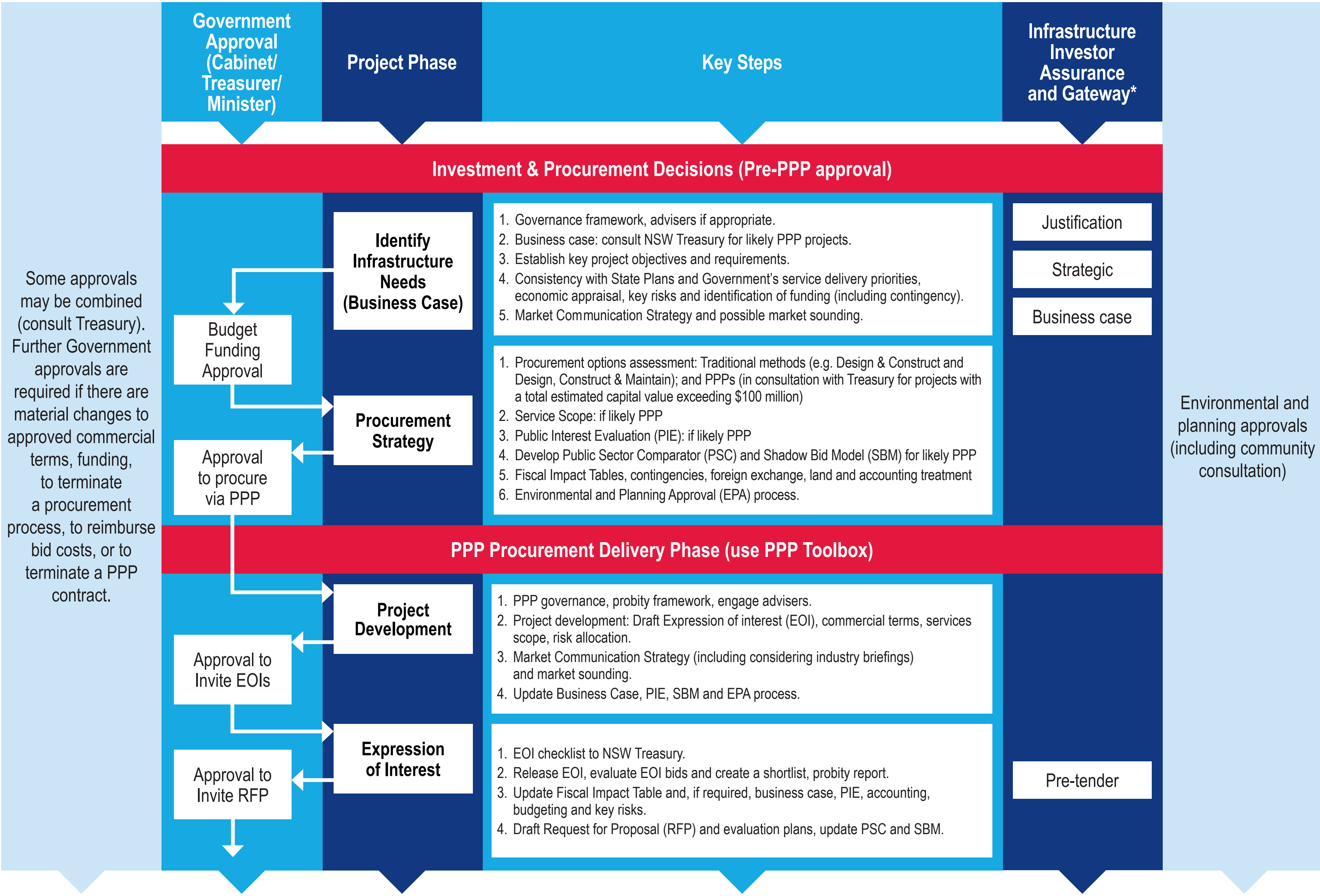
With respect to PPPs procured by SOCs or other public trading enterprises with a Board of Directors, approval by the Board is required prior to requesting Cabinet approval at each phase outlined in Figure 3.1.

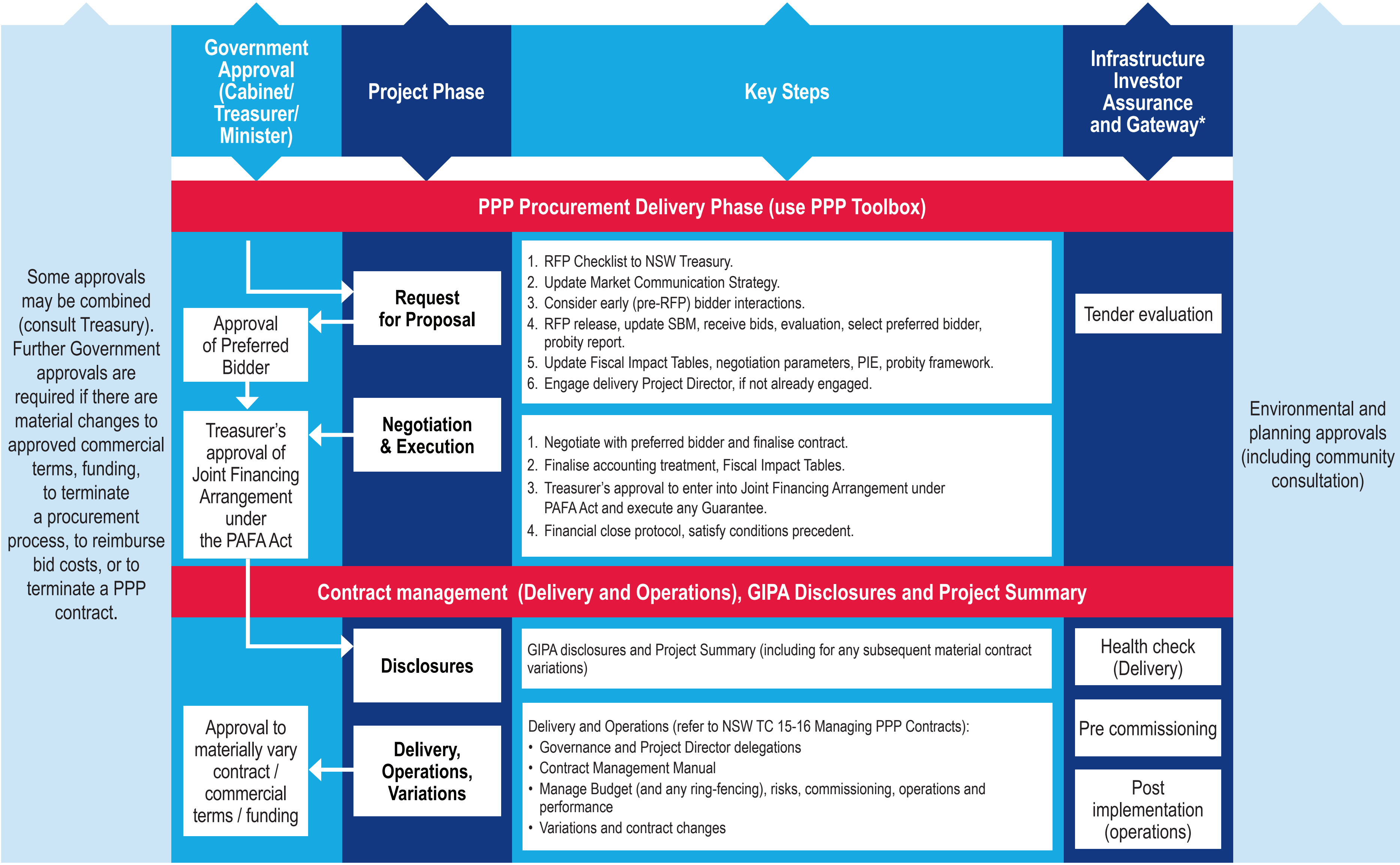
Work and documentation related to achieving Environmental and Planning Approvals (EPA) needs to be progressed throughout the project planning and procurement phases. Cabinet should be informed of any key EPA issues and risks as they arise. Refer to section 3.4 for further details.

In NSW, PPPs that are also joint financing arrangements, need to be approved by the Treasurer pursuant to the PAFA Act and, if applicable, the *State Owned Corporations Act 1989* (SOC Act), as detailed in sections 3.5 and 3.6.

If another assurance framework applies to a particular project, then that other framework should be followed and matched against the key PPP milestones in discussion with NSW Treasury.

Figure 3.1 Phases of Government Approval -





* Note a Gateway Health Check can occur at any time

3.2 Cabinet approvals during PPP procurement

As summarised in Figure 3.1, Cabinet (or appropriate Cabinet sub-committee) approvals and Gateway Reviews are required at certain tender milestones and project gates.

At each milestone, Cabinet (or appropriate Cabinet sub-committee) will consider any proposed material changes in the risk allocation, proposed (particularly bespoke) contract terms, estimated costs and funding, accounting and budget impact on the Responsible Agency and State, project scope, public interest, and/or likely value for money outcome.

A Responsible Agency will be required to seek additional Cabinet approvals, during PPP procurement, if there are, at any time, material changes in the following, which may also affect the business case conclusions:

- forecast construction, operating or maintenance costs (particularly due to changes in project scope);
- revenue estimates or proposed or maximum user charges;
- significant additional funding is required from Government or from internally generated funds of the Responsible Agency, including funding for PPP procurement processes;
- there is significant change in likely or actual development approval conditions that requires additional public funding outside the Responsible Agency allocated contingency provision;
- there is a need to provide greater actual or contingent funding for exposure to State-borne risks;
- there is a material change in debt and/or equity financial markets that affects the viability and/or cost of the project; and/or
- there is any other material change to the agreed risk allocation or project costs and funding.

A further Cabinet approval will be required prior to signing a contract if any material aspect of the negotiation terms previously approved by Cabinet cannot be met.

Responsible Agencies must inform NSW Treasury if at any time during procurement affordability issues arise.

Responsible Agencies should consult NSW Treasury for guidance on whether a proposed/likely change would be considered material or significant.

3.3 Government approvals and NSW Treasury consultation during delivery

Consistent with TC15-16: Managing PPP Contracts and the Treasurer's approval to enter a Joint Financing Arrangement (refer section 3.5), NSW Treasury is to be consulted as the Responsible Agency becomes aware of a likely or proposed material contractual or commercial (risk allocation) change to an existing PPP contract and prior to agreeing or negotiating such changes. This includes the refinancing of any private sector debt (except for a no consent refinance arrangement), or a change in control of a key or private sector party (refer also to chapter 7).

