# Working with Government

NSW Government

# Guidelines for Privately Financed Projects

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New South Wales

Government

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# Working with Government:
# Guidelines for Privately Financed Projects

## What are these Guidelines about?

These Guidelines provide a framework that enables both the public and private sectors to work together to improve public service delivery through private sector provision of infrastructure and related non-core services.

The Guidelines describe a competitive and transparent mechanism to pursue opportunities that bring together the ideas, experience and skills of both sectors to develop innovative solutions to meet the community's needs, expectations and aspirations.

The aim is to deliver improved services and better value for money, primarily through appropriate risk transfer, encouraging innovation, greater asset utilisation and integrated whole-of-life asset management.

Private provision of infrastructure and non-core services does not mean privatisation of public services. The Government will continue to deliver core services. While the distinction between core and non-core services will be determined case by case, teaching services in education and clinical services in health for example are core services. All projects covered by these Guidelines will undergo an evaluation to ensure they are in the public interest.

### What do these Guidelines cover?

The Guidelines specifically cover Privately Financed Projects (PFPs), which are one type of a broader spectrum of projects generally referred to as 'Public Private Partnerships' (PPPs).

PPP is a general term covering any contracted relationship between the public and private sectors to produce an asset or deliver a service.

These Guidelines cover PFPs only. Other types of PPPs are covered by the NSW Government Procurement Guidelines.

### What distinguishes a PFP from other forms of PPPs?

PFPs, as a specific form of PPP, involve creation of an asset through private sector financing and ownership control for a specified period. The Government is willing to contribute through land, capital works, risk sharing, revenue diversion or purchase of the agreed services.

PFPs cover economic and social infrastructure and typically include both a capital component and an ongoing service delivery component.

PFPs are generally complex and involve high capital costs, lengthy contract periods that create long term obligations, and a sharing of risks between the private and public sectors. They therefore require careful consideration and approval by the Budget Committee of Cabinet.

### What's in it for the Public?

For Government agencies, contracting the delivery of infrastructure and non-core services to the private sector creates opportunities to deliver improved public services more cost effectively. Agencies can focus their own efforts on the delivery of their core services, and use the savings generated to improve or expand other services.

PFPs provide the construction, service and finance industries with opportunities to generate efficiencies and cost-effectiveness in delivery of infrastructure and non-core services through innovation and specialist expertise, and to develop their businesses by doing so.

## Who must comply with these 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 these Guidelines) must comply with these Guidelines.

Councils are not bound by these Guidelines. However Part 6 of Chapter 12 of the Local Government Act 1993 (NSW), requires councils to comply with separate guidelines which outline the specific processes and procedures to be followed by councils entering into public private partnerships[1].

Western Sydney Orbital (Photo courtesy of Westlink M7)

## Departures from these Guidelines

It is recognised that these Guidelines must be applied to a wide range of different types of projects.

Given this, and in the spirit of efficiently procuring infrastructure and in keeping bid costs as low as possible, there may be cases where it is appropriate to depart from the processes set out in these Guidelines.

Where this is the case, the procuring agency should seek approval from NSW Treasury. Depending on the circumstances, Treasury may seek approval from the Treasurer or the Budget Committee of Cabinet (BCC).

## Updating these Guidelines

NSW Treasury will periodically review these Guidelines and update them as required. Revised guidelines will be published following BCC approval.

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[1] The Local Government PPP Guidelines are available at: www.dlg.nsw.gov.au/ Files/Circulars/05-51.pdf.

# Contents

# Acronyms

| | |
|---|---|
| ANZ | Australia/New Zealand |
| BAFO | Best and Final Offer |
| BCC | Budget Committee of Cabinet |
| BOO | Build, Own, Operate |
| BOOT | Build, Own, Operate, Transfer |
| BOT | Build, Operate, Transfer |
| CEO | Chief Executive Officer |
| CISP | Capital Investment Strategic Plan |
| DA | Development application |
| D&C | Design & Construct |
| DBFM | Design, Build, Finance, Maintain |
| DCM | Design, Construct, Maintain |
| EA | Environmental Assessment |
| EIS | Environmental Impact Statement |
| EIA | Environmental Impact Assessment |
| EOI | Expression of Interest |
| EP&A Act | *Environmental Planning and Assessment Act 1979* |
| ICAC | Independent Commission Against Corruption |
| IIG | Infrastructure Implementation Group, Premier's Department |
| LEP | Local Environment Plan |
| OIM | Office of Infrastructure Management, NSW Treasury |
| PAFA | *Public Authorities (Financial Arrangements) Act 1987* |
| PFP | Privately Financed Project |
| PPP | Public Private Partnership |
| PSC | Public Sector Comparator |
| REF | Review of Environmental Factors |
| SIS | State Infrastructure Strategy |
| SOC Act | *State Owned Corporations Act 1989* |
| SPV | Special Purpose Vehicle |
| SEE | Statement of Environmental Effects |
| SEPP | State Environmental Planning Policy |
| SOC | State Owned Corporation |
| SSS | State Significant Site |
| TAM | Total Asset Management |

Note that a Glossary of definitions is provided at Appendix 5.

# 1 Introduction

The Government is committed to providing the best practicable level of public services to the people of NSW. Key factors contributing to this are the achievement of value for money and the delivery of service solutions that best meet the community's needs and aspirations. To this end, the Government has sought the participation of the private sector in the delivery of services and associated infrastructure to the public.

This is not new. Indeed, full public sector provision of infrastructure is rare and NSW Government guidelines for private financing of infrastructure have existed since 1989. Projects such as the Olympic facilities, the tollways around Sydney, schools, hospitals and the Opera House car park are examples of successful partnerships between the public and private sectors.

These Guidelines support the Government's commitment to provide the best practicable level of public services to the people of NSW by providing a consistent, efficient, transparent and accountable set of processes and procedures to select, assess and implement Privately Financed Projects (PFPs).

These Guidelines reflect the following principles:

- A competitive and transparent process to provide a fair opportunity for all prospective private sector participants
- Direct negotiations with a single proponent will not be undertaken unless approved by the Budget Committee of Cabinet (BCC), whose decision will be made public
- The Government not guaranteeing private sector borrowings and not taking an equity share-holding
- Scope for Government contributing land, capital works or some form of revenue diversion
- Disclosing 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
- Complying 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
- Encouragement of maximum Australian and New Zealand industry participation
- Consideration of reimbursing bidders' reasonable bidding costs if, for reasons unrelated to any commercial or technical aspect, a project is prematurely terminated after the Call for Detailed Proposals
- Implementing these Guidelines in a professional, fair, equitable and open manner, ensuring probity and minimisation of tendering costs.

These Guidelines apply to all NSW Government departments and authorities, including State-owned corporations and public trading enterprises that are not State-owned Corporations.

For projects where it is not clear whether the procedures in these Guidelines should apply, agencies should contact the Treasury Private Projects Branch for advice.

## 1.1 What is a PFP and what is the purpose of these Guidelines?

The New South Wales Government engages the private sector in public service delivery in many ways, which may be broadly termed public private partnerships (PPPs). PFPs, the subject of these Guidelines, are one type of PPP.

PFPs create new infrastructure assets and deliver associated services for a specified period through private sector financing and ownership control. Private financing and ownership are features of projects covered by these Guidelines, distinguishing them from outsourcing of services to the private sector or infrastructure procured by conventional methods such as design and construct contracts.

The principal features of a PFP are:

- A service normally provided to the public by Government involving the creation of an asset through private sector financing and ownership control
- A contribution by Government through land, capital works, risk sharing, revenue diversion or other supporting mechanisms.[2]

A PFP entails both the creation of a new asset and the delivery of some services associated with the asset for a defined, but typically very long, period. The balance of total project value between the asset creation and ongoing service delivery components may vary greatly from project to project.

