



New South Wales  
**TREASURY**

**Office of Financial Management**

***NSW Treasury submission to Infrastructure Australia***

National public private partnerships guidelines -  
NSW jurisdictional requirements

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## Executive summary

National public private partnerships (PPP) policy and guidelines draw on existing best-practice PPP material, primarily sourced from Victoria and NSW. NSW Treasury helped prepare and has endorsed the national guidelines, which should result in a consistent, best-practice approach to PPP delivery nationally.

NSW jurisdictional requirements are covered in the Working with Government Guidelines for Privately Financed Projects policy document, published in December 2006. While national PPP guidelines are largely consistent with current New South Wales guidelines, this document examines NSW jurisdictional requirements that differ from the national guidelines.

These NSW specific differences are summarised in a section of the guidelines prepared by Infrastructure Australia. Jurisdictions will retain flexibility to apply their own requirements and principles in some areas including:

- Unique legislative requirements
- State Government approvals processes
- Public interest considerations
- Probity requirements
- Tender publications requirements
- Disclosure policy requirements
- Project and contract management and
- Accounting issues.

The NSW guidelines reflect the following principles:

- A competitive and transparent process to provide a fair opportunity for all prospective private sector participants.
- No direct negotiations with a single proponent unless approved by the Budget Committee of Cabinet (BCC) whose decision will be made public.
- The Government will not guarantee private sector borrowings nor take an equity share-holding.
- Scope for Government to contribute land, capital works or revenue diversion.
- Disclosure of information on contracts and tenders in line with the Government's policy on the disclosure of information on Government contracts with the private sector.
- Delivery of services consistent with agreements and undertakings under the National Reform Agenda.
- Comply with the obligations under the *Environmental Planning and Assessment Act 1979 (EP&A Act)*.
- Fair treatment of public employees who may transfer to a private employer as part of a PFP.
- Encourage maximum Australian and New Zealand industry participation.
- Consider reimbursing bidders' reasonable bidding costs if a project is prematurely terminated for reasons unrelated to any commercial or technical aspect after the call for detailed proposals.
- Apply the NSW Guidelines in a professional, fair, equitable and open manner, ensuring probity and minimisation of tendering costs.

PPPs require careful consideration and the BCC will review and progressively approve projects at each development phase, consistent with the national guidelines. An agency must receive the Treasurer's approval under the *Public Authorities Financial Arrangements Act 1987* (PAFA Act) to enter a PPP.

### Coverage of the NSW guidelines

All NSW Government agencies including State-owned corporations and public trading enterprises that are not State-owned corporations (collectively referred to as 'agencies' in the NSW Guidelines) must comply with the NSW Guidelines.

Councils are not bound by the NSW Guidelines. However, Part 6 of Chapter 12 of the *Local Government Act 1993* (NSW), requires councils to comply with separate guidelines which outline specific processes and procedures councils must follow when entering into public private partnerships.

These national guidelines must be applied to a wide range of different types of projects.

To efficiently procure infrastructure and to keep bid costs as low as possible, in some cases it may be appropriate to depart from the processes set out in the national guidelines.

In that case, the procuring agency must seek approval from NSW Treasury. Depending on the circumstances, Treasury may seek approval from the Treasurer or the BCC.

All procurement by agencies (but not State-owned corporations) is subject to the NSW Government Procurement Policy ([www.treasury.nsw.gov.au/procurement/procure-intro](http://www.treasury.nsw.gov.au/procurement/procure-intro)) and its associated guideline documents. This is compulsory whether conventional procurement, PPP or outsourcing.

State-owned corporations are subject to the NSW guidelines for assessment of projects of State significance and the reporting and monitoring policy for Government businesses.

### Scope of services

Private provision of infrastructure and non-core services does not mean privatisation of public services. The Government will continue to deliver core services.

The distinction between core and non-core services will be determined case by case.

## Unsolicited proposals

While unsolicited proposals can provide innovative ideas about improving delivery of Government services, they must demonstrate an overall community benefit and be consistent with the Government's plans and priorities.