The Responsible Agency and Minister is required to obtain Cabinet approval prior to renegotiating any significant elements (or material variations) of a PPP contract.

Renegotiation of proposed significant variations of a PPP contract, particularly where there is a significant budget, risk or impact on the State's actual or contingent liabilities, are likely to also require Cabinet/Ministerial approvals. NSW Treasury, in consultation with Department of Premier and Cabinet, will determine whether it would be appropriate to seek the approval of the Treasurer, portfolio Minister and/or Cabinet.

3.4 Environmental and planning approvals

Environmental and Planning Approval (EPA) requirements are separate from the PPP Cabinet approval requirements for project funding and PPP procurement tender phases. However, the processes for attaining EPAs should happen in parallel with the PPP business case and procurement processes, as shown in Figure 3.1. Risks and associated costs with gaining development approvals should be considered at the outset from the Business Case development stage and updated as required throughout procurement and project delivery.

Under the *Environmental Planning & Assessment Act 1979* (EPA Act), the Minister for Planning (or their delegate, e.g. the Planning Assessment Commission) provides consent for all State Significant Developments or Infrastructure under Parts 4 and 5.1, respectively. Generally, service-enabling infrastructure PPPs are either State Significant Developments or State Significant Infrastructure based on project scope and capital investment value.

In all cases, an appropriate level of environmental assessment and community consultation must be undertaken as part of the assessment process. Final EPA will not occur until details of the project to be actually delivered are known.

Cabinet should be informed of the planning process that will be followed prior to the Responsible Agency calling for EOIs. The planning approval process can be flexible enough to accommodate outcomes-focused approaches to allow innovation.

A Responsible Agency should, as early as practical in the project planning and procurement phases:

- engage an internal or external planning expert and community consultation expert; and

- consult with the appropriate Planning Approval authority, including discussions regarding the likely development approval conditions.

This will assist in mitigating overall procurement costs for the Government and private parties. In addition, it will mitigate cost, affordability and time risks associated with the Planning Approval process.

Likely development approval conditions and their associated costs need to be updated at the various project approval phases, in consultation with NSW Treasury. These costs may impact materially on business case conclusions, project budget, affordability and timing and commercial risk allocation. This may trigger the need to seek further Cabinet approvals (see sections 3.2 and 3.3). The allocation of risks and costs relating to the securing of EPA and complying with any approval conditions must be detailed in the Project Contract, and for Social Infrastructure PPPs, be consistent with the NSW Treasury Template Project Documents. The Template Project Documents refers to a suite of template contractual documentation.

An appropriate contingency amount for cost risk associated with planning approval conditions should be separately identified as part of the Responsible Agency's overall Budget funding for the project. Management of contingency funding should comply with Treasury Circular TC14-29 Management of Contingency Provisions for Major Projects.

3.5 Statutory approvals under the PAFA Act

3.5.1 Approval to enter into joint financing arrangements

PPPs are usually joint financing arrangements as defined pursuant to section 5A of the PAFA Act. The Treasurer's approval is required under section 20 of the PAFA Act for the Responsible Agency to enter into a joint financing arrangement, on the recommendation of the Responsible Minister. NSW Treasury should be consulted on the appropriate form of words of the Minister's letter requesting the Treasurer approve the Responsible Agency/Minister entering the joint financing arrangement. Responsible Agencies should contact NSW Treasury for templates of both the Minister's letter and the Treasurer's response letter (i.e. the approval).

Prior to the Treasurer or the Treasurer's delegate releasing approval to enter into the joint financing arrangement, the Responsible Agency will need to provide the Treasurer or the Treasurer's delegate (and NSW Treasury) with a copy of:

- the final Project Deed and supporting documents
- final accounting and Fiscal Impact Tables.

Responsible Agencies must plan to allow sufficient time to obtain a signed letter from their Minister and for the Treasurer to consider the Minister's letter and respond, taking into account target dates for contractual and financial close. The Treasurer's letter will state that:

> *"The Responsible Agency must consult Treasury regarding proposed future amendments to the joint financing arrangement. Depending on the nature and materiality of the proposed amendments, NSW Treasury will advise whether any other (e.g. Departmental, Ministerial or Cabinet) approvals are needed, consistent with the NSW PPP Guidelines and TC15-16."*

3.5.2 Approval for Government Guarantees for PPPs under the PAFA Act

For certain joint financing arrangements, it may be appropriate to issue a Crown guarantee of the financial performance obligations of the Responsible Agency pursuant to sections 22F and either 22AA or 22B of the PAFA Act. NSW Treasury should be consulted regarding the appropriateness of providing such guarantees, including whether a section 22AA or 22B Guarantee should be issued.

If a 22B Guarantee is considered appropriate, the NSW Treasury template PPP Guarantee Deed Poll document must be used, to ensure initial and any subsequent transaction costs are minimised. The list of “Guaranteed Documents” is to be limited to those core project documents which form the basis of the joint financing arrangement and which contain the key financial obligations of the Responsible Agency.

3.5.3 Treasurer’s PAFA Act approval to amend a Joint Financing Arrangement or Guarantee may be required in certain limited cases

In certain limited circumstances, amendments to previously signed joint financing arrangements contracts may also require the Treasurer’s approval under the PAFA Act.

Consistent with the terms of each Treasurer’s Approval to enter a joint financing arrangement, the NSW PPP Guidelines (refer to chapter 7) and TC15-16: Managing PPP Contracts, agencies should consult with NSW Treasury prior to commencing contractual or commercial renegotiations. At this time, NSW Treasury will advise whether the Treasurer’s PAFA Act approval or other Cabinet/Ministerial approval is required to amend an existing PPP contract, including joint financing arrangements, taking into account expert legal advice if required. NSW Treasury should be involved in the relevant contractual or commercial negotiations.

In certain limited circumstances, an existing Guarantee may need to be refreshed or re-issued. Consistent with above, where a new Guarantee is to be issued for an existing joint financing arrangement, the NSW Treasury template PPP Guarantee Deed Poll is to be used. “Guaranteed Documents” are to be limited to those core project documents which form the basis of the joint financing arrangement. Agencies should consult with NSW Treasury prior to discussing changes to the beneficiaries or the schedule of documents covered by the Guarantee.

3.6 Statutory Approvals under the SOC Act

SOCs need to identify the approvals required under the State Owned Corporations Act 1989 (SOC Act), including sections 19 and 20X. These sections of the SOC Act deal with the acquisition or disposal of fixed assets and investments. These approvals should proceed together with PAFA Act approvals prior to signing the contract. SOCs should confirm with NSW Treasury to determine what approvals are required for their particular PPP.

3.7 Direct negotiations

3.7.1 Unsolicited Proposals approval process

Unsolicited proposals for PPPs are proposals initiated by the private sector proponent and can provide a source of innovative ideas about how to improve Government infrastructure and the delivery of Government services.

Unsolicited proposals for new infrastructure and/or goods and services must comply with the NSW Government's Unsolicited Proposals: Guide for Submission and Assessment. This Guide provides a definition of an Unsolicited Proposal. The Secretary of the Department of Premier and Cabinet is the first point of contact for unsolicited proposals.

Unsolicited proposals, which involve a new "stand-alone" PPP concession arrangement for new infrastructure and/or services, must comply with the principles and processes contained in both the Unsolicited Proposals Guide and these NSW PPP Guidelines.

For example, the NorthConnex proposal, which involved the construction of a new $3 billion road tunnel, as well as the modification of existing toll road concessions, needed to comply with both the NSW Unsolicited Proposals Guide and the NSW PPP Guidelines.

In certain circumstances, a Responsible Agency, in consultation with NSW Treasury, may be able to directly deal with an incumbent PPP concessionaire, outside the framework of the Unsolicited Proposals Guide as outlined below in section 3.7.2.

3.7.2 Direct negotiations with an incumbent of an existing PPP concession

Where a proposal is from an incumbent (or a member of a) PPP Consortium to vary an existing concession, which may or may not include related new or modified infrastructure, the Responsible Agency and proponent must comply with the existing PPP contract (where relevant), these NSW PPP Guidelines and TC15-16: Managing Public Private Partnership (PPP) Contracts. This is the case, irrespective of whether the existing PPP contract documents contain specific modification or variation clauses.

For such variations, the Responsible Agency does not need to comply with the NSW Unsolicited Proposal Guide given it is in essence a variation of an existing PPP.

In particular, a proposal to materially vary an existing PPP contract will require consultation with NSW Treasury and relevant Cabinet approvals prior to:

- entering direct negotiations with a proponent;
- signing any Memorandum of Understanding or Heads of Agreement;
- materially changing any commercial terms previously approved by Cabinet; and
- signing Amending Deed(s).

In addition, the Responsible Agency, in consultation with NSW Treasury, must:

- establish an appropriate PPP Governance Framework at the outset; and
- assess the proposal, at least, against the Minimum criteria for Evaluating Commercial or Contractual Change as set out in TC15-16, being:
  - value for money;
  - the benefits and costs of the changes to Government and the private party;
  - impact on the State Budget and project affordability;
  - the impact on the allocation and management of risks and avoiding creating an undesirable precedent;
  - continuing viability of the project; and
  - external market forces.

3.7.3 Premier's Innovation Initiative

The Premier's Innovation Initiative (the Initiative), announced in August 2014, expands the Government's commitment to attract and implement innovative methods from the non-Government sector to improve public service offerings. The Initiative periodically invites non-Government parties to submit proposals in defined priority service areas, which provides the opportunity to explore and trial new models to achieve better or more cost effective outcomes for Government goals. It also recognises the role that the business and wider community of NSW can play to ensure that NSW continues to meet its 2021 goals of rebuilding the economy, returning quality services and renovating infrastructure.

The Guide to the Premier's Innovation Initiative details the assessment process, framework and criteria to form the basis for private sector proposals. Government will assess proposals for objectives such as value for money and service improvements through a cross-agency working group. Proposals will be self-funding unless otherwise agreed by Cabinet sub-committees and the final agreement will be approved by the relevant portfolio Minister.

4 Governance

4.1 Effective Governance

A detailed documented PPP governance framework should be established as early as possible, ideally in the business case stage if PPP procurement is likely or after Cabinet approves PPP procurement. Where a governance framework already exists from the business case stage, the Governance framework can be adjusted to suit PPP procurement.

An inter-agency Steering Committee or Project Advisory Board will direct and oversee the development of all PPP or likely PPP projects. A dedicated Project Director and Project Team will manage the day to day tasks of the PPP project.