In a capital-intensive project, such as a toll road, asset creation is likely to dominate. In projects such as schools, courthouses and hospitals, the long-term service delivery component is likely to be larger, even with the public sector providing core services.

PFPs are typically complex and involve high capital costs, lengthy contract periods involving long-term obligations and a sharing of risks and rewards between the private and public sectors.

Because PFPs require careful consideration, the Budget Committee of Cabinet (BCC) will review and progressively approve the projects at each phase of their development.[3] Applicable environmental planning approvals will also be required in accordance with the EP&A Act.

PPPs can make a very valuable contribution to the delivery of public services in NSW and are therefore encouraged, where appropriate, by Government. The challenge to the public and private sectors is to determine the most effective and efficient means of service delivery in an arrangement that is beneficial to both sectors as well as to users and taxpayers.

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[2] See also *Public Authorities (Financial Arrangements) Act 1987*, especially Section 5A.

[3] Although PFPs will normally be large projects or bundles of smaller projects with a total contract value of $50M or more, occasionally a smaller project may be developed as a PFP. For PFPs costing $5M or less in total, the BCC has delegated approval authority to the Treasurer. Refer to Treasury Circular 98/5, available at http://www.treasury.nsw.gov.au/pubs/98tcirc/tc_9805.htm.

All procurement by agencies other than State-owned corporations, whether conventional procurement, PFPs or outsourcing, are subject to the NSW Government Procurement Policy[4] and its associated guideline documents.

State-owned corporations are subject to the Guidelines for Assessment of Projects of State Significance[5] and the Reporting and Monitoring Policy for Government Businesses[6]. In addition, all agencies procuring PFPs are subject to these Working with Government Guidelines.

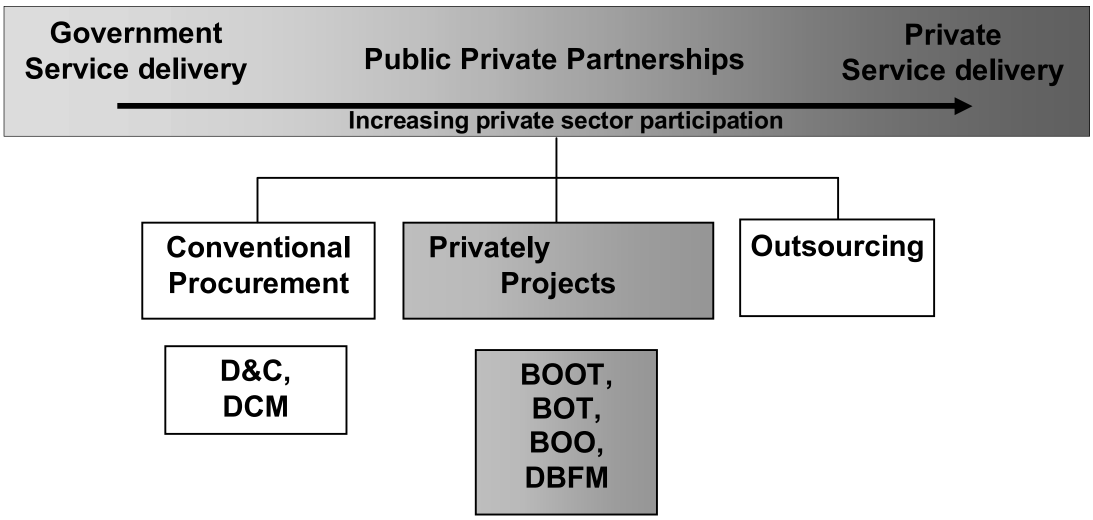
This means that in the first instance, all PFPs must be consistent with an agency's Asset Strategy and should have undergone an economic appraisal.

The reason for having a distinct set of guidelines for PFPs is that PFPs raise unique issues and risks for Government.

These risks stem from private sector financing and ownership and the very long-term nature of the commitments involved.

Figure 1.1 illustrates the relationship between PPPs and other forms of procurement including PFPs.

### Figure 1.1. Public service delivery spectrum




[4] Available at http://www.treasury.nsw.gov. au/procurement/procure-intro.htm.
[5] Available at: http://www.treasury.nsw.gov.au/pubs/tpp2002/tpp02-4.pdf
[6] Available at: http://www.treasury.nsw.gov.au/pubs/tpp2005/tpp05-2.pdf

## 1.2 Value for Money and the benefits of PFP procurement

All PFPs are to be the subject of a comprehensive economic appraisal. This examines whether the project is worth doing, that is whether the social benefits of investing in the infrastructure exceed the social costs.

PFP procurement can potentially deliver both significant benefits in the quality of services and reductions in the cost of providing them.

Value for money from private sector involvement will be determined by evaluating the project's costs and benefits. Key quantitative tools in this evaluation will include the economic appraisal and the Public Sector Comparator (refer to section 7).

To ensure objective evaluation a range of technical, economic and social criteria will also be used, as outlined in the public interest evaluation (see Appendix 2).

The value for money drivers of PFPs include:

- **Improved risk management**: More rigorous risk evaluation and transfer to the private sector of those risks it is best able to manage, including those associated with providing specified services, asset ownership and whole-of-life asset management.
- **Ownership and whole-of-life costing**: Improved efficiency as design and construction become fully integrated up-front with operations and asset management.
- **Single point of contact**: Ongoing service delivery, operational, maintenance and refurbishment costs become a single party's responsibility for the length of the contract period.
- **Innovation**: Wider opportunities and incentives for innovative solutions to deliver service requirements. Opportunities may include:
    - Bundled services, through a package deal for all non-core services;
    - Upgrades, of associated and complementary infrastructure; and
    - Packaged information systems.
- **Asset utilisation**: Reducing costs to Government, as a sole user, through more efficient design to meet performance (i.e. service delivery) specifications and by creating complementary opportunities to generate revenue from use of the asset by others.
- **Whole-of-Government outcomes**: Contained within the objectives and strategies of the NSW Government's Procurement Policy. These include non-asset and non-price related value-adding outcomes of wider interest to the Government, such as socio-economic and environmental outcomes.

These improved efficiencies and cost savings enable agencies to deliver better public services by allowing agencies to focus on the delivery of core services and use the savings generated to invest in the delivery of those core services.

## 1.3 What's new in these Guidelines?

Government has procured a number of PFP projects since the publication of the original *Working with Government Guidelines for Privately Financed Projects* in late 2001.

These Guidelines have been updated and revised to reflect Government's experience on projects and to incorporate the findings of recent reviews and inquiries into PFPs.

Accordingly the Guidelines:

- Have been updated to reflect changes in Government structure since the publication of the original *Working with Government Guidelines* in 2001
- Now include in the Public Interest Evaluation an explicit value for money test from the perspectives of the users and taxpayers
- Require that at certain points throughout the tender process, updated Public Interest Evaluations are to be prepared and summaries publicly disclosed. Any significant changes are to be reported to BCC
- Include updated sections of the environmental approval process to reflect the introduction of Part 3A of the EP&A Act
- Now provide guidance on how agencies may use bidder engagement strategies, Best and Final Offers and pre-selection negotiations and guidance on the evaluation of non-conforming proposals;
- Provide clarity on the role of the boards of SOCs in the approval process;
- Update Government approval processes, including new requirements to seek further BCC approvals/advice if significant project factors change or if an agency wishes to renegotiate a PFP contract;
- Include a standard format for the preparation of Contract Summaries;
- Provide for continuing the life of the Steering Committee to enable it to oversee the initial delivery phase of the project; and
- Now provide consistency with the Government's Procurement Policy Guidelines, released in July 2004.