The Director-General of the Department of Premier and Cabinet is the first point of contact for unsolicited proposals. The Department of Premier and Cabinet will consult with relevant agencies to assess the merits of a proposal and determine where it fits into the relevant priorities of agencies. The State Infrastructure Strategy (SIS) will be used to benchmark the proposal against current priorities and gauge its impact on other projects.

The Director-General will inform proponents of the outcomes of the preliminary assessment.

The Government will not reimburse any costs incurred by a proponent in developing and presenting an unsolicited proposal.

The Government will normally test unsolicited proposals in the market place through competitive tendering. The aim is to maximise both financial efficiencies and effective service delivery.

Requests to bypass the competitive tendering process and negotiate directly with the Government must be approved by the BCC. Approval will only be granted where the proponent can show that there would be no viable competition for the delivery of the proposal's essential outcomes. See the following section for further guidance on **Direct Negotiations**.

## Direct negotiations

Where direct negotiation is used for any proposal, the agency must demonstrate to the BCC the reasons and net benefits of not running a competitive tender process.

The proposal must meet the conditions contained in Section 2 of the WWG Guidelines. The agency must have completed the necessary planning to specifically demonstrate that the project is consistent with its capital investment strategic plan or asset strategy. The agency must have thoroughly researched the proposal and have independent evaluations confirming all of the following:

- Only the proponent, because it owns real property, intellectual property, or another unique element, can deliver the proposal's essential outcomes.
- Direct negotiation would preserve considerable benefits for the agency, the Government and the community.
- Direct negotiations would provide better value for money than a competitive tender process.
- The proponent has the expertise, experience and financial capacity to successfully deliver the project.
- The monetary value of any intellectual property.

Where direct negotiation is approved by the BCC, a public statement will be issued outlining the reasons for adopting this approach. The proponent will then have to provide a detailed proposal for assessment consistent with the elements of Table 1: The NSW Government Approval Process, on page 5.

## Approval process

A Business case must be submitted to Treasury prior to an agency seeking BCC approval to procure new infrastructure. The business case must contain the following elements:

- Scope and objectives of project
- Economic appraisal report
- Supporting information underlying the economic appraisal
- Financial appraisal
- Financial impact statement
- Risk assessment, mitigation and valuation and
- A satisfactory Gateway review report at the planning and definition stage

After the BCC approves procurement of a project and it is being considered for delivery via private finance, it is developed in a five phase process outlined in Table 1 on page 5. These phases are based on BCC approval points.

PPPs procured by State-owned corporations or other public trading enterprises that have a Board of Directors must obtain Board approval before requesting BCC approval to go to the next phase. This approval process is required for all PPPs regardless of whether the project falls under other guidelines, such as the *Guidelines for Assessment of Projects of State Significance*.

The BCC may require submission of further updates at other points in the tender process.

## Terms and conditions for negotiations of private sector infrastructure projects

Before seeking BCC approval to begin contract negotiations with one or more proponents, the agency together with Treasury, must develop a project-specific 'terms and conditions for negotiations of private sector infrastructure projects' agreement in the PSI-3 format (refer to Appendix 4 in the WWG Guidelines).

This will inform the BCC of type of commercial deal that the agency wants to pursue with the private sector.

The terms and conditions submitted to the BCC 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.

The agency submission should also provide the information needed to estimate any likely contingent liability of the project on the Consolidated Fund.