The Steering Committee or Board should approve all key documents and decisions in relation to the PPP (or likely PPP) project, including, for example, business case, procurement strategy, market communication strategy, EOI and RFP tender documents (including contracts), tender evaluation plans, PSC and/or SBM, commercial principles and final contracts. In addition, the Steering Committee or Board will need to approve any proposed recommendations to Ministers and/or Cabinet.

All decisions in relation to the PPP should be authorised consistent with the PPP governance framework (rather than as per the approvals process of the Responsible Agency, for example).

NSW Treasury can provide templates for PPP governance frameworks and should be consulted on draft versions of the governance framework prior to finalisation and submission to Cabinet.

For guidance on governance frameworks after contract signing, refer to chapter 7.

4.2 Project management structure

Figure 4.1 outlines a typical high-level project management structure for NSW PPP projects.

Figure 4.1. Typical project management structure

4.3 Steering Committees and Advisory Boards

In NSW, the composition of the Project Steering Committee or Project Advisory Board for a PPP project will typically include: the Responsible Agency (usually as chair), other directly affected agencies, an experienced officer from NSW Treasury and appropriately experienced representatives from other agencies or independent advisers as determined by the Responsible Agency, in consultation with NSW Treasury, or as directed by Cabinet.

The Project Director will attend all meetings and be responsible for producing the Agenda, Minutes and papers.

4.4 Project Team and appointing Project Director and Advisers

Formation of the Project Team should be on the basis that members can continue in their roles throughout the project planning and procurement phases (as far as practical) and have sufficient capacity to be able to undertake their role.

The Project Team members will generally include an appropriately qualified and experienced Project Director, NSW Treasury member(s) and Responsible Agency staff, as well as appropriately qualified and experienced financial, commercial, technical (including a planning approval expert), operational and legal experts. All advisers should have clear lines of accountability.

NSW Treasury should be involved in the selection of Project Director, commercial and financial adviser and legal adviser. Responsible Agencies should contact NSW Treasury for templates for inviting proposals from advisers and evaluating submitted proposals.

NSW Treasury maintains pre-qualified lists of consultants with PPP, financial, legal, and accounting expertise. The Responsible Agency may also wish to consider using the NSW Department of Finance, Services and Innovation ‘Prequalification Scheme: Performance and Management Services’, to shortlist and engage legal advisers and/or probity advisers.

In some cases, an appropriately skilled NSW Treasury staff member may act as the commercial/financial adviser (or lead the commercial/financial work stream with the support of external consultants) for the project.

The Project Director should be appointed as soon as practical. For likely PPPs it may be beneficial to engage a Project Director during the business case stage.

The Project Director should be given the appropriate delegations to ensure that there are no unnecessary delays in progressing work streams and meeting the project timetable.

Legal advisers are required to review tender documentation and to prepare contractual documents, taking into account the NSW Treasury PPP tender templates and template Project Documents for social PPP infrastructure.

The services of an Environmental and Planning Approval expert(s) and community consultation expert should also be retained. These services may be able to be sourced externally or internally in some Responsible Agencies.

Where possible, prior to or during procurement, the Responsible Agency should also engage geotechnical and other experts. To minimise bid costs, these experts should be engaged on the basis that at least any factual information contained in (but not necessarily inferences from) expert reports can be relied on by bidders and novated to the successful bidder. Where practical, the scope of work should be shared with potential bidders or short-listed parties so they can provide input.

4.5 Tender evaluation team members

Responsible Agencies, in consultation with NSW Treasury, should ensure tender evaluation members have the appropriate technical skills. In addition, evaluation team members should either be experienced in tender evaluations or be provided with appropriate guidance and training prior to the tender evaluation process being commenced, or if involved, prior to the interactive tender process commencing. All tender evaluation team members should be briefed on the tender evaluation plans and probity requirements prior to commencing the tender evaluation. Responsible Agencies should contact NSW Treasury for template evaluation plans. Members of specialist sub-panels or teams should have a high level of knowledge and expertise in the relevant specialist subject matter.

4.6 Probity requirements

The NSW Government is committed to efficiency, fairness, impartiality and integrity in all its dealings. Probity is an important issue for Government as custodian of the community's assets. Probity management is an integral part of the procurement process as PPP transactions can involve lengthy and complex tender processes.

As part of ensuring public and bidder confidence in the process, all PPPs in NSW must have, as early as possible in the process:

- a comprehensive probity plan – a probity plan that helps foster a probity culture and clearly defines the proper process; and
- an appointed Probity Adviser or auditor – providing independent advice and/or assessment throughout the tender process.

All PPPs must also comply with NSW Government's Code of Practice for Procurement[6]. The Code establishes ethical principles and standards of behaviour for all parties involved and will apply to all procurement actions from calling for EOIs through to project completion.

To ensure that the participation of related companies in a tender does not impact on the probity, competitiveness, or cost of a project, the related companies may be required to sign a probity process deed.

The NSW Government has established independent review mechanisms for complaints about tendering with Government agencies to maximise community and business confidence in the NSW Government's tendering practices. The Independent Commission Against Corruption may examine complaints about potentially corrupt conduct in the procurement process.

[6] Further details are provided at https://www.procurepoint.nsw.gov.au/policy-and-reform/nsw-government-procurement-policy-framework .

5 Project need, funding and procurement strategy

5.1 Business case and procurement strategy

The Responsible Agency must identify public infrastructure needs to achieve its service delivery objectives in line with the Total Asset Management (TAM) Framework[7]. Cabinet approval to fund the infrastructure project and associated services should be requested after the project has a well-developed Final Business Case. Prior to Cabinet approving the investment (funding) decision, an IIAF Gateway Review (depending on the Tier) must have been conducted on the Final Business Case. Gateway Reviews should also be undertaken at Gate 1 Strategic Business Case and Gate 0 Project Justification.

Business cases should be prepared consistent with:

- TC 12/19: Submission of Business Cases
- TPP 08-05: Guidelines for Capital Business Cases
- Infrastructure Investor Assurance Framework
- Appendix 2 (Fiscal Impact Tables and Negotiation Parameters) of the NSW PPP Guidelines for likely PPPs.

During the development of a business case and irrespective of the procurement method, a successful and low cost procurement will be facilitated by:

- establishing project objectives and outcomes: this involves determining what key issues the Responsible Agency and Government are trying to address, for example, greater use of public transport, reducing pressure on the health or justice system, improving quality of service, introducing innovation, urban renewal, improving commuter times/information, removing trucks from surface streets
- desired risk allocation for project specific risks
- the Responsible Agency committing to a realistic project and procurement timetable. The timetable should take into account any constraints for construction start/end dates, land acquisition process, Planning Approvals process, establishing project team and advisers, market soundings and interactions with potential and short-listed bidders (particularly for complex projects), resolving any unique project specific risk allocation issues and preparation and evaluation of tenders. The timetable should also take into account the number and timetable of other Australian infrastructure projects that may impact bidder capacity.

7 More details on the Government's Total Asset Management Policy and Guidelines are available at Treasury's Website: https://www.treasury.nsw.gov.au/. Whilst SOCs are not bound by TAM policy, their assets strategies should, as far as practicable, be consistent with the principles of TAM.

In NSW, a public infrastructure project with a total estimated capital value exceeding $100 million, must be assessed for possible PPP procurement having regard to value for money drivers. This threshold also applies to smaller projects that may be bundled together, for example, a number of new and/or brownfield school projects.

A Responsible Agency should consult NSW Treasury as early as possible when developing a business case and/or procurement strategy for a potential PPP. This consultation should occur prior to engaging external consultants or conducting market soundings. NSW Treasury maintains pre-qualified lists of consultants with PPP, financial, legal, accounting and probity expertise.

The Business Case and Procurement Strategy may be informed by an informal/formal market sounding process to help determine infrastructure and service scope, project and procurement timetable, risk allocation, financing structure, site selection and project objectives.

Where a PPP procurement strategy is elected, the private sector will be the employer of the staff within the PPP, unless otherwise approved by Cabinet.

The Responsible Agency should take care to prepare realistic cost estimates that include land acquisition costs, likely development approval condition costs, procurement costs and an appropriate separately identifiable amount for contingencies or the realisation of risks, including any interest rate or foreign exchange risk.

It is important to identify the extent to which the project will be exposed to foreign exchange risk. If a material amount of goods or services are likely to be sourced from foreign jurisdictions, variations in the exchange rate between Australian dollars and the foreign currency in which these goods and services are denominated could lead to fluctuations in the project cost and, in extreme cases, jeopardise the affordability of the project. Material foreign exchange risks should be highlighted in the business case as early as possible, provided for through the project's contingency provision, and continually monitored throughout project procurement.

Table 1 of Appendix 2 should be submitted to NSW Treasury to summarise all cost information for likely PPPs.

In some cases, the Business Case and a detailed Procurement Strategy may be submitted to Cabinet concurrently. This may be the case for likely PPPs where the funding is user fee-based or if the project and proposed procurement method are similar to a previous project.

5.2 Public Sector Comparator and Shadow Bid Model

In NSW, for likely PPPs, a preliminary Public Sector Comparator (PSC) and a Shadow Bid Model (SBM) are to be developed during the Business Case and Procurement Strategy phases, unless otherwise agreed by NSW Treasury. At this stage, comparing the PSC and SBM help to inform the likely value for money drivers and the likelihood of achieving value for money in the case of PPP procurement.

The National PPP Guidelines provide detailed guidance on constructing PSCs for social infrastructure. Consistent with these Guidelines, a risk-free discount rate should be used in calculating the PSC. Responsible Agencies should contact NSW Treasury to obtain the appropriate risk-free discount rate for social infrastructure PSCs.

A PPP SBM is the Responsible Agency's best estimate of a private party's bid price (in net present value/cost terms) to deliver the output specification under a PPP project structure. The SBM should reflect a private party's costs and debt and equity structure and the Project Deed terms (including the payment mechanism).

After a project is approved for PPP procurement, the PSC and SBM are to be fully scoped and updated, consistent with the terms of the RFP, draft contract and output specification.

The PSC is a mandatory requirement.

The SBM is also a requirement unless otherwise determined by NSW Treasury.

The PSC and SBM require a high level of technical expertise in project costing, financing and risk analysis. NSW Treasury is responsible for advising agencies on the development of PSCs and SBMs, including the discount rates. Responsible Agencies should engage various technical experts to advise on capital and operating cost estimates as well as any revenue estimates. Given estimates are subjective, they should be verified through benchmarking analysis, independent or other checks. Stress testing of model robustness and key assumptions should be conducted.

Both the PSC and the SBM are dynamic and should be updated as new information is received but should be finalised prior to or soon after the RFP release, if disclosing model information to bidders (refer also to section 6.7.2). The PSC and/or SBM should not be changed after the opening of bids unless there is an obvious significant error or new information impacts on the estimated forecasts. Any such changes should be documented.