## 1.4 National PPP Forum

In 2004, the National PPP Forum was created comprising members from all States, Territories and the Commonwealth, with a view to:

- Facilitating greater consistency and cooperation across jurisdictions in the provision of infrastructure through public private partnerships; and
- Learning from each other's experiences.

One of the objectives of the National PPP Forum is to provide a consistent approach to project development. These Guidelines respond to this objective by providing broad consistency with PFP guidelines in other jurisdictions[7].

## 1.5 Free Trade Agreement

The Australia-United States Free Trade Agreement ("AUSFTA") commenced 1 January 2005. The AUSFTA contains provisions governing the conduct of Government procurement.[8]

## 1.6 The Role of Agencies in Procurement

### 1.6.1 Coordinating infrastructure procurement

To assist the delivery of key infrastructure, the Government has in place mechanisms for the coordination of infrastructure procurement across Government.

To support these arrangements the Government has established the Infrastructure Implementation Group (IIG) within the Premier's Department and the Office of Infrastructure Management (OIM) within NSW Treasury. The OIM is responsible for formulating all procurement policy.

The Cabinet Standing Committee on Infrastructure and Planning , supported by the IIG, NSW Treasury and the Department of Planning, reviews major infrastructure. This Standing Committee sets strategic directions for urban and regional infrastructure development and associated infrastructure priorities.

The OIM is responsible for the development of the State Infrastructure Strategy (SIS).

This Strategy is a ten (10) year rolling plan, which draws heavily from information in agencies' Total Asset Management Plans[9], especially their Asset Strategies and Capital Investment Strategic Plans (CISP). The State Infrastructure Strategy also draws from the Metropolitan Strategy, regional strategies and other key Strategies and Plans developed by the Department of Planning.

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7 The New South Wales Government has obtained permission from the Victorian Government to reproduce extracts from the Victorian material, and acknowledges the excellent work of the Victorian Department of Treasury and Finance and their team of consultants.

8 For further information see NSW Treasury Circular 04/11, available at: http://www.treasury.nsw.gov.au/pubs/04_tcirc/tc04-11.pdf and the Department of Foreign Affairs and Trade website: www.dfat.gov.au.

9 Whilst State-owned corporations are not bound by TAM policy, their asset strategies should as far as practicable be consistent with the principles of TAM.

The OIM is also responsible for making recommendations to the Government on individual infrastructure proposals and agency capital programs as part of the State Budget process.

The Cabinet Standing Committee on Infrastructure and Planning considers infrastructure issues, strategies and major infrastructure proposals from agencies. The Committee helps ensure that these are in accordance with the Government's strategic direction and priorities and are reflected in the State Infrastructure Strategy.

The Budget Committee of Cabinet also considers these same issues in light of funding constraints, prior to approving funding for individual infrastructure proposals.

### 1.6.2 The role of agencies in procuring PFPs

The procuring agency has overall responsibility for delivering a PFP and for ensuring the project will meet its service requirements. Depending on the capabilities of the procuring agency, it should seek either assistance from The Department of Commerce or an accredited (by the Department of Commerce) external consultant for project management and other technical support.

The Private Projects Branch of Treasury is responsible for ensuring that agencies adhere to the processes set out in these Guidelines. Treasury assists agencies in the procurement of PFPs by assisting with the preparation of required documents and the Public Sector Comparator (see section 7) and participating in the tender evaluation process. The level of assistance provided by Treasury will vary according to the procuring agency's level of relevant experience.

The Auditor-General is responsible for certifying the accuracy of the Contract Summary prepared by the procuring agency. In addition, the agency should consult the Auditor-General early in the process on the likely contract structure and the proposed accounting treatment for the PFP.

Other agencies, like the Infrastructure Implementation Group of the Premier's Department and the Cabinet Office may also be involved in a PFP. Whether they are involved and what role they have will be determined on a case-by-case basis.

The Director-General of the Premier's Department is the first point of contact for unsolicited proposals and will co-ordinate any assessment of these proposals.

Chatswood Transport Interchange platform (Photo courtesy of CRI Australia)

# 2 Identifying Infrastructure Needs and PFPs

## 2.1 Identifying capital works needs

Agencies are responsible for delivering particular services in line with the Government's overarching service delivery goals and priorities and for ensuring that they have the necessary physical assets/infrastructure to achieve these goals.

Agencies should undertake their asset/infrastructure planning within the Government's Total Asset Management (TAM) framework[10]. Through TAM planning, agencies should develop an Asset Strategy which identifies the assets required to sustain appropriate service delivery levels and how those assets should perform.

Where an agency's Asset Strategy indicates that existing assets are insufficient to sustain appropriate service delivery levels, new capital works may be considered as a cost-effective option for service delivery. The agency should include its requirement for new capital works in its Capital Investment Strategic Plan (CISP), with links to the other TAM Plans for Maintenance and Asset Disposal.

The CISP is a ten (10) year rolling planning document, with detailed project plans for the upcoming Budget year and the next three (3) years, and a longer-term projection for the next six (6) years.

An agency must construct its CISP to ensure that its asset portfolio meets its required service delivery outcomes, now and in the future.

Agencies should follow these steps (Figure 2.1):

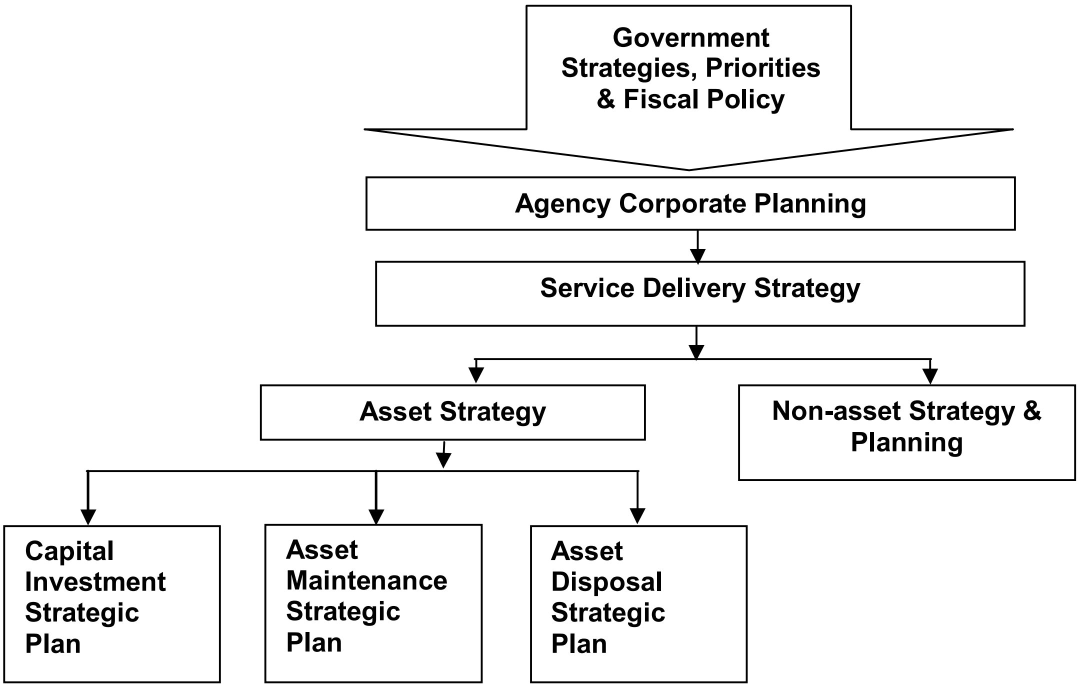
- Define their service/business outcomes, and ensure that these are consistent with the Government's goals, strategies and priorities, such as transport and metropolitan and regional development. They should examine opportunities for collaboration and integration of their strategic planning with that of other agencies, where this will lead to better service outcomes for the community
- Consider what services are required and how these can be delivered sustainably within existing resource limits
- Consider demand management and non-build or less asset-intensive solutions to improve the efficiency and effectiveness of service delivery strategies
- Examine opportunities to improve the performance of their existing asset/infrastructure base (portfolio). They should ensure that assets align with service/business needs, asset-related risks to services are monitored and managed, existing assets are properly maintained, and surplus assets are appropriately divested

[10] More details on the Government's *Total Asset Management (TAM)* Policy and Guidelines are available at Treasury's Website: www.treasury.nsw.gov.au. Whilst State-owned corporations are not bound by TAM policy, their asset strategies should as far as practicable be consistent with the principles of TAM.