**Table 1: The NSW Government Approval Process**

Phase	Title	Actions
1	<b>PPP project planning and definition</b>	<ul style="list-style-type: none"> <li>▪ Determine core v non core services and project scope</li> <li>▪ Updated business case (including economic appraisal)</li> <li>▪ Procurement strategy report, including a timetable for procurement showing key milestones</li> <li>▪ Public interest evaluation</li> <li>▪ Risk allocation matrix and management plan</li> <li>▪ Preliminary public sector comparator</li> <li>▪ Project management structure</li> <li>▪ Preliminary statement of fiscal impacts in the format</li> <li>▪ An estimate of contingent liabilities upon the Consolidated Fund</li> <li>▪ Planning approval preliminary assessment and consultation</li> </ul>
<b>BCC approval to proceed</b>		
2	<b>EOI and short listing</b>	<ul style="list-style-type: none"> <li>▪ Draft EOI documentation</li> <li>▪ Probity plan prior to issue of the EOI</li> <li>▪ Invite EOI</li> <li>▪ Evaluation plan, evaluation and short listing</li> <li>▪ Update of public interest evaluation</li> <li>▪ Update of risk allocation matrix</li> <li>▪ Environmental assessment</li> </ul>
<b>Possible concept approval under the EP&amp;A Act</b>		
<b>BCC approval to proceed if required</b>		
3	<b>Detailed proposals and assessment</b>	<ul style="list-style-type: none"> <li>▪ Draft call for detailed proposals document</li> <li>▪ Draft contracts to issue with the call for proposals</li> <li>▪ Issue call for detailed proposals</li> <li>▪ For Process 1 project development approval under the EP&amp;A Act and issue to bidders</li> <li>▪ Update PSC prior to receiving proposals</li> <li>▪ Evaluation plan and evaluation</li> <li>▪ Where applicable, proceed to Best and Final Offer (BAFO)</li> <li>▪ Prepare 'terms and conditions for negotiations of private sector infrastructure projects'</li> <li>▪ Update:                             <ul style="list-style-type: none"> <li>▪ Public interest evaluation</li> <li>▪ Business case (including economic appraisal)</li> <li>▪ Risk allocation matrix and management plan</li> <li>▪ Statement of fiscal impacts</li> <li>▪ Assessment of Loan Council treatment</li> <li>▪ Assessment of probity, policy and other issues</li> <li>▪ Accounting treatment and taxation opinion</li> </ul> </li> </ul>

<b>BCC approval to proceed</b>	
<b>4</b>	<p><b>Negotiation and contracts</b></p> <ul style="list-style-type: none"> <li>▪ Where appropriate and approved, proceed with pre-selection negotiations</li> <li>▪ Negotiations with preferred proponent</li> <li>▪ Finalise contract</li> <li>▪ Finalise accounting treatment</li> <li>▪ Update:                             <ul style="list-style-type: none"> <li>▪ public interest evaluation</li> <li>▪ business case (including economic appraisal)</li> <li>▪ risk allocation matrix and management plan</li> <li>▪ statement of fiscal impacts</li> <li>▪ assessment of loan council treatment</li> <li>▪ assessment of probity, policy and other issues</li> </ul> </li> <li>▪ Accounting treatment and taxation opinion</li> </ul>
<b>BCC approval to proceed required if significant variations arise in negotiations</b>	
<b>Treasurer's approval (PAFA Act)</b>	
<b>Project or development approval under the EP&amp;A Act</b>	
<b>5</b>	<p><b>Execution, disclosure and application</b></p> <ul style="list-style-type: none"> <li>▪ Execute contract</li> <li>▪ Environmental assessment</li> <li>▪ Publish project agreement and associated documents (excluding confidential information)</li> <li>▪ Issue contract summary</li> <li>▪ Implement and monitor project</li> <li>▪ Post implementation review</li> </ul>

In addition to the five phases outlined above, an agency will be required to seek BCC approval to continue the project in any of these following situations.

If at any time prior to signing the contract, the conclusions or major assumptions of the business case (including the economic and financial appraisals) significantly change, including:

- Forecast construction, operating or maintenance costs, or forecast revenues changing by more than 10%.
- Likely development approval conditions.
- Proposed or maximum user charges changing by more than 5%.
- Budget funding is required from Government or from internally generated funds of the Agency which is additional to that previously approved.
- Any previously set BCC conditions of approval are unlikely to be met.
- There is a material change in the risk allocation from that which was last approved by BCC.
- Procuring the project, as a PPP or not, is no longer in the public interest or would not represent value for money.