During PPP procurement the PSC and/or SBM are used to assist in evaluating and interrogating the reasonableness of the bidders' financial models. The discount rate applied to the bids is the same discount rate applied and used in the PPP SBM, being the Project Internal Rate of Return of the SBM. The SBM may be used as an indicator of affordability.

Value for money is determined by evaluating and comparing the price and non-price aspects of the bids (refer section 6.7.5).

Responsible Agencies should consult with NSW Treasury immediately if at any time affordability issues are likely to arise.

The results of the PSC and/or SBM should be summarised as set out in Appendix 2: Fiscal Impact Tables and Negotiation Parameters.

5.3 Public sector comparator: Social and Economic PPPs

5.3.1 PSCs for Social Infrastructure

PSCs for social infrastructure are calculated as the estimated Net Present Value (NPV) of a project's cash flows based on traditional infrastructure procurement and whole-of-life operational and maintenance costs. This is because revenue derived from social infrastructure is primarily (if not completely) sourced from Government, through availability based payment mechanisms. The PSC for social infrastructure projects are cost-driven, and Government generally retains most, if not all, of the demand risk.

The cash flows for social infrastructure in the PSC will include three core components:

- the base costs of delivering the services specified in the project brief based on traditional delivery through a general government agency;
- a competitive neutrality adjustment (if applicable), covering any expenditure-based State and Local Government taxes, fees and charges that the Responsible Agency is not required to make by virtue of its Government-owned status; and
- an estimate of the expected cost of risks that could potentially crystallise over the life of the project. The PSC should be able to distinguish between the expected cost of risks that would be retained by the Government and those that would be transferred to the private sector.

5.3.2 PSCs for Economic Infrastructure

In developing a PSC for economic infrastructure projects, it is assumed that the most efficient government delivery method is using a special purpose vehicle and in accordance with NSW Government's Commercial Policy Framework.[8] This approach reflects the importance of revenue and the allocation of demand risk between the public and private parties in determining the financial outcomes of the project.

PSCs for economic infrastructure projects will incorporate the following principles:

- competitive neutrality with the private sector through the payment of State and Commonwealth tax equivalents and other regulatory costs equivalent to those that would be faced by the private sector
- a commercial capital structure, i.e. a level of debt and equity that optimises the value of the project while maintaining an investment-grade credit rating for the project's debt. Prudential constraints will be applied to the project's financial structure, including minimum debt service cover ratios and reserves for debt service

[8] This framework seeks to replicate within Government businesses appropriate disciplines and incentives that lead private sector businesses towards efficient commercial practices. The framework includes financial performance monitoring, financial distributions, capital structure, guarantee fees, social programs and assessment of projects of State significance. Relevant policy documents are available from NSW Treasury at https://www.treasury.nsw.gov.au/.

- a Government guarantee fee, reflecting the margin between the project's credit rating and the credit rating of the NSW Government
- a commercial level of return on the Government's equity investment in the project, reflecting the project and financial risks borne by equity throughout the project's life.

5.4 Market Communication Strategy

For likely PPPs, Responsible Agencies, in consultation with NSW Treasury are required to prepare a Market Communication Strategy which details the process for communicating with the potential, short-listed and preferred bidders and ideally should include:

- Government's key project messages, objectives and expected outcomes for delivering Government services;
- a realistic project and procurement timetable; and
- the process for communicating changes to key project information, including delays or if project delivery is to be accelerated.

This Market Communication Strategy should take into account the probity framework and be updated at each key project phase, consistent with Figure 3.1, including prior to EOI issue and prior to RFP issue.

The timing of initial market engagement should consider allowing proponents to have sufficient time to prepare to participate whilst balancing the need for the public message to provide clarity around the project definition and key milestones.

Responsible Agencies should contact NSW Treasury to obtain a template Market Communication Strategy.

5.5 Market Soundings

For likely PPPs, Responsible Agencies, in consultation with NSW Treasury, and consistent with the probity framework, may conduct a market sounding or similar interactive process as early as the Business Case or Procurement Strategy stages or prior to EOI issue. Market soundings are particularly useful if a project is likely to be suitable for PPP procurement or for very complex projects.

Market soundings should be conducted as a genuine opportunity to receive input from the private sector to:

- establish private sector interest
- help develop key project objectives taking into account Government priorities (to be used consistently throughout any tender process)
- help inform project and service scope
- help inform, develop and resolve complex design, engineering and commercial risk allocations and mitigations, which may include feedback on any proposed Conditional Debt Pay Down (CDPD) structure.

The level of input received from the private sector will depend greatly on the stage of project development and the amount of detail that Responsible Agencies can provide.

In conducting a market sounding, Responsible Agencies should ensure that they:

- have prepared a Market Communication Strategy (refer section 5.4)
- have clear objectives regarding the outcomes of the market sounding process and communicate these objectives to the potential bidders
- provide information on the status of the project (e.g. Business Case phase, to communicate that a procurement decision has not been made)
- do not raise expectations regarding the project if they have not received approvals for Government funding or procurement strategy
- use the opportunity to inform the development or revisions to the Market Communication Strategy to be used during any tender process
- have potential bidders sign a confidentiality deed poll.

5.6 Public Interest Evaluation for likely PPPs

Likely PPPs need to undergo a Public Interest Evaluation (per Appendix 1) to ensure that the PPP is in the public interest. This must be submitted to and considered by Cabinet prior to proceeding to the market and updated throughout the procurement process, as detailed in Figure 3.1. Cabinet may require updates to be submitted at other points during the tender process.

6 Procurement: EOI, RFP and negotiations

The National PPP Guidelines detail the required documentation and procedures at each phase of procurement.

Responsible Agencies should contact NSW Treasury if they have any questions regarding the National PPP Guidelines or these NSW PPP Guidelines.

The following sections highlight a number of NSW requirements, consistent with the objective of minimising bid costs.

6.1 Accounting and budgeting updates

Consistent with Figure 3.1, Responsible Agencies are required to prepare and update an accounting position paper and the Fiscal Impact Tables (see Appendix 2) at each project milestone and if new project information would result in significant changes to the accounting or budget treatment.

The accounting position paper should be consistent with the following (including updates to these policies):

- TPP 15-02: Budgeting for availability PPPs
- TPP 06-08: Accounting for PPPs.

The accounting position paper should identify the:

- balance sheet, income statement and cash flow impacts of the PPP project from the Responsible Agency's perspective, General Government Sector and Total State Sector
- estimated full contingent exposure to Government, including:
  - the termination liability, in the case of private party default or voluntary termination by the Government
  - the sum of any individual actual or contingent liabilities under specific clauses of the project delivery contract, combined with the probability of each outcome
- adjustments for forthcoming likely new accounting standards, as appropriate.

The Fiscal Estimates and Financial Reporting Division of NSW Treasury is responsible for accounting policy guidelines. Responsible Agencies should consult with NSW Treasury to agree on the most appropriate accounting treatment for each individual PPP transaction.

The Auditor-General will ultimately be issuing to Parliament an audit opinion on the financial statements of the Responsible Agency and the whole-of-government accounts. These audits will include considerations of the accounting treatment for any PPPs. In some cases the views of the Audit Office may differ from NSW Treasury's view.

Responsible Agencies should therefore keep the Audit Office updated on the proposed accounting treatment for a PPP project, especially if there are unique aspects to the transaction.

NSW Treasury issues an annual Treasury Circular (for example, TC16-01) on early close reporting procedures which requires accounting treatment of significant and complex transactions to be resolved at an early stage. Responsible Agencies need to comply with this Circular.

6.2 Market Communication Strategy

Consistent with Figure 3.1, an updated Market Communication Strategy documenting the process for communicating with potential and short-listed bidders should be submitted at each Cabinet approval (refer to section 5.4).

6.3 Electronic tender release and submission

Responsible Agencies are to ensure EOI and RFP documentation is available electronically or via a virtual data room.

Responsible Agencies are required to receive EOI and RFP submissions electronically. Any exceptions for items such as drawings, are to be considered on a project by project basis, in consultation with NSW Treasury. Electronic submissions will fast track compliance checks and facilitate faster dissemination of information to the evaluation teams. Bid costs will be minimised because bidders will not need to produce costly multiple hard copy versions or produce costly “fly-throughs” where they are not required for evaluation purposes.

Premier’s Memorandum 2006-11 NSW Procurement Reforms requires all agencies, other than SOCs, to make Request for Tender documents available and enable tenders to be lodged through the NSW Government eTendering system. This system is managed by NSW Department of Finance, Services and Innovation, through the eTendering website[9]. It also provides a mechanism for the receipt of tenders in electronic form, closing tenders, receiving late tenders, opening the tenders, the removal of tenders, publishing a list of tenderers, and publishing contract award information.

6.4 Market sounding

To inform the tender process and documents, and alert potential bidders, market soundings or other similar interactive processes may be conducted prior to the EOI phase (refer to chapter 5).

[9] See https://tenders.nsw.gov.au/

6.5 Expression of Interest phase

Consistent with the National PPP Guidelines, the EOI phase is the first step of the formal bidding process. The purpose of the EOI phase is to allow Government to shortlist no more than three private parties to ensure overall transaction costs are minimised.

Responsible Agencies should, in consultation with NSW Treasury, develop the EOI documentation based on the NSW Treasury PPP templates with due consideration of minimising bid costs. Responsible Agencies should consider carefully the need and use of all the requested information detailed in the returnable schedules.

The EOI documentation and requirements should clearly communicate which technical advisers and documents are required at EOI stage. Responsible Agencies should provide sufficient flexibility to allow consortia to procure specialist advisers, which are not key to shortlisting, until after shortlisting. This is likely to increase competition among specialist advisers and enable consortia to obtain improved pricing.

Prior to releasing the EOI, the Responsible Agency must submit a completed checklist to NSW Treasury to confirm they are ready to release quality EOI documents and manage the EOI process.

Responsible Agencies should contact NSW Treasury for the EOI checklist template. The checklists are designed to ensure that the EOI has been prepared such that bid costs are minimised, that the Government's project and services objectives are clear and that only quality and necessary information is received. In addition, the Checklist focuses on consistency of the PSC, SBM, Reference Project and Output Specification.

Consistent with Figure 3.1, certain documents may need to be updated prior to announcing short-listed bidders and requesting Cabinet approval to proceed to the RFP phase. This includes, if key information or assumptions change, updating the Business Case, Public Interest Evaluation (Appendix 1) and Fiscal Impact Tables (see Appendix 2).