- Identify in so far as is practicable the performance (outcomes) based requirements for the infrastructure needed to sustainably support agreed service/business outcomes. Generally, these requirements would include social, environmental and economic parameters.
- Identify financing options for asset management projects and programs.

Agencies should only plan new infrastructure investment if the assets are vital for the selected service delivery method and resources are likely to be available.

**Figure 2.1 Agency Strategic Asset Planning Hierarchy**




## 2.2 Seeking Cabinet approval to Procure a Capital Project

Once an agency has identified service-related infrastructure needs, it can proceed to define specific projects.

In order to seek approval to procure a new capital works project, an agency must prepare a business case[11] for submission to the BCC, justifying the requirement for additional capital works. The business case must include:

(a) An economic appraisal[12]

(b) A financial appraisal[13]

(c) A value management assessment[14]

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[11] See Appendix 2 for further details on what should be included in the business case. State-owned Corporations only need BCC approval for Budget funded proposals and PFPs.

[12] Refer to the Guidelines for Economic Appraisal at http://www.treasury.nsw.gov.au/pubs/tpp97_2/ea-index.htm.

[13] Refer to the Guidelines for Financial Appraisal at http://www.treasury.nsw.gov.au/pubs/tpp97_4/guidline.htm.

[14] Refer to the Total Asset Management Manual at http://www.gamc.nsw.gov.au/tam2000.

(d) For items (a), (b) and (c) above, analysis of all feasible options (including non-capital solutions) identified and evaluated on a whole-of-life basis taking the environmental, social and economic context into consideration

(e) Any cross-agency impacts

(f) A preliminary summary of proposed accounting treatment

(g) Financial Impact Statement[15]

In addition, agencies (other than State-owned corporations) must demonstrate compliance with the NSW Government Procurement Policy[16.] State-owned Corporations must demonstrate compliance with the Guidelines for Assessment of Projects of State Significance[17] and the Reporting and Monitoring Policy for Government Businesses[18.]

When preparing their business cases for a capital works project, agencies (other than State-owned corporations) need to comply with the Government's Agency Accreditation Scheme for construction projects[19.] The scheme applies to the planning and delivery phases of construction procurement by all agencies (other than State-owned corporations).

Agencies that are not accredited for either the planning or delivery phase may be required to engage external support for that phase of their projects, depending on the risk profile of the project.

For certain projects agencies may request the BCC to approve the procurement of infrastructure concurrent with using private finance.

In such cases the actions outlined in Phase 1 of Chapter 3 must be completed prior to submitting a proposal to BCC. This will include preparation of a procurement strategy plan which should analyse the various options for procuring a project, including conventional delivery and privately financed projects.

## 2.3 Projects suitable for private financing

Projects likely to have potential to provide value for money using a PFP delivery method are those with some or all of the following attributes:

- **Scale:** Normally projects with a total contract value of $50 million or more; which could include bundling together a small number of similar projects; or a regional infrastructure management package are also possibilities.
- **Duration:** Long service delivery periods, possibly up to 25 years or more.
- **Service focus:** The services(s) required should be capable of specification in terms of measurable outputs that can be translated to a performance contract.

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15 Refer to Appendix 5.

16 Available from the NSW Treasury Website at http://www.treasury.nsw.gov.au/pubs/tpp2004.tpp04-1.pdf.

17 Available from the NSW Treasury Website at: http://www.treasury.nsw.gov.au/pubs/tpp2002/tpp02-4.pdf

18 Available from the NSW Treasury website at: http://www.treasury.nsw.gov.au/pubs/tpp2005/tpp05-2.pdf

19 Further details are available at http://www.treasury.nsw.gov.au/procurement/procure-intro.htm.

- **Non-core activities:** Significant non-core services and support activities that currently divert management and skilled staff in the public sector.
- **Innovation:** The project is of sufficient complexity to encourage innovative approaches (in terms of design and technology) that can deliver value-for-money.
- **High maintenance:** Alternatives to old infrastructure with high operating costs.
- **Technology:** Scope for cost savings and improved services through new technology.
- **Risk allocation:** Capacity to allocate appropriate significant risk to the private sector.
- **Complexity:** Complexity and other features that encourage innovative solutions.
- **Market appetite:** A real business opportunity that will attract a number of competent bidders.
- **Public interest:** Procuring the project as a PFP is in the public interest (see Appendix 2).

Core services, which must be delivered wholly by Government, fall outside the PFP framework. In this context core services relate to the physical delivery of public services, such as clinical services in health and teaching in education. The services within the PFP that may be privately provided would be those that support the main service function (for example providing accommodation, cleaning and maintenance[20]).

The BCC will also consider whether it is in the public interest to procure a capital works project as a PFP. The nature of this evaluation is discussed further in Chapter 3 and Appendix 2 of these Guidelines.

Prospect Water Filtration Plant (Photo courtesy of Australian Water Services Pty Ltd)

20 For further guidance on which services may constitute non-core services in social infrastructure projects, see paragraph 17.1.1 of the NSW *Risk Allocation and Commercial Principles for PFPs*.

## 2.4 Unsolicited proposals

Unsolicited proposals can provide a source of innovative ideas about how to improve the delivery of Government services.

As with all projects, unsolicited proposals must demonstrate an overall community benefit and be consistent with the Government's plans and priorities. Commercial viability alone will not be sufficient to gain Government support.

The Director-General of the Premier's Department is the first point of contact for unsolicited proposals.[21] Centralised receipt allows opportunities to be captured as they present themselves, and timely and comprehensive feedback to be provided to the proponent.

The Director-General will refer single agency proposals to that agency. Proposals with a cross-agency element and new initiatives (i.e. those regarded as not currently part of the Government's plans or priorities) need wider consideration.

The Premier's Department will consult with relevant agencies to assess the merits of a proposal and determine where it fits in the relative priorities of agencies. The SIS will be used to benchmark the proposal against current priorities and gauge its impact on other projects.

The Director-General will advise proponents of:

- The applicability of these Guidelines to their proposal
- Additional information required to facilitate further consideration
- The process and timetable for a preliminary assessment
- How the Premier's Department might assist them with these processes.

The Director-General will also 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.

Where a promising proposal has a broader focus than a single agency, the Director-General will appoint a lead agency to develop it in accordance these Guidelines.

During this process, 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 Section 3.3 for further guidance on this issue.

21 Proposals may be submitted direct to the relevant agency where there is an existing contractual relationship between the proponent and the agency and the only way to implement the proposal would be to vary the contract.

# 3 PFP Project Development and Approval Process

## 3.1 Phases in the Government PFP approval process

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 as outlined in Table 3.1. These phases are based on BCC approval points. The Treasurer must also approve any final contract under the PAFA Act.