An agency must seek the Treasurer's approval under the PAFA Act to enter into joint financing arrangements or PPPs.

State owned corporations may need to obtain the written approval of the shareholding Ministers under section 20X of the *State Owned Corporations Act 1989* (SOC Act). This section of the SOC Act deals with the acquisition and disposal of fixed assets and investments. State owned corporations should check with NSW Treasury to determine if they need this approval for their particular privately financed project.

If the agency wants to renegotiate any significant areas of a PPP contract after it has been approved and signed by Government, the agency must obtain BCC approval before starting renegotiations.

A further BCC approval is required before signing a contract if any of the negotiation terms previously approved by BCC cannot be met.

If the agency wants to renegotiate or amend any element of a previously signed PPP contract without materially changing the workings of the contract, the agency must consult with Treasury before commencing renegotiations. Treasury will determine if it is appropriate to inform the Treasurer or BCC.

Any amendments to previously signed PPP contracts may require the Treasurer's approval under the PAFA Act.

Planning and Environmental approvals must also be sought under the EP&A Act (NSW). For more information refer to section 3.2 in the NSW WWG Guidelines.

### Public interest evaluation

All projects covered by the NSW Guidelines will undergo an evaluation to ensure they are in the public interest.

BCC needs to be satisfied that it is in the public interest to procure the project as a PPP.

The public interest evaluation will be updated before the issue of the call for detailed proposals, after finalising the evaluation of the call for detailed proposals and prior to Government signing the contract documents.

The Public Interest Evaluation will concentrate on:

- whether the project is effective in meeting the Government's objectives
- value for money
- community consultation;
- consumer rights;
- accountability and transparency;
- public access;
- health and safety
- privacy

For further information, refer to Appendix 2 in the NSW WWG Guidelines.

## Public sector comparator (PSC)

A preliminary PSC should be developed before issuing an EOI, and should be fully updated before accepting responses to the call for detailed proposals.

The Government is flexible about disclosing a summary of a PSC in tender documents. Disclosure is more likely where it will obviously assist the private sector's bid preparation process and result in higher quality and better value bids to the Government. The results of the PSC will ultimately be publicly available in the contract summary.

The national guidelines currently provide detailed guidance on constructing PSCs for social infrastructure and on the discount rate applied for social infrastructure projects. This excludes the use of the discount rate in cost benefit analysis associated with the investment decision.

Consistent with the national guidelines, PSCs for NSW social infrastructure will be constructed as a cash-flow model under traditional delivery methods because, unlike economic infrastructure, social infrastructure is primarily funded by payments from the Government.

The NSW Guidelines also provide high level guidance on constructing PSCs for economic infrastructure. PSCs for economic infrastructure projects will usually be developed on a project financed basis. The project delivery vehicle will normally be assumed to be a SPV operating under the *State Owned Corporations Act (NSW) 1989*.

NSW Treasury is responsible for advising on the value for money aspects of private financing arrangements, including the development of the PSCs. Treasury will assist agencies throughout the project development process and provide advice on technical issues, such as discount rate to be used in constructing PSCs.

Further information can be found in Chapter 7 of the NSW WWG Guidelines.

## Probity and accountability

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. A comprehensive probity plan is essential in all PPP projects and a probity auditor will be appointed for large, complex and/or unusually sensitive projects.

To ensure that the participation of related companies in a tender does not impact on the probity, competitiveness or cost of a project, the companies may be required to sign a probity process deed. To maximise community and business confidence in its tendering practices, the Government has established independent review mechanisms for complaints about tendering with government agencies.

The State Contracts Control Board is responsible for issues associated with probity, the National Reform Agenda and the Australian and New Zealand Government procurement agreement. The NSW Government's Code of Practice for Procurement applies to procurement by all NSW government agencies, and those doing business with and for government. This includes the procurement of services through privately owned and financed public infrastructure.

The Code establishes ethical principles and standards of behaviour for all parties involved and will apply to all procurement actions from calling for EOIs to project completion.