6.6 Early (pre-RFP) bidder interactions

The Responsible Agency, in consultation with NSW Treasury, may conduct early bidder interactions where this may help inform the RFP information and requirements. This may be the case, for example, for very complex projects where output specification could lead to highly varied design or engineering solutions or poorly formed bids, or where the service scope is very broad or there are complex commercial risk allocation issues (e.g. utilities risk on light rail projects).

It is paramount that the Responsible Agency is clear in the RFP about the level of acceptable, and/or limitations on, innovations with respect to design, engineering and service solutions. The output specification must reflect Government's key priorities and any mandatory minimum requirements.

The Responsible Agency should also take into account the probity framework.

6.7 Request for Proposals (RFP) Phase

Responsible Agencies, in consultation with NSW Treasury, should develop the RFP documentation based on the NSW Treasury PPP templates with due consideration of minimising bid costs.

Responsible Agencies should carefully consider what information is requested in the returnable schedules such that only information required in order to effectively evaluate proposals is included. Consideration should be given as to whether any information could be provided post preferred bidder or post contract award stage. Consideration should also be given to whether full documents are required (e.g. communication plans, operating plans, full subcontracts) or if less developed documents would be sufficient (e.g. outlines of plans, a selection of plans but not all, term sheets instead of full documents). There should be a clear link between each piece of information requested and the evaluation criteria to which they apply.

Prior to releasing the RFP documents, the Responsible Agency must submit a completed checklist to NSW Treasury to ensure they are ready to release quality RFP documents and can effectively manage the RFP process. This will help to ensure quality bids are submitted on time with few addenda.

The checklist is designed to ensure that the RFP has been prepared such that bid costs are minimised, that the Government's project and services objectives are clear and that only quality and necessary information is received at the RFP stage.

Responsible Agencies should contact NSW Treasury for the RFP checklist template.

6.7.1 Template project documents for infrastructure

Social infrastructure PPP projects in NSW are to adopt the suite of template contractual documentation (Template Project Documents) that has been developed by NSW Treasury in conjunction with its legal and financial advisers. The Template Project Documents, which include templates for the project deed, the financier's tripartite agreement, and other key project documents, will form the basis of contractual documentation to be released to bidders as part of the RFP documentation.

Where a Responsible Agency has a project-specific reason to deviate from provisions in the Template Project Documents, the Responsible Agency must seek the approval of NSW Treasury.

The Template Project Documents vary from or are in addition to the National PPP Guidelines in certain key respects, for example:

- adjustment of the relief and compensation regimes to align with the delivery and operational stages of a Project
- inclusion of a two stage completion process comprising technical completion and commercial acceptance
- an ability of the State to pay down a portion of senior debt once the facility is operational

- reduced ‘asset-related’ requirements
- adjustments to the treatment of uninsurable risks
- requirement to comply with relevant building codes, including the NSW Code and Guidelines for the Building and Construction Industry
- provisions in relation to privacy, governance, community, health and safety.

Key areas of the Template Project Documents that will need to be adjusted for project specific requirements are the services specification, payment mechanism and the associated Key Performance Indicators (KPIs).

Conditional Debt Pay Down Contribution (CDPD) and/or Capital Contributions

The Template Project Deed includes an ability for the State to pay down a portion of senior debt once the facility is operational and conditional on a number of factors. These factors include that there is no outstanding major default and that the CDPD amount must be allocated directly to paying down the outstanding debt.

Whether the State decides to make such a payment and the amount of the payment is determined on value for money grounds taking into account the commensurate reduction in risk incurred in a post construction environment.

In addition to a CDPD, the State may opt to make Capital Contributions during the construction period. The State may make this decision if there are capacity constraints on the private debt and capital markets at the time and taking into account the size and estimated cost or value of the project’s infrastructure. In this case, the Template Project Deed terms would need to be adjusted to include this project specific requirement.

Output Specification and KPIs

Every project must have a clear output specification which forms the basis of the mandatory minimum service requirements. This output specification may be only a few pages long. The services specification which forms a schedule to the Project Deed will be much more detailed. A draft of the services specification should be provided with the RFP but bidders will amend this services specification in accordance with their proposed solution. The services specification proposed by each bidder must be compliant with the principles in the mandatory output specification.

The following principles should be followed when setting the payment mechanism KPIs for the project:

- KPI and performance regimes should be output based
- only set KPIs which are required to drive the desired performance, with a small number of critical service obligations to be measured
- KPIs should relate to performance only. Issues related to availability of the facility should be dealt with in determining the availability payments. There should be a clear separation between which elements of the services specification relate to availability issues and which relate to performance issues

- KPI definitions should be tested to ensure they do not encourage perverse provider behaviour and to avoid duplication where other mechanisms (such as an element of demand risk or the default regime) exist to drive desired behaviour
- detailed testing should be undertaken to ensure the calibration of the KPIs and payment mechanism results in appropriate abatements (commensurate with importance) for the specified performance issue.

Taxation

PPPs are taxed at the national, state and local government levels. However, Commonwealth taxation legislation, particularly Income Tax legislation, is generally the most significant cost to the private parties involved in or considering infrastructure projects under PPP arrangements.

Depending on the degree to which Government (a tax-exempt entity) is deemed to have assumed commercial risk and control, Commonwealth taxation legislation may adversely affect PPPs. Tax risk is the responsibility of the private party, and NSW Government will not assume or underwrite risk associated with the denial of tax deductions, or of any other aspect of tax law.

For those tax risks that can threaten the viability of a project, NSW Government agencies may require the private party to obtain a binding ruling from the Australian Taxation Office as a condition precedent to the contract becoming effective.

6.7.2 Disclosure of Public Sector Comparator and Shadow Bid Model

Sections 5.2 and 5.3 of these Guidelines provide details on constructing and using PSCs and SBMs.

The results and key assumptions of the PSC or SBM may be disclosed to short-listed bidders if NSW Treasury considers that disclosure is likely to improve the receipt of value for money bids. Responsible Agencies should consult NSW Treasury on whether to disclose the results and other information contained in the PSC and/or SBM to short-listed bidders.

The results of the PSC or SBM (but not necessarily both) will usually be made publicly available in the Project Summary after financial close.

6.7.3 Interactive Tender process

The RFP should include an Interactive Tender Process (ITP) where Responsible Agencies and NSW Treasury hold a series of individual workshops with short-listed bidders, in accordance with the procedures and timetable set out in the RFP and the probity framework.

The ITP provides short-listed bidders with an opportunity to discuss the development of their concepts and designs and to seek clarification and feedback in the context of the Government’s output requirements, before lodgement of bids.

The ITP should also include a planning workshop with each short-listed bidder and the Department of Planning and Environment, so that bidders have opportunity to discuss the development approval process and any conditions that have been or are likely to be set.

The objective is to improve the quality of bid submissions, ensure bids meet key project objectives, minimise overall transaction costs and ultimately deliver better outcomes for the public, through clear communication of the Government's requirements and priorities. The sessions should facilitate a frank discussion on the Government's project affordability requirements. Responsible Agencies should contact NSW Treasury for a copy of the ITP Protocol template.

The sessions should also include discussions as required on potential variants to bids that will still be considered compliant RFP tenders.

All ITP sessions should have the Probity Adviser in attendance.

6.7.4 RFP submission requirements

NSW Treasury's PPP template for Returnable Schedules includes a table of comments explaining the rationale for mark-ups to the Project Deed. Ancillary documents, e.g. subcontracts and finance documents, should be provided in term sheet form.

6.7.5 Evaluating PPP bids and value for money

Responsible Agencies should contact NSW Treasury for templates on PPP tender evaluation plans.

All evaluators should have appropriate technical skills to undertake the task and be experienced in PPP evaluation, or provided with training to undertake the evaluation.

Evaluation of PPP bids is undertaken by:

- assessing bids against the non-price criteria;
- comparing price proposals; and
- making a value judgment on which bidder provides the best value taking into account both the non-price assessment and the price comparisons of each bidder.

If the evaluation panel cannot reach consensus on the value decision then the panel has the option to undertake interviews and subsequently update the assessment.

A proposal is value for money if it achieves the required project outcomes and objectives in an efficient, high quality, innovative and cost-effective way with appropriate regard to the allocation, management and mitigation of risks. Value for money takes into account quantifiable and non-quantifiable benefits, costs and risks.

While a flexible approach to value for money is needed given each project and proposal will need to consider unique issues and risks, consideration will likely be given to the following non-price related factors such as:

- Quality of all aspects of the proposal, including: achievable timetable, clearly stated proposal objectives and outcomes, detailed appropriate commercial and/or contractual documentation (including service scope and key performance targets), and a clearly set-out process for obtaining Planning or other required approvals.

- Optimal risk allocation and contractual or other risk mitigation strategies (quantifiable risks should be taken into account when assessing the price aspects of the proposal - refer below).
- Innovation in service delivery, infrastructure design, construction methodologies (including impact on community) and maintenance.
- Non-quantifiable benefits gained (economic, environmental and social) and costs incurred.
- Any time benefits that would not otherwise be achieved.
- In the case of contract variations, competitively tendering aspects of the proposal where feasible or likely to yield value for money.

In addition, evaluation of value for money will include, but not be limited to the following quantitative analysis and/or assessment of price:

- Interrogation of the proponent's financial models to determine the reasonableness of any infrastructure, land acquisition, service and maintenance cost estimates and, if relevant, revenue estimates (including the appropriateness and acceptability to the Government of any user fees or prices; and including reasonable estimates for forecast quantity levels).
- This evaluation may include the use of independent experts or valuers, benchmarking analysis, sensitivity testing, and where appropriate, the use of comparative financial models like PSC or SBM, based on a Reference Project.
- An appropriate return on the private sector's investment.
- Formal risk adjustment of the cost and revenue estimates where appropriate.
- The amount of any contingency provision, particularly in the case of infrastructure related proposals.
- Ensuring there is no double-counting for risk adjustments across each of:
    - the individual cost line items (or revenue line items)
    - an appropriate rate of return
    - the amount of the contingency provision.

NSW Government does not use a formulaic approach in evaluating bids because weightings and formulas may place undue emphasis on price rather than overall value for money drivers, including design or operating innovation and efficiencies. For example, formulas cannot take proper account of the fact that a bidder may have deficiencies on essential requirements that would be too timely, risky and costly to overcome, if the bidder also offers a substantially lower price.

Premier's Memorandum M2014-11, also requires bidders to "demonstrate their capacity for successful collaboration with the NSW Government by providing details of two appropriate referees. Referees will be asked to verify past performance, confirming that bidders have the ability to achieve outcomes, the extent of any legal and contract disputes, and demonstrated commitment to working constructively with the NSW Government to resolve commercial issues.”