With respect to PFPs procured by Stated-owned corporations or other public trading enterprises that have a Board of Directors, approval by the Board is required prior to requesting BCC approval to proceed to the next phase as outlined in Table 3.1. This approval process is required for all PFPs regardless of whether the project falls under other guidelines, such as the *Guidelines for Assessment of Projects of State Significance*.

Phase 1 requires the procuring agency to prepare a public interest evaluation as per Appendix 2. The evaluation includes an assessment of the value for money of the project for the user and taxpayer. An initial evaluation must be submitted to and considered by the BCC prior to proceeding to market. The public interest evaluation must be updated:

- Prior to the issue of the call for detailed proposals, with any significant variations reported to the BCC;
- After finalising the evaluation of the call for detailed proposals, with the public interest evaluation submitted to the BCC for consideration; and
- Prior to the Government signing the contract documents, with any significant variations from the previous evaluation reported back to the BCC.

The BCC may require updates to be submitted at other points during the tender process.

In addition to the five phases outlined in Table 3.1, an agency will be required to seek BCC approval to continue the project in any of the following situations:

- 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 or procuring the project as a PFP is no longer in the public interest or would not represent value for money.

Furthermore if the agency wishes to renegotiate any significant areas of a PFP contract after it has been approved and signed by Government, the agency is required to obtain BCC approval prior to commencing renegotiations. A further BCC approval will be required prior to signing a contract if any of the negotiation terms previously approved by BCC cannot be met.

In the case where the agency wishes to renegotiate or amend any element of a previously signed PFP contract without materially changing the workings of the contract, the agency is required to consult with Treasury prior to commencing renegotiations. Treasury will determine whether it would be appropriate to inform the Treasurer or the BCC.

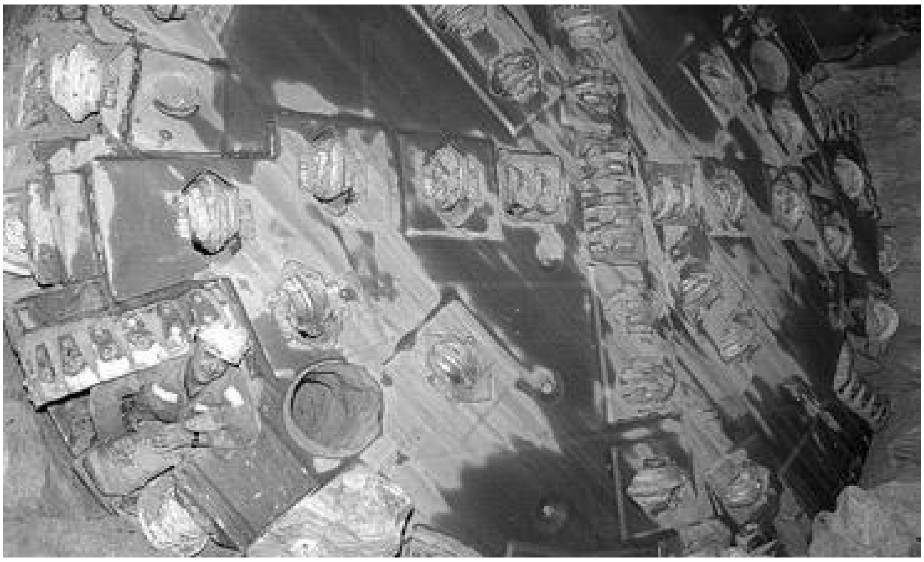
Any amendments to previously signed PFP contracts may require the Treasurer's approval under the PAFA Act.

### Table 3.1 – The five-phase process for Government approval of PFPs

| Phase | Title | Actions |
|---|---|---|
| 1 | **PFP Project Planning & Definition** | • determine core v non core services and project scope<br>• updated business case (including economic appraisal)<br>• procurement strategy report, including a timetable for procurement showing key milestones<br>• public interest evaluation<br>• risk allocation matrix and management plan<br>• preliminary public sector comparator ("PSC")<br>• project management structure<br>• preliminary statement of fiscal impacts in the format (PSI-2) (see Appendix 4)<br>• an estimate of contingent liabilities upon the Consolidated Fund<br>• planning approval preliminary assessment and consultation (refer section 3.2.4)) |
| | ***BCC approval to proceed*** | |
| 2 | **Expressions of Interest (EOI) and Short listing** | • draft EOI documentation<br>• probity plan prior to issue of the EOI<br>• invite EOI<br>• evaluation plan, evaluation and short listing<br>• update of public interest evaluation<br>• update of risk allocation matrix<br>• Environmental assessment (for Process 1 or 2 - see section 3.2.4)) |
| | ***Possible Concept Approval under the EP&A Act (for Process 1 or 2 – see section 3.2.4)***<br>***BCC approval to proceed if required***[22] | |

[22] BCC guidance and approval may be required for very large projects, where there is a large number of bidders, and/or where there are divergent proposals to consider.

<table>
<tr><th>Phase</th><th>Title</th><th>Actions</th></tr>
<tr><td rowspan="2">3</td><td>Detailed Proposals and Assessment</td><td>• draft call for detailed proposals documentation<br>• draft contracts to issue with the call for proposals<br>• issue call for detailed proposals<br>• for Process 1 (see section 3.2.4) project development approval under the EP&A Act and issue to bidders<br>• update PSC prior to receiving proposals<br>• evaluation plan and evaluation<br>• where applicable, proceed to Best and Final Offer (BAFO)<br>• prepare ‘terms and conditions for negotiations of private sector infrastructure projects’ (PSI -3) (see Appendix 4)<br>• update:<br>– public interest evaluation<br>– business case (including economic appraisal)<br>– risk allocation matrix and management plan<br>– statement of fiscal impacts (PSI-2) (see Appendix 4)<br>– assessment of Loan Council treatment<br>– assessment of probity, policy and other issues<br>• accounting treatment and taxation opinion</td></tr>
<tr><td colspan="2">BCC approval to proceed</td></tr>
<tr><td rowspan="3">4</td><td>Negotiations and Contracts</td><td>• where appropriate and approved, proceed with pre-selection negotiations<br>• negotiations with preferred proponent<br>• finalise contract<br>• finalise accounting treatment<br>• update if required:<br>– public interest evaluation<br>– business case (including economic appraisal)<br>– risk allocation matrix and management plan<br>– statement of fiscal impacts (PSI-2) (see Appendix 4)<br>– assessment of Loan Council treatment<br>– assessment of probity, policy and other issues<br>• accounting treatment and taxation opinion</td></tr>
<tr><td colspan="2">BCC approval to proceed required if significant variations arise in negotiations</td></tr>
<tr><td colspan="2">Treasurer’s Approval (PAFA Act)<br>Project or development approval under the EP&A Act (for Process 2 or 3 (see section 3.2.4))</td></tr>
<tr><td>5</td><td>Execution, Disclosure and Implementation</td><td>• execute contract<br>• environmental assessment (Process 2 or 3 (see section 3.2.4))<br>• publish project agreement and associated documents (excluding any confidential information)<br>• issue contract summary<br>• implement and monitor project<br>• post implementation review</td></tr>
</table>



Tunnel boring machine (Photo courtesy of Transport Infrastructure Development Corporation)

## 3.2 Phases in the environmental and planning approval process

Environmental and community issues must be considered alongside financial and budgetary factors when developing and planning PFP-type projects.

At project definition stage, any obligations under local, regional or State environmental plans or policies likely to affect the project should be considered. Issues such as public transport access, water and energy use and biodiversity conservation should be considered in consultation with the relevant agencies.

Proponents of unsolicited proposals must enter into an agreement with the lead agency about the responsibilities for obtaining the relevant environmental approvals under the EP&A Act.

Under the EP&A Act the Minister for Planning approves all major infrastructure and other developments under Part 3A.