### Tender publication requirements

Under the Premier's Memorandum 2006-11 NSW Procurement Reforms, government agencies are to make Requests for Tender documentation available. Tenders may be lodged through the NSW Government eTendering system which is managed by the NSW Department of Commerce through the Tenders NSW website (<http://tenders.nsw.gov.au>).

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 listing of tenderers, and publishing contract award information.

### Expression of interest (EOI) requirements

Having assessed the various issues of a proposal, the BCC will consider and approve if appropriate, a call for EOIs being issued to invite responses from the marketplace. Before the issue of EOIs, agencies in consultation with NSW Treasury, should

- draft the EOI documentation
- complete a probity plan prior to the release of the EOI and
- complete the EOI evaluation plan, consistent with Phase 2 of Table 1.

The evaluation process must be fair and equitable and be consistent with the project probity plan. Responses to the call for EOI will be evaluated by an agency-established evaluation panel and coordinated by the project manager. Subject to a favourable outcome, the evaluation would lead to a shortlist of bidders.

### Detailed proposal requirements

An agency may proceed to a call for detailed proposals ("the Call") from the short listed bidders after gaining any required BCC approvals. The Call should clearly specify the information required from bidders to enable the agency to assess whether bidders have satisfied the evaluation criteria.

For financial information, sponsoring agencies usually provide bidders with templates to submit with their bids. This provides the agency with information in a consistent format and makes comparing bids easier. To help government fully understand the private sector's funding package, short listed bidders must provide, with their response to the call for detailed proposals, the financial model used to support their bid.

Other information which may be required includes:

- Signed terms sheets for key subcontractors - in some cases the agency may require draft contracts.
- Signed terms sheets for the financing agreements, including evidence of credit committee approvals.
- In the case of equity funding, evidence of the extent to which equity has been committed.

- A binding ruling from the ATO supporting the proponent's belief that the viability of the project is not threatened by tax risks.

Generally, the Call should specify what constitutes a conforming bid. The Call will also identify parameters within which variations to the above requirements will be accepted, and the terms on which they will be accepted and evaluated.

These are often referred to as a 'variant conforming bid.' Generally, the Call will specify that a variant conforming bid will only be considered if a conforming bid also has been submitted by a proponent.

A non-conforming bid is a bid which does not comply with the requirements for a conforming bid or a variant conforming bid.

Agencies should ensure that the Call states that whether or not a non-conforming bid is accepted will be at the agency's sole discretion.

### **Disclosure policy and requirements**

All PPPs are subject to Ministerial Memorandum No.2000-11 and the *Freedom of Information Act (NSW) 1989*, as amended from time to time, which sets specific disclosure requirements arising from NSW Government tenders and contracts.

The agency must ensure that a contract summary is made available to the Auditor-General for audit within 30 days of the contract becoming effective.

Within 90 days of receipt by the Auditor-General, the audited contract summary must be tabled in Parliament by the responsible Minister.

Where Parliament is not sitting, the Clerk of the Legislative Assembly should receive the contract summary within 90 days of it being received by the Auditor-General with a view to it being tabled the first day that Parliament is next sitting.

After the summary has been tabled, the agency must advertise the availability of the contract summary in the Public Notices.

Contract summaries will also be placed on the Working with Government Website at [www.treasury.nsw.gov.au/wwwg](http://www.treasury.nsw.gov.au/wwwg)

The contract summary must distinguish between the Background to the Project which includes non-contractual information, and Elements of the Contract which summaries the contractual information.

The summary must contain the following information:

#### Background to the project

- History of the project and its characteristics.
- Full identity of the private party, including sponsors and cross ownership with relevant companies.
- A list of the contract(s).
- Nature and purpose of the contract(s), including a general description of the parties' obligations.
- A general statement on material excluded on the basis that it is subject to obligations of confidentiality or is 'commercial in confidence'.
- Results of cost-benefit analyses.