6.7.6 Affordability issues during procurement

Where affordability issues become clear during procurement, Responsible Agencies should discuss these issues immediately with NSW Treasury. Ideally these issues should be resolved in the ITP or prior to bid submission.

6.7.7 Reimbursement of bid costs

The processes outlined in the NSW PPP Guidelines endeavour to minimise the bid costs for the private sector.

Government will not normally reimburse bid costs.

In exceptional circumstances, consideration may be given to the full or partial reimbursement of bidders’ reasonable bid costs. Any reimbursement will be based on the quality and quantity of materials (including designs, reports etc.) supplied by the proponent(s). Where reimbursement is paid, the Responsible Agency will retain the proprietary rights to the materials supplied (including, intellectual property rights and rights to use the material for any future purpose).

Any reimbursement will be at the sole discretion of the NSW Government with Cabinet approval, based on recommendations by NSW Treasury and the Responsible Agency, in consultation with expert advisers where appropriate or necessary.

6.8 Negotiation and contract finalisation

6.8.1 Negotiation parameters

Before seeking Cabinet approval to begin contract negotiations with one or more proponent, the Responsible Agency, together with NSW Treasury, must complete Table 3 (for approval to appoint preferred bidder) and Table 4 (for negotiation parameters) of Appendix 2. Any departures from the Commercial Principles underpinning the RFP documentation and prior Cabinet approvals need to be explained.

Responsible Agencies should contact NSW Treasury for a template Negotiation Plan.

The terms and conditions submitted to Cabinet must outline the scope of the project and areas for final negotiations, as well as any conditions that must be satisfied for the Government to support the project.

Responsible Agencies should contact NSW Treasury for templates for the Minister’s and Treasurer’s PAFA Act approval letters.

6.8.2 Financial close

Responsible Agencies should contact NSW Treasury for procedures, templates and checks to ensure timely Financial Close of the project, including a standard list of conditions precedent and acceptable financial close protocol.

7 Contract management: Delivery and operations

The National PPP Guidelines: Volume 2 Practitioners Guide, chapters 7 and Appendix H provides useful Guidance on contract management.

After contract execution, delivery and ongoing contract management of the project will usually be transferred to a new Delivery Project Director and an implementation team, overseen by a Delivery Steering Committee or Board.

Project assurance requirements continue to apply after contract executions, consistent with the IIAF, including Gateway Reviews.

7.1 Engage Delivery Project Director prior to Delivery Phase

An appropriately qualified Delivery Project Director (if different to the procurement Project Director) should be engaged a number of months prior to the end of the procurement phase. This will facilitate a smooth and efficient transfer from the procurement to the project delivery phase. It will also ensure from day one of the delivery phase, the Delivery Project Director understands the contract and the Responsible Agency and private sector's deliverables, the basis for the risk allocations, the Responsible Agency's project budget and Planning Approval requirements. This knowledge will help to ensure that value for money is maintained throughout the project delivery and operations phases.

The Delivery Project Director must be given appropriate delegation powers within the Responsible Agency to undertake his/her contractual responsibilities for the Responsible Agency.

The Delivery Project Director and senior management of the Responsible Agency must comply with TC15-16: Managing Public Private Partnership (PPP) Contracts. For further details refer to section 7.3 of the NSW PPP Guidelines and TC15-16.

The Project Director will report to a senior manager of the Responsible Agency as well as an inter-agency Steering Committee.

It is highly advisable that the Project Director and team members undertake Contract Management for Public Private Partnerships training, which is provided once or twice a year by a joint arrangement between Partnerships Victoria and NSW Treasury.

7.2 Delivery Steering Committee or Advisory Board

The Delivery Steering Committee or Board will generally be chaired by a senior person of the Responsible Agency with responsibility for delivering and managing the project. Other Committee members should include senior personnel from NSW Treasury, Department of Premier and Cabinet, other relevant agencies and may also include independent experts. The Project Director should attend all Delivery Steering Committee or Board meetings and is responsible for ensuring appropriate secretariat services are provided to the Committee.

The Committee will usually meet monthly during the construction delivery phase and the initial period (e.g. first 2 years) of operations. After this period, the Committee may meet less regularly or as required.

The Committee will oversee a number of key activities and issues which may include some or all of the following:

- Ensuring the Project Director is efficiently managing the project to achieve successful delivery of the Project.
- Providing strategic direction through expertise, capabilities, knowledge and guidance to the Project Director and Project Team.
- Ensuring a coordinated whole-of-Government position and approach.
- Ensuring a Contract Administration Manual is produced for use by the Responsible Agency. This should include all agency obligations over the life of the contract to help ensure they are met on time and in accordance with the required processes outlined in the contract.
- Helping to ensure the Responsible Agency meets their obligations for Project disclosures on time. This includes GIPA Act disclosures, and Project Summaries, as outlined in chapter 8 of these NSW PPP Guidelines.
- Managing and mitigating material risks, including securing Planning Approval (if not achieved prior to contract close), as well as completion and commissioning risks.
- Ensuring ongoing consultation with stakeholders and the community, as required and consistent with Planning Approval conditions.
- Where required assist in managing relationships between the Project Director, implementation team and the PPP Project Company. This may include assisting with formal and informal disputes and performance issues (including a sensible and practical approach to enforcing abatements).
- Monitoring and keeping the Project within agency/project Budget provisions including any specific provisions for Contingencies and timely payments of any State lump-sum contributions and regular monthly/quarterly service payments are made within the terms of the contracts.
- Overseeing proposed amendments and changes to any contract and or commercial requirements (refer to further details below), including ensuring Public Disclosure requirements are met (refer to chapter 8).
- Facilitating compliance with the IIAF, including post contract award Gateway Reviews at Pre-Commissioning and Post Implementation, any Gateway Health Checks, as well as other IIAF reporting requirements.
- Ensuring relevant Cabinet sub-committees are updated as appropriate on key activities, milestones, budget (including any contingency) and management of key risks.
- Overseeing the handover of assets (if any) and transition procedures, prior to contract expiry, during which time the Steering Committee or Board may need to meet regularly again.

7.3 Complying with TC15-16: Managing PPP Contracts

The Delivery Project Director and senior management of the Responsible Agency must comply with TC15-16: Managing Public Private Partnership (PPP) Contracts in administering PPP contracts.

This section summarises TC15-16. For full requirements, please refer to TC15-16.

TC15-16 requires consultation with the Infrastructure and Structured Finance Unit (ISFU) in NSW Treasury prior to negotiating or agreeing proposed contractual or commercial changes to existing PPP Projects.

This consultation may be formal or informal. Depending on the materiality of the proposed change, limited or no further consultation with NSW Treasury may be required after the initial notification.

NSW Treasury will:

- provide expert commercial and financial advice, whilst avoiding setting undesirable precedents and avoiding unnecessary deviation from the NSW Treasury Template Project Documents for Social Infrastructure PPPs
- assist in resolving disputes prior to them escalating
- assist in retaining external experts if appropriate
- advise on approval process and the application of NSW PPP policies.

Some proposed changes or events are automatically considered material and will likely require ongoing NSW Treasury consultation and advice, as well as possible Ministerial, Treasurer and/or Cabinet approvals. These include changes to Conditions Precedent, Planning Approval Conditions, certain refinancing, changes of control, omissions of services, breaches, defaults, step-in and termination events.

Other proposed changes or events may or may not be considered material depending on specific circumstances. These may include changes to project scope, performance issues, disputes, relief and compensation events and changes to the payment mechanism.

In evaluating likely or proposed material contract or commercial changes to a PPP project, Responsible Agencies and NSW Treasury should, at a minimum, evaluate the changes against the following criteria:

- value for money
- the benefits and costs of the changes to Government and the private party
- impact on the State Budget and project affordability
- the impact on the allocation and management of risks and avoiding creating an undesirable precedents
- continuing viability of the project
- external market forces.

7.4 Specific Contract Management Events and Issues

7.4.1 Refinancing

In accordance with the specific provisions of the PPP Project Deed, Responsible Agencies will usually need to consent to:

- proposed refinancing of the PPP Project Company which exceed the quantum and tenure of debt as envisaged at financial close; and
- updated Financial Models associated with any refinancing. Responsible Agencies must consult and seek advice from NSW Treasury on the proposed refinancing (including the financial model) as soon as the Responsible Agency is aware formally or informally of an upcoming refinancing, regardless of whether or not the Responsible Agency needs to provide formal consent to the refinancing.

NSW Treasury advice will draw from experience on other PPP project refinancing, particularly in the case of refinancing which:

- result in a new Base Case Financial Model;
- give rise to a refinancing gain share;
- increase the amount of outstanding debt, relative to the current Financial Model;
- defers the amortisation of debt relative to the current Financial Model;
- incorporates an exotic swap; and
- increases or is likely to increase or adversely change the State's risks or liabilities (whether actual or contingent).

Where there are no specific contractual provisions otherwise:

- any proposed refinancing should not result in a debt balance, at any time between the date of the refinancing and the end of the concession, greater than the projected debt balances in the original Base Case Financial Model;
- the transaction costs related to future debt refinancing should be appropriately allocated in the previous agreed Financial Model; and
- any refinancing gains are to be shared between Government and the private party on a 50:50 basis provided the projected equity return at the time of the refinancing (taking into account any refinancing) is above that reflected in the previous agreed Financial Model.

NSW Treasury will also advise whether any PAFA Act approval consent is required, including whether any associated Guarantee needs replacing or updating (refer also to section 3.5).

Any Responsible Agency consent to refinancing (including Consent Deeds) should not include amendments to the Project Deed. Any amendments to the Project Deed should be contained in an Amending (and Restatement) Deed.

8 GIPA Act disclosures and Project Summaries

8.1 GIPA Act requirements

All NSW PPPs are subject to Ministerial Memorandum No.2007-01 Public Disclosure of Information Arising from NSW Government Tenders and Contracts (M2007-01) and the *Government Information (Public Access) Act 2009* (GIPA Act), which set out specific disclosure requirements arising from NSW Government tenders and contracts.

Specific information that must be disclosed publicly within 45 working days after the contract becomes effective is listed in sections 29 and 30 of the GIPA Act (class 1 and 2 contracts). For contracts with a value of $5 million or more (class 3 contracts), the complete contract (less confidential information) must be disclosed (see sections 31 and 32 of the GIPA Act).[10]

Any material variation(s) to the contract should also be disclosed within 45 days of the variation(s) becoming effective.