Local councils determine agency building projects under Part 4 and Part 5A of the Act and the relevant Government agency approves its own infrastructure projects under Part 5 of the Act.

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

### 3.2.1 Provisions relating to major Government building projects

Under Part 3A of the EP&A Act, agencies must obtain approval from the Minister for Planning for all major buildings and infrastructure proposals listed in the Major Projects State Environmental Planning Policy ("SEPP")[23] as well as for infrastructure projects which are likely to significantly affect the environment. Projects may include hospital projects with a capital investment value of more than $15M or education or corrective services projects with a capital investment value of more than $30M.

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[23] Full text of the Major Projects SEPP 2005 is available at http://www.austlii.edu.au/au/legis/nsw/consol_reg/seppp2005512/.

Project applications must be accompanied by an Environmental Assessment (EA). The project application and EA must be exhibited with an invitation for public comment.

For complex projects or projects being developed in stages, a concept plan can be approved first, with the project details being determined later consistent with the approved concept plan.

There should be early consultation with the Department of Planning to obtain the EA requirements, which will vary on a project by project basis, and to determine if the project is permissible under the relevant planning scheme and appropriate for the site. If all or part of the project is permissible, then the Minister can determine the project without a rezoning.

If the entire project is prohibited under the local environment plan (LEP) or other planning instrument, approval must be sought to change the zoning. If the Minister supports the proposal proceeding, the Major Projects SEPP can be used to efficiently rezone the site to permit the project.

In some cases the Minister may require a new planning regime to be developed for the entire site. In these cases, the site would be declared a State Significant Site (SSS) and would be listed in Schedule 3 of the Major Projects SEPP along with the new planning provisions. In some cases a concept plan can be assessed and determined concurrently with the development of the new planning regime and the listing of the State Significant Site in Schedule 3 of the SEPP.

### 3.2.2 Provisions relating to Smaller Scale Government building projects

Smaller scale building proposals - where Government services are to be provided such as correctional facilities, health facilities, schools and police stations - are covered by Part 4 of the EP&A Act. The local council is the consent authority for such projects. Development applications (DA) must be accompanied by statements of environmental effect (SEE). The DA and SEE are exhibited for public comment.

For complex projects or projects being developed in stages, a Stage 1 approval can be obtained first, approving the overall parameters and layout of the development. The development details are determined later through subsequent development applicants consistent with the Stage 1 approval.

There should be early consultation with the relevant council to ensure that the proposed PFP is permissible under the relevant planning scheme, and is appropriate for the site. Agencies must seek a variation in the local environment plan (LEP) if a development is not permissible in the zone.

There should also be early consultation with council regarding the provisions of or contribution to local infrastructure. Councils may have a section 94 contributions plan or levy scheme which would apply to the development. In other cases, councils may propose that a voluntary contribution agreement be developed to offset some or all of the cost implications for additional local infrastructure.

Under Part 5A of the EP&A Act, councils cannot refuse DAs or place approval conditions on developments made by or on behalf of the Crown without the agreement of the Minister for Planning. Where there is a dispute between the Council and the agency regarding the terms of an approval, the Department of Planning will act to resolve outstanding issues and may set timeframes and approval conditions for determining the DA.

### 3.2.3 Provisions relating to other Government infrastructure projects

Major infrastructure projects undertaken by or on behalf of a Government agency, such as roads, railway, sewerage, pipelines and transmission lines, generally are likely to significantly affect the environment. Hence these are determined under Part 3A by the Minister for Planning.

Other projects are determined by the relevant agency following an assessment of environmental impacts under Part 5 of the EP&A Act.

A Review of Environmental Factors (REF) should be prepared to assess the environmental implications of the proposal. There is no requirement for the REF to be publicly exhibited. However, it is advisable to do so in order to give local communities the opportunity to provide comments, particularly for projects where there is likely to be public interest.

Agencies should ensure that the proposed activity is permissible under the relevant planning scheme. If it is not, agencies may explore options to amend the planning scheme in consultation with the local council and the Department of Planning.

Key considerations are the surrounding land uses and the appropriateness of the site for the proposed activity.

### 3.2.4 Possible Environmental approval processes for PFPs

As outlined above, Development Approval may be under Part 3A for major projects or under Part 4 or Part 5 for other projects. The risks associated with gaining Development Approval should be appropriately considered at the outset.

In general, the trade-off for a higher degree of planning approval certainty is a lower level of private sector innovation. The planning approval process adopted will depend on the level of private sector innovation required. The BCC should be informed of the planning process that will be followed (as outlined below) prior to the agency calling for EOI.

Regardless of which planning process is followed, it should commence as early as possible in consultation with the Department of Planning.

The initial Business Case should include an assessment of the alignment of project objectives with planning objectives. Consistent with section 3.1 of these guidelines, BCC approval to continue the project will be required if likely development approval conditions affect the Business Case conclusions or the assumptions underpinning the Business Case.

The sharing of risks and costs relating to the attainment of approval and compliance with any conditions must be detailed in the project contract.

Prior to the close of the Call for Detailed Proposals, a planning workshop should be held with each of the short-listed bidders and the Department of Planning so that bidders have the opportunity to discuss the development approval process and any conditions that have been set or are likely to be set.

### Process 1: High Degree of Planning Certainty

For a high degree of planning certainty, the agency should obtain development approval prior to the close of the Call for Detailed Proposals based on the agency's reference project (as used to construct the Public Sector Comparator). This allows short-listed bidders to submit fully costed and underwritten bids, prior to selecting a preferred proponent and ensures a high level of competitive tension in pricing the development conditions of the project.

This planning approval process is most likely to be used for projects like toll-roads where the planning approval and public consultation process usually commences well before the call for Expressions of Interest or for projects where the agency does not require significant private sector innovation.

Where non-conforming proposals are submitted, the planning approval implications of the proposals should be carefully considered (see section 3.6.7 for more information). Non-conforming proposals that are not consistent with the project definition, environmental approval or approval condition require a further Development Approval. Therefore, the evaluation would need to take into account the likely cost and time implications of seeking a further Development Approval, and who should bear the planning risk.

Where a Preferred Proponent is selected based on a non-conforming proposal, the Preferred Proponent and procuring agency should meet as early as possible with the Department of Planning to discuss the planning implications.

### Process 2: Medium Degree of Planning Certainty

For a medium level of certainty, the agency should obtain a Concept Plan approval under Part 3A of the EP&A Act, prior to issuing the Call for Detailed Proposals. This will allow the short-listed bidders to provide design and construction innovation within the development envelope approved at the Concept Stage. For example the Concept Approval might be based on a project which defines the scale of operations or the height and density of the buildings.

Final Development Approval would need to be sought based on the successful proponent's design. The private party would normally bear the contractual risk and ultimate responsibility for obtaining approval for the modified design or proposal. However, as the project must be consistent with the parameters of the Concept Approval, the risks are limited.

### Process 3: Low Degree of Planning Certainty

For some projects, the procuring agency may require the private sector to have full flexibility in design and construction to achieve the most innovative and best value for money infrastructure. This may be the case, for example, for large scale property developments, where the Government could run master planning design competitions in order to maximise the value of the land for Government. In these situations, the preferred proponent is selected before the proponent can seek either concept approval or full development approval, and before the project is defined in detail.

In these circumstances, it is recommended that the path to final planning approval be done in stages in order to mitigate planning risk to both the Government and the private party. The process outlined below should be followed:

- First stage — this should commence as early as practicable, preferably at the Request for Detailed Proposals phase. At this stage the sponsoring agency should undertake a preliminary assessment of environmental constraints and opportunities likely to influence the development of preferred options. This should be done in consultation with the Department of Planning and the local council and may involve some public consultation.