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- Results of the public sector comparator compared with the successful private sector proposal.
- Significant evaluation criteria and the weightings used in the tender assessment.
- The risk sharing in the construction and operational phases of the project, quantified in net present value terms (where possible) and specifying the major assumptions involved.
- Responsibilities of the State and contractor during the construction period.
- A statement of the actual liabilities of the Crown; a statement of any indemnities and/or guarantees given by the Crown.
- A summary of the public interest evaluation.

### Elements of the contract

- Description of change control provisions.
- The commencement date, term and extension options of the contract.
- Service delivery (including maintenance), quality and performance requirements.
- What and when assets are to be transferred by the public sector to the contractor.
- Operation and/or maintenance provisions in the contract.
- The price to be paid by the public, and the basis for future changes in this price.
- Provisions for negotiation.
- Significant guarantees or undertakings between the parties, including loans entered into or agreed to be entered into.
- A statement that the Auditor-General's ability to carry out the audit function under *the Public Finance and Audit Act 1983* has not been diminished by the contract(s).
- A description of the events of default and any termination rights.
- A statement as to contractual remedies available to the Government in respect of breach or losses otherwise caused by the private party, and remedies against the Government in any circumstances.
- A description of exit arrangements and costs of exiting.
- A description of the situations in which the Government may exercise its contractual right to step-in.
- A description of any pre-determined dispute resolution process.
- Description on how insurance proceeds in the event it is called upon.
- Other key contractual arrangements elements not covered above.

A post implementation review will be undertaken, jointly by NSW Treasury and the agency initiating the project, on all PPPs.

### Communications

NSW government agencies may have their own policies and guidelines in relation to communications strategy.

## PPP project governance and contract management

The delivery agency manages the PPP Project with assistance from NSW Treasury.

NSW Treasury sets PPP and general procurement policy. The delivery agency manages a PPP project with Treasury providing varying degrees of assistance depending on the agency's experience with PPP's and procurement generally.

NSW government agencies may have their own contract management policies and procedures.

Further information can be found in Section 4 of the NSW WWG Guidelines.

## Accounting and taxation issues

Agencies must assess the likely accounting treatment to be used for privately financed projects. A statement of accounting treatment must be prepared, showing balance sheet, operating statement and statement of cash flows.

NSW Treasury is responsible for accounting policy guidelines and should be consulted by agencies when the most appropriate accounting treatment is being considered for a particular PPP transaction.

An updated statement of accounting treatment must be submitted to NSW Treasury after negotiations have been finalised. Before the contract is executed, the agency should obtain a NSW Treasury determination on the accounting treatment and should advise the Auditor-General of the proposed accounting treatment.

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.

For those tax risks that can threaten the viability of a project, 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.

## Commercial principles for social infrastructure

The National Guidelines contain updated NSW commercial principles for social infrastructure.

Where the National Guidelines provide flexibility for specific commercial areas, agencies should contact NSW Treasury to clarify current policy.

## Legal and policy references

Relevant legislation, policy and guidelines include:

### NSW Acts

- *Public Authorities Financial Arrangements (PAFA) Act 1987;*
- *Public Finance and Audit (PFAA) Act 1983;*
- *Freedom of Information Act 1989;*
- *Local Government Act 1993;*
- *State Owned Corporations Act 1989; and*
- *Environmental Planning and Assessment Act 1979*

### NSW Premier's Memoranda

- M2006-11 NSW Procurement Reforms+ Bill; and
- M2007-01 Public Disclosure of Information arising from NSW Government Tenders and Contracts

### NSW Guidelines and Strategies

- NSW Treasury Working with Government Policy  
[www.treasury.nsw.gov.au/www](http://www.treasury.nsw.gov.au/www)
- NSW Government Procurement Policy  
[www.treasury.nsw.gov.au/procurement/procure-intro](http://www.treasury.nsw.gov.au/procurement/procure-intro)
- Total Asset Management
- Guidelines for Assessment of Projects of State Significance
- Reporting and Monitoring Policy for Government Businesses
- NSW State Infrastructure Strategy

### Commonwealth Acts

- *Income Tax Assessment Act 1936; and*
- *Income Tax Assessment Act 1997*