8.2 Project summaries for PPPs

8.2.1 Preparation, Approval and Updates of Project Summaries

In addition to the above public disclosure requirements, a Project Summary (formerly known as Contract Summary) should be publicly released within 90 days of the contract becoming effective. The Responsible Agency must approve the release of the Project Summary. Project Summaries are to be placed on the NSW Treasury PPP website.

Project Directors of the Responsible Agency are required to prepare the Project Summary with the assistance of legal, technical or other experts, and NSW Treasury. Where components of the Project Summary reflect or summarise the Project Contracts, a legal expert must either author these components or declare that they are correct. Notwithstanding this requirement, the information provided in these Project Summaries does not have any independent legal status.

Responsible Agencies are to update Project Summaries if material changes are made to the Project Contracts that significantly change the information provided or the implications of the information provided in the Project Summary, particularly if that information cannot be easily found elsewhere.

In updating a Project Summary, Responsible Agencies should follow the same processes to prepare, approve and disclose the update as undertaken for the original Project Summary. In certain cases, it may be more appropriate to prepare a stand-alone addendum to a Project Summary rather than revising a previous Project Summary. This may be the case, for example, when updating older style Project or Contract Summaries, which are overly detailed relative to current NSW PPP Guidelines requirements.

Private Sector PPP participant ownership changes are disclosed on the NSW Treasury PPP website.

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[10] For further details see Division 5 Part 3 of the GIPA Act, which outlines specific disclosure requirements for PPPs, including a list of items that qualify as “Confidential Information.”

8.2.2 Content of Project Summaries

The Project Summary should use plain English language and be succinct. The level of detail required will vary on a case-by-case basis, however it should not be excessive. High-level statements of general principles may be used to summarise those aspects of the contract which are typical or usual. However, detail regarding any bespoke provisions specific to the project should be provided. The Project Summary must be self-contained, and include all information required by the NSW PPP Guidelines without the use of cross-referencing to other information which may be hyperlinked to or from the summary.

The Project Summary will have two distinct parts:

- Project Overview, including a summary and rationale for the project background, its value and the parties involved
- Key Commercial and Contractual Features which summarise the key aspects of the Project Contracts.

As a guide, Project Summaries should generally include information on the following aspects. However, it is recognised that each project is unique and it may sometimes be appropriate to re-order or re-categorise information to ensure the Project Summary is simple to read and logical in its presentation.

Project Overview

1. Introduction, including:
   - Overview of project
   - Purpose of the Project Summary, including disclaimer that the Summary should not be relied upon for legal purposes
2. Project Description:
   - Consortium members and main parties to the core Project Contracts
   - Project objectives
   - Description of infrastructure, scope and site (with any maps and/or diagrams)
   - Project timetable
   - Main funding sources
3. History of the project and Strategic Need:
   - This section may summarise the historical development of the project, aspects of the Business Case and cost-benefit analysis and relate the project to Government infrastructure/service plans
4. Procurement:
   - Approach overview, including whether a competitive 2-stage PPP tender was used or procurement was via an unsolicited proposal

- A summary of the Public Interest Evaluation
- Tender or other evaluation/assessment criteria
- Value for money rationale and the results of any SBM

Key Commercial and Contractual Features

1. Contract Overview:
   - List of contacts and parties and/or a diagram illustrating the relationship
   - Term (construction/delivery phase(s), operational commissioning and operating phase) and any option to extend the term
2. Risk Allocation table of major risks including:
   - Planning Approval, environmental, native title, heritage, site and site access
   - Design, construction and commissioning
   - Asset ownership and residual value risk
   - Market risks – price, volumes, inflation, exchange rate
   - Operational risks
   - Finance and market, including price, volumes, inflation, exchange rate and refinancing
   - Insurance risk
   - Change in Law
3. General obligations of PPP Project Company in delivery and operation phases (in non-technical language), including reporting obligations and any benchmarking processes
4. Government contributions/obligations and any CDPD obligations
5. User fees (if applicable), including escalation
6. Payment mechanism, performance standards, key performance indicators and measurement
7. Change and project modification procedures
8. Any unique compensation or material adverse effect arrangements
9. Default and termination arrangements, including step-in arrangements (State and financiers)
10. Change of control and assignment provisions
11. Handover obligations
12. Guarantees and security arrangements
13. Any other key or unique elements of the contractual arrangements if they have not been covered above.

Acronyms

CDPD	Conditional Debt Pay Down
CIC	Cabinet Standing Committee on Infrastructure
EOI	Expression of Interest
EPA Act	*Environmental Planning and Assessment Act 1979*
ERC	Cabinet Standing Committee on Expenditure Review
ETC	Estimated Total Cost
GIPA Act	*Government Information (Public Access) Act 2009*
KPI	Key Performance Indicator
NPC	Net Present Cost
NPV	Net Present Value
IIAF	Infrastructure Investor Assurance Framework
ISFU	Infrastructure and Structured Finance Unit of NSW Treasury
ITP	Interactive Tender Process
INSW	Infrastructure NSW
PAFA Act	*Public Authorities (Financial Arrangements) Act 1987*
PIE	Public Interest Evaluation
PPP	Public Private Partnership
PSC	Public Sector Comparator
RFP	Request for Proposal
SBM	Shadow Bid Model
SOC	State Owned Corporations
SOC Act	*State Owned Corporations Act 1989*
TAM	Total Asset Management

Glossary

Term	Meaning
Bidder	A respondent to an EOI request or an invitation to submit a bid in response to a RFP. Typically a bidder will be a consortium of parties, each responsible for a specific element, such as constructing the infrastructure, supplying the equipment, or operating the business.
Business Case	The document that articulates the rationale for undertaking an investment. In NSW, the business case should be prepared in accordance with Treasury Policy and Guidelines Paper TPP08-5 Guidelines for Capital Business Cases.
Capital	A generic term for an asset. Capital sometimes refers to financial investments and at other times to physical capital, such as land and buildings, earthworks, machinery and vehicles.
Condition Precedent	Certain conditions that are required to be satisfied prior to the majority of the project agreement becoming effective.
Consortium	Those private party entities who together intend to deliver a PPP.
Contractual Close	The date when contracts are executed.
Discount Rate	The rate used to calculate the present value of future cash flows, usually determined on the basis of the cost of capital used to fund the investment from which the cash flow is expected.
Delivery Steering Committee or Board	The Committee or Board of departmental/agency representatives, chaired by the Responsible Agency and including NSW Treasury, responsible for overseeing the delivery (construction), operations and eventual handback of the PPP project to Government.
Economic Infrastructure PPP	A PPP where the private party derives revenue from third parties (e.g. user charges) and therefore takes on the demand risk. Typical examples of economic infrastructure are networks of roads and telecommunications facilities, airports, ports, water storage and sewerage, railways, electric power generation and distribution facilities.
Expressions of Interest (EOI)	The tender phase used to shortlist bidders to proceed to submit more detailed proposals.

Term	Meaning
Financial Close	The date of satisfaction of the last Condition Precedent is known as Financial Close. Whilst a contract is binding once signed, a contract only becomes completely effective at Financial Close.
Intellectual Property	Inventions, original designs and practical applications of good ideas protected by statute law through copyright, patents, registered designs, circuit layout rights and trademarks; trade secrets, proprietary know-how and other confidential information protected against unlawful disclosure by common law and through additional contractual obligations such as Confidentiality Agreements.
Interactive Tender Process (ITP)	The process of conducting workshops and consultations with short-listed bidders and the project team, generally during the RFP phase.
National PPP Guidelines	The suite of guidance (Policy Overview and Volumes of Detailed Guidance) that form the national guidance on PPPs. See: https://infrastructure.gov.au/infrastructure/ngpd/index.aspx
Preferred Bidder	A short-listed bidder selected following the RFP evaluation to proceed to the negotiation and completion phase.
Probity	Uprightness, honesty, proper and ethical conduct and propriety in dealings.
Probity Auditor/Adviser	An independent expert retained to monitor the procurement process at critical stages, assessing and reporting whether the process has been conducted to the required standards of probity.
Project Director	The person engaged by the Responsible Agency with overall accountability for procuring and/or managing the project during delivery and operations. The procuring Project Director may differ to the delivery and operations Project Director.
Project Steering Committee or Project Board	The Committee or Board of departmental/agency representatives, chaired by the Responsible Agency and including NSW Treasury, established by the Responsible Agency and/or Cabinet to oversee the procurement of the PPP project and deal with key issues.
Project Summary	The document that is released to the public following the contract becoming effective that sets out the key aspects of the project, including key contract terms.

Term	Meaning
Project Team	The group of specialists and departmental/agency representatives, established by the Responsible Agency, that is responsible for assisting the Project Director to deliver the project (including developing project documentation and undertaking evaluation processes).
Proponent	See Bidder.
Public Private Partnership (PPP)	A long-term arrangement between the public and private sector for the delivery of service enabling public infrastructure, including Social Infrastructure PPPs, Economic Infrastructure PPPs, joint financing arrangements and concession agreements.
Public Sector Comparator (PSC)	An estimate of the net present value of a project's whole of life costs and revenues using the most efficient and likely form of Government delivery.
Reference Project	The basis for calculating the PSC, reflecting Government delivery of the project by traditional means.
Request for Proposals (RFP)	The tender phase involving the release of the RFP to short-listed bidders for detailed, fully costed RFP responses, followed by evaluation and selection of the preferred bidder.
Responsible Agency	The Government agency that is responsible for procuring and/or delivering and managing the project during construction and operations. The procuring Responsible Agency may differ to the delivery and operations Responsible Agency.
Retained Risk	The value of those risks or parts of a risk that Government bears under a PPP project.
Risk Allocation	The allocation of responsibility for dealing with the consequences for each risk to one of the parties to the contract; or alternatively, agreeing to deal with a particular risk through a specified mechanism which may involve sharing that risk.
Shadow Bid Model (SBM)	A PPP Shadow Bid Model is the Responsible Agency's best estimate of a private party bid price (in net present value/cost terms) to deliver the output specification under a PPP project structure. The SBM should reflect a private party's costs and debt and equity structure, and the Project Deed terms (including the payment mechanism). The SBM is dynamic and should be updated as new information is received but should be finalised prior to or soon after the RFP release.

Term	Meaning
Short-listed Bidder	Bidders selected as part of the EOI evaluation to be invited to submit a proposal in response to an RFP issued by Government for a project.
Social Infrastructure PPP	A PPP where the government pays the private party a service fee for the availability of a facility/social infrastructure. Examples of social infrastructure include hospitals, schools, police stations, prisons, transport and road projects involving availability payments.
Special Purpose Vehicle (SPV)	An entity created to act as the legal manifestation of a project consortium. In establishing a project consortium, the sponsor or sponsors typically establish the private party in the form of a SPV which contracts with Government.
Steering Committee	See Project Steering Committee or Project Board, or Delivery Steering Committee or Board.
Tender Process	The process of inviting the market to submit bids against a particular project and includes the EOI, RFP and negotiation phases.
Unsolicited Proposal	Please refer to the NSW Government's Unsolicited Proposals Guide for Submission and Assessment.