As part of the engagement and clarification process with bidders at the RDP stage, the sponsoring agency must arrange consultations between bidders and the Department of Planning so that both parties are fully informed of each other's assumptions, parameters and constraints. The Department can inform bidders of the planning implications of their proposal, including what can or cannot be done within the constraints of the bidder's timetable and proposed contract price. Bidders in turn will be able to obtain a greater degree of certainty about planning approvals and conditions.

While this does not entirely eliminate planning risk, it greatly minimises post-contract award risks associated with planning approvals. This enables the transfer of risk from the Government to the preferred proponent, as the latter would have greater confidence that they can deliver the project within the proposed timetable for the quoted bid price, and with fuller knowledge of the extent and nature of the planning risks that they have accepted.

- Second stage — commences after contractual agreement, which is made subject to planning and environmental approval. At this stage the formal process of seeking planning approval can begin. As a general rule the private party should take responsibility for obtaining planning approval. However, in some circumstances, it may be appropriate for the approval to remain the responsibility of the agency. For example, where the project involves a complex combination of both private and public facilities.

## 3.3 Direct negotiations

Where direct negotiation is being proposed, the agency must fully demonstrate to the BCC the reasons for, and net benefits of, not undertaking a competitive tender process.

The proposal must meet the conditions contained in Section 2 of these Guidelines. The agency must have completed the necessary planning (outlined in Sections 2.2 and 3.4 of these Guidelines) to specifically demonstrate that the project is consistent with its CISP or asset strategy. The agency also 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 some other unique element, can deliver the proposal's essential outcomes
- Direct negotiation would preserve considerable benefits for the agency, the Government and the community
- That direct negotiations would provide better value for money than a competitive tender process
- That 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 be asked to provide a detailed proposal for assessment consistent with the elements of Table 3.1.

## 3.4 Phase 1 - PFP Project Planning & Definition

Where an agency seeks BCC approval to procure a capital works project as a PFP, the agency must complete the documents outlined in Phase 1 of Table 3.1 to BCC for consideration.

This should include a procurement strategy report outlining reasons why the project is suitable for PFP procurement as opposed to other procurement options. See Section 2.3 for an outline of the project attributes that should be present for private finance procurement to be a feasible option.

## 3.5 Phase 2 - Expressions of Interest and short listing phase

### 3.5.1 Call for Expressions of Interest (EOI)

Having assessed the various issues of a proposal, the BCC will consider and approve, where appropriate, a call for EOIs being issued to invite responses from the marketplace.[24]

In the lead up to the issue of EOIs agencies should, in consultation with Treasury, 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 3.1.

Preparation of the EOI evaluation plan should include criteria for, and management of, the evaluation processes. Any known probity, policy or other issues likely to impact on the tendering or evaluation processes must be disclosed to the BCC.

It may be appropriate for agencies to consult with the Independent Commission Against Corruption (ICAC) on these matters. Section 3.5.4 provides generic criteria for evaluating PFP infrastructure proposals at the EOI stage.

### 3.5.2 Contents of Expression of Interest

The call for EOI document should address:

- Maximising the scope for private sector innovation. Government's service delivery objectives are to be expressed, as far as practicable, in terms of the essential outcomes and performance-based requirements, without identifying specific solutions
- The decision-making processes, including realistic time-frames and stages of the process
- The criteria for evaluating EOIs
- The Government's preferred risk allocation position and requirements together with key issues, such as risk sharing, pricing of services, net community benefits, Government contributions and other regulatory aspects
- Australian and New Zealand industry and technology development considerations

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[24] Ministerial Memorandum 2006-11 requires all agencies (other than State Owned Corporations) to place all Request for Tender documentation on the NSW Government eTendering website.

The call for EOI document should also include:

- Relevant background material, including preliminary market assessment
- Environmental and land use planning studies and assessment and if the environmental planning, assessment and approvals process has been already undertaken by the agency, a copy of the approval conditions
- Limits on the size of EOI responses, to control bidding costs and simplify assessment
- Details of the manner in which intellectual property in the EOI will be treated and the methods for the identification of intellectual property
- A summary of the results of the public interest evaluation.

If an approval under the EP&A Act is to be based on an agency's preferred site and design parameters, the agency should provide in the EOI documentation the approval conditions along with the Environmental Assessment (EA), Environmental Impact Statement (EIS), Statement of Environmental Effect (SEE), Review of Environmental Factors (REF), technical design and other relevant project information.

If there is no approval under the EP&A Act at this stage, the agency should provide in the EOI documentation any key information on the Department of Planning's regional or sub-regional planning, preliminary options evaluation and any relevant preliminary environmental assessments and land-use planning studies, as well as the outcome of any preliminary community consultations.

### 3.5.3 General terms and conditions

The EOI should clearly state the general terms and conditions which are to apply to the process including:

- A statement that Government reserves the right not to proceed with the project and may withdraw from the EOI process at anytime
- A statement that no costs associated with preparing a response to the EOI will be reimbursed by Government under any circumstances
- The disclosure procedures for the project and tender process
- The format, date and place of receipt of the EOI submissions.

### 3.5.4 Evaluation of EOIs

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. External financial, legal and technical advisers will usually support the Panel. The Steering Committee will oversee the evaluation process.

The Evaluation Panel's brief is to assess whether responses:

- Indicate an overall net benefit to the Government and the community, in terms of financial, economic and social factors
- Indicate preliminary viability and suitability for private sector financing and delivery of services
- Are consistent with the infrastructure strategic plans
- Indicate that bidders have the capability to provide the project and meet the output requirements.

The Evaluation Panel must objectively assess all proposals against specific weighted selection criteria. All criteria, but not necessarily the weightings, will be published in the EOI. The Evaluation Panel must allocate weightings to each criterion before the closing date for EOI submissions.

The criteria for evaluation (which should be clearly stated in the call for EOI) will generally include:

- Experience in successfully designing, constructing, financing, maintaining and operating major infrastructure
- Experience and capacity to undertake the particular project and deliver the required services
- Experience and capacity to manage environmental and community relations matters
- Financial capacity to meet the likely contractual obligations associated with the project
- Design, construction, financing and operational resources available to the proponent
- The proposed approach and evidence of addressing all areas (eg. designing, constructing, operating and maintaining)
- Innovative approach, and satisfying specifications, technical feasibility and quality
- Net economic, social and environmental benefits and costs
- Viability, likely risk to be assumed by the Government and its probable contribution, if any
- Community and other benefits, including local industry participation, technology transfer, and other Government programs
- Understanding of Government's requirements for the project.

Short listed bidders may also be invited to give presentations of their proposals to the evaluation panel and separately to the Steering Committee. Subject to a favourable outcome, the evaluation would lead to a shortlist (normally of about three bidders) who would be invited to submit detailed proposals.

The Auditor-General should be advised of the form of the contractual arrangement to be included in the 'call for detailed proposals' as well as the likely accounting treatment for the transaction.

The evaluation report is submitted by the agency's Chief Executive Officer (CEO) to the responsible Minister for endorsement. BCC approval to proceed to a call for detailed proposals is not necessarily required. Treasury should be consulted about whether BCC approval is required.

BCC guidance and approval may be required for very large projects; where there are a large number of bidders; where proposals diverge substantially from the requirements of the call document; and/or where critical project details have changed, as detailed in Section 3.1.

In these cases the BCC will consider the Evaluation Panel's report along with the Minister's recommendations. The BCC will decide whether to proceed to a Call for Detailed Proposals or to terminate the process.

### 3.5.5 Local industry participation

The NSW Government recognises the substantial economic benefits flowing from buying Australia New Zealand (ANZ) sourced goods and services. The Government is also aware of the economic benefits of maximising opportunities for local service providers to compete for Government business on the basis of value for money.