Appendix 1: Public Interest Evaluation

The Public Interest Evaluation should be assessed as part of the Procurement Strategy phase (see Figure 3.1) to ensure that PPP procurement is in the public interest. The Public Interest Evaluation should be updated throughout the procurement process to ensure that the PPP delivery method continues to be in the public interest.

The Public Interest Evaluation will assess the PPP project for the following public interest attributes:

1. Effective in Meeting Government's Objectives	The PPP project should be consistent with: ▪ the Responsible Agency's budget, service objectives and delivery ▪ strategy; ▪ Government's short and long term policy objectives; ▪ employment and environmental legislation and Government policies; ▪ concurrent government initiatives/projects (potential for extra benefits/synergies or detriment/conflicts; and ▪ economic and regional development in the area concerned, including investment and employment growth.
2. Achieves Better Value for Money	▪ Does PPP procurement offer better value for money than the best practicable public sector delivery model? ▪ Is the level of the user charge paid by the public appropriate and related to the benefits to be received by the user under the project? (if applicable) ▪ Is the level of contribution by taxpayers reasonable? (if applicable)
3. Community Consultation	▪ Identify individuals/groups (e.g. employees, unions, community groups and local councils) likely to be affected by the project. ▪ Assess the likely impact of the project on those individuals likely to be affected by the project, including the likely social, economic, employment and environmental issues which may arise. ▪ Develop a community consultation process which: - ensures participation by the affected individuals/groups during the EOI and short-listing process - in the case of large, complex or controversial projects, ensures the participation of the affected individuals/groups after contract - signing, during construction and during the commissioning of the project; and - complies with the legal requirements and broader Government policy standards. ▪ How have issues raised by the community as part of any community consultation processes been addressed or how will they be addressed?

4. Consumer Rights	▪ Ensure compliance with relevant consumer rights legislation and Government policies. ▪ Ensure the PPP project provides sufficient safeguards for service recipients, particularly those for whom Government has a high level of duty of care, and/or the most vulnerable including special needs and rights. ▪ Assess whether identified special needs and rights are met by the project and if not, what provisions and mechanisms can be introduced to address those deficiencies.
5. Accountability and Transparency	▪ Are the project processes transparent and do they allow the community to be appropriately informed about the key elements of the project? ▪ Does the project management structure demonstrate clear responsibility and accountability for project reporting? ▪ Is there, or will there be, a comprehensive probity plan and are there measures to ensure transparency of process?
6. Public Access	▪ Are there adequate arrangements to ensure that the public, including disadvantaged groups, can access and use the Government service(s) and related infrastructure? This should include: - clearly identifying the nature and extent of public access needed; - developing project plans to meet these needs; and - protecting third party access to essential infrastructure and services. ▪ To the extent that the project cannot protect the identified public access needs, what provisions or mechanisms can be used to address these deficiencies? ▪ Do the proposed infrastructure and service specifications comply with relevant public use and access legislation and Government policies?
7. Health and Safety	▪ Clearly identify all public health and safety standards as per legislation, Government policies or from other Government's accountability. ▪ Does the project contain sufficient mechanisms to ensure that the project achieves the identified public health and safety standards? ▪ To the extent that the project does not achieve some of the identified public health and safety standards, what provisions or mechanisms does the Responsible Agency propose to address this deficiency?
8. Privacy	▪ Clearly identify user rights to privacy as per legislation and Government policies. ▪ Does the project contain sufficient mechanisms to ensure that the identified rights to privacy are protected? ▪ To the extent that the project does not protect all of the identified rights to privacy, what provisions or mechanisms does the Responsible Agency propose to address this deficiency?

Appendix 2: Fiscal Impact Tables and Negotiation Parameters

The Fiscal Impact Tables should be completed during the project development phase and estimates the impact of the PPP project on Government costs and revenues, including contingent obligations. The Fiscal Impact Tables are to form part of the submission to Cabinet, in addition to the mandatory Financial Impact Statement.

Table 1: Fiscal Impact Table for approval to procure via PPP

	Business Case	
	Nominal ($m)	NPC[11] ($m)
Use of Funds		
Capital - Estimated Total Cost P90		
- Contingency		
Recurrent - Operating Costs P90		
Total Cost		
Additional Revenue		
Net Cost		
Source of Funds		
State Contributions Separately identify all source types, eg Restart, Consolidated Fund, agency own source contributions		
Private Contributions		
State Budget Impacts		
Net Cost of Services		
Capital Expenditure Authorisation Limit		
State Budget Result		
Net Lending		
Gross Debt		
Proposed PPP Component		
Indicative PPP Procurement Cost (Shadow Bid)		
Public Sector Comparator P50		
Expected Value for Money		

Assumptions for Proposed PPP Component	
Scope	{insert}
Development Phase	{insert} years, {Insert date} to {Insert date}
Operations Phase	{insert} years, {Insert date} to {Insert date}
PPP Asset & Financial Liability	${NPV Amount}, {Insert Recognition Date}
Conditional Debt Pay Down	${Amount}, {Insert Recognition Date}
Service Payments	Refer to attached Data Tables (if required)

[11] The Responsible Agency is required to consult with NSW Treasury on the appropriate discount rate for the NPC.

Table 2: Fiscal Impact Table for approval to invite EOIs (if required)

	Updated Business Case		Change from Business Case[12]	
	Nominal ($m)	NPC[13] ($m)	Nominal ($m)	NPC[14] ($m)
Use of Funds				
Capital - Estimated Total Cost P90				
- Contingency				
Recurrent - Operating Costs P90				
Total Cost				
Additional Revenue				
Net Cost				
Source of Funds				
State Contributions Separately identify all source types, e.g. Restart, Consolidated Fund, agency own source contributions				
Private Contributions				
State Budget Impacts				
Net Cost of Services				
Capital Expenditure Authorisation Limit				
State Budget Result				
Net Lending				
Gross Debt				
Proposed PPP Component				
Indicative PPP Cost (Shadow Bid)				
Indicative PSC				

Assumptions for Proposed PPP Component	
Scope	{insert}
Development Phase	{insert} years, {Insert date} to {Insert date}
Operations Phase	{insert} years, {Insert date} to {Insert date}
PPP Asset & Financial Liability	${NPV Amount}, {Insert Recognition Date}
Conditional Debt Pay Down	${Amount}, {Insert Recognition Date}
Service Payments	Refer to attached Data Tables (if required)

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[12] This should show the change from Table 1: Fiscal Impact Table for approval to procure via PPP to Table 2: Fiscal Impact Table for approval to invite EOIs (if required).

[13] The Responsible Agency is required to consult with NSW Treasury on the appropriate discount rate for the NPC.

[14] The Responsible Agency is required to consult with NSW Treasury on the appropriate discount rate for the NPC.

Table 3: Fiscal Impact Table for approval to appoint Preferred Bidder

	Latest Estimates		Change from EOI[15]	
	Nominal ($m)	NPC[16] ($m)	Nominal ($m)	NPC[17] ($m)
Use of Funds				
Capital - Estimated Total Cost P90 Land & Property Acquisitions Construction Delivery Contingency (incl. forex) Escalation				
Contingency				
Recurrent - Operating Costs P90				
Total Cost				
Additional Revenue				
Net Cost				
Source of Funds				
State Contributions Separately identify all source types, e.g. Restart, Consolidated Fund, agency own source contributions Cluster Resources Additional State Funding Capital Funding Recurrent Funding				
Private Contributions				
State Budget Impacts				
Net Cost of Services				
Capital Expenditure Authorisation Limit				
State Budget Result				
Net Lending				
Gross Debt				
Proposed PPP Component				
RFP Submission Price Financial Liability Capitalised Financing Costs Service Payments – Capital Service Payments - Recurrent Interest Payments				
State Provisions up to Financial Close[18]				
Expected PPP Contract Award Price				
Shadow Bid/PSC				
Expected Value for Money				

[15] This should show the change from Table 2: Fiscal Impact Table for approval to invite EOIs (if required) to Table 3: Fiscal Impact Table for approval to appoint Preferred Bidder.
[16] The Responsible Agency is required to consult with NSW Treasury on the appropriate discount rate for the NPC.
[17] The Responsible Agency is required to consult with NSW Treasury on the appropriate discount rate for the NPC.
[18] This should separately identify and include Foreign Exchange Risk, Interest Rate Risk, and other contract finalisation items such as costs related to finalising insurance arrangements or planning approvals.

Table 4: PPP Negotiation Parameters

Private Consortium
{List the parties}
Project Scope
{Full description of the proposed project}
Project Costs
{Likely PPP Contract Award Price as detailed in Table 3: Fiscal Impact Table for approval to appoint Preferred Bidder}
Term
Contractual Close {insert} Financial Close {insert} Construction Period {insert} Debt Finance Term {insert} Commissioning Date {insert} Term of Concession {insert}
Other Contractual Terms or Risk Allocation
{Insert details}

Table 5: Fiscal Impact Table for approval to award contract

	PPP Contract Award Price		Change since appointing preferred bidder[19]	
	Nominal ($m)	**NPC** ($m)[20]	**Nominal** ($m)	**NPC** ($m)[21]
Use of funds				
Capital Service Payments				
Recurrent Service Payments				
Proponent Submission Price				
State Provisions up to Financial Close				
Expected Award Price				
Modifications Expected post Financial Close				
Contract Contingency				
Total PPP Contract Budget				
SBM/PSC				
Expected Value for Money				
Private Sector Financing (for Construction)				
Source of Funds (post Construction)				
State Contributions Separately identify all source types, e.g. Restart, Consolidated Fund, agency own source contributions				
Private Contributions				
Adjustment to fiscal impact if PPP reaches Financial Close				
Net Cost of Services				
Capital Expenditure Authorisation Limit				
State Budget Result				
Net Lending				
Gross Debt				

19 This should show the change from Table 3: Fiscal Impact Table for approval to appoint Preferred Bidder to Table 5: Fiscal Impact Table for approval to award contract.

20 The Responsible Agency is required to consult with NSW Treasury on the appropriate discount rate for the NPC.

21 The Responsible Agency is required to consult with NSW Treasury on the appropriate discount rate for the NPC.

Further Information and Contacts

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The Treasury

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