Bidders will be required to prepare and submit preliminary local industry participation plans identifying how and to what extent they will incorporate ANZ sourced goods and services.[25]

## 3.6 Phase 3 - Call for Detailed Proposals and assessment phase

An agency may proceed to a call for detailed proposals (**"the Call"**) from the short listed bidders after gaining any required BCC approvals.[26]

BCC guidance and approval may be required for very large projects, where there are a large number of bidders, or where there are divergent proposals to consider.

Prior to proceeding to the Call, agencies should complete any outstanding actions outlined in Phase 2 of Table 3.1.

### 3.6.1 Content of the Call

The purpose of the Call is to solicit from bidders their proposed solution to deliver the project. Accordingly it is important that the Call contains sufficient information to allow bidders to understand the nature of the project and its background.

Accordingly the Call should include:

(a) Information on:

- The agency including, if relevant, the statutory basis of its authority and functions
- Descriptions of key stakeholders
- Social, political and economic circumstances that led to the development of the project
- The project objectives.

(b) Descriptions of the service delivery requirements and the proposed payment mechanism. Service delivery requirements will usually be in the form of the services output specification.

(c) Any design requirements and the proposed completion date for construction.

(d) The proposed contractual arrangements and risk allocation including a draft of the contract documents. In addition to the contract documents, it is often useful to include in the Call a 'lay person' description of the proposed risk allocation.

(e) Any special requirements or issues such as special transitional arrangements (eg decommissioning of existing facilities).

(f) Details of the processes which will apply through the 'bid phase' and during the evaluation phase (including procedures for communicating with proponents during the bid phase, details of the probity arrangements and so on).

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[25] Refer to the NSW Government Procurement Policy at www.treasury.nsw.gov.au/ procurement/procure-intro.htm.

[26] Ministerial Memorandum 2006-11 requires all agencies other than SOCs to place all Requests for Tender documentation on the NSW Government eTendering website.

### 3.6.2 What information should be required from Bidders?

The Call should clearly specify the information required from bidders to enable the agency to assess whether bidders have satisfied the evaluation criteria.

With respect to financial information, it is common for sponsoring agencies to provide bidders with templates to submit with their bids. This provides the agency with information in a consistent format, thereby enabling easier comparison of bids.

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 tax opinion on whether section 51AD and Division 16D of the *Income Tax Assessment Act* (or any replacement provisions) applies to the project.

### 3.6.3 Unbundling financial models

There is a need to analyse cost inputs including those that are part of the financing package, which represent a significant proportion of the total costs of a typical PFP.

To enable Government to fully understand the private sector's funding package, short listed bidders will be required to provide, as part of their response to the call for detailed proposals, the financial model used to support their bid.

Access to the financial model will enhance Government confidence in the project by:

- Confirming the level of risk transfers and costs
- Allowing full assessment of project affordability
- Providing the basis for comparative analyses
- Ensuring value for money is achieved
- Enabling Government to assess project changes, such as interest rate movements and cost changes, prior to financial close.

### 3.6.4 Purchase of Intellectual Property from unsuccessful bidders

In their response to the call for detailed proposals, bidders must identify the specific elements of their bids which they are claiming as intellectual property. Government may seek to negotiate the purchase of intellectual property that forms part of an unsuccessful bid.

### 3.6.5 Interaction with bidders during the 'bid phase'

An interactive tender process may be appropriate to use where there is a high level of interface risk between the state operators and the private sector infrastructure providers.

A good example of this is in social infrastructure projects, where generally the infrastructure is designed and constructed by the private sector but substantially operated and managed by the public sector.

Accordingly, Government is sometimes highly dependent on the functionality of the infrastructure to achieve operational outcomes and efficiencies.

An interactive tender process provides an opportunity for bidders to discuss the development of their concepts and designs with the agency and to seek clarification and feedback of the State's output specification. State representatives attending workshops should avoid making definitive statements about design solution or preference.

The interactive tender process will typically involve a series of workshops, usually numbering between three and ten per bidder. Each workshop will normally involve both the State project team representatives and a team from a single bidder.

The workshops are held separately with each bidder, with all bidders being offered the same number of workshops. There are generally three types of workshops offered to bidders:

- Technical workshops dealing primarily with design and development approval issues
- Services workshops
- Commercial, legal and/or financial workshops.

The Call should specify the procedures and protocols for the interactive tender process. Protocols or ground rules for the workshops should be established and provided to bidders in advance of the workshops, and bidders should notify the State in writing of their acceptance of the procedures and protocols.

These procedures and protocols should help ensure that the same information is provided to all bidders.

In particular the procedures and protocols should:

- Provide for involvement of the probity auditor in the project and planning of the interactive tender process
- Provide for the probity auditor's attendance at the workshops
- Provide that protocols and procedures governing the conduct of both the state representatives and bidders will be in place before the workshops commence
- Ensure the security and confidentiality of intellectual property and proprietary information, to the extent allowed by law and government policy
- Provide that each meeting will be recorded - or alternatively, that minutes of the meeting, including questions and answers, will be taken.

### 3.6.6 Evaluation of bids

The agency's Evaluation Panel will undertake a full assessment of the detailed proposals submitted by the short listed bidders against the evaluation criteria and recommend a preferred bidder.

The criteria for evaluation will be clearly stated in the Call. The specific criteria used and their weighting will vary on a case-by-case basis.

The value for money for the user in paying any user charges should be considered in evaluating proponents' responses to the Call.

If no satisfactory bid is received, the process may be terminated. Alternatively, if the Evaluation Panel believes a value for money solution can still be obtained, a Best and Final Offer process (see Section 3.6.8) or pre-selection negotiations (3.7.1) may be conducted.

Subject to endorsement by the responsible Minister, the final evaluation and recommendations must be submitted to the BCC for approval. Updating and finalising of studies and analyses commenced at the beginning of the process is an essential element of this full assessment (see further Phase 3 of Table 3.1).

### 3.6.7 Evaluation of non-conforming bids

Generally the Call should specify what constitutes a conforming bid. Depending on the particular project, this will require (amongst other things):

- Substantial acceptance of the revenue or service payment mechanism
- Substantial acceptance of the proposed risk allocation
- Compliance in all material respects with the requirements of any technical or design requirements or services specifications
- Compliance with planning approval (if available at this stage).

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 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. These bids may differ significantly from the reference project assumed by the agency in its preparation of the PSC. Therefore sponsoring agencies should take care when deciding whether to evaluate a non-conforming bid and should consult with their probity auditor.

This does not mean that non-conforming bids should be rejected at the outset. Rather, it means that in addition to factors considered during the assessment of conforming bids, the evaluation should also have regard to factors considered by the agency in developing the reference project.

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.

Accordingly in addition to the standard evaluation criteria for both conforming bids and variant conforming bids (which would generally include a value for money test on any proposed user charges), the evaluation of the non-conforming bid should consider:

- Whether it is consistent with the agency's CISP
- Whether the project will satisfy the project objectives
- The financial, design, construction and operational benefits of the project compared with the disadvantages
- The reasonableness of the risk-adjusted construction and operating costs to ensure that taxpayers/users get value for money
- Whether revised planning or environmental approvals would be needed and the likely cost of any conditions of approvals and the likely timeframe to get those approvals
- Whether the revised economic appraisal, based on the non-conforming bid, shows sufficient benefits exceeding costs (the agency should use assumptions that are achievable rather than necessarily any revenue, cost or other data provided in the bid).
- Whether the public interest would be served by adopting the non-conforming bid

- If applicable, any additional agency or budget funding required to deliver the associated core services or related works
- Any savings or additional costs to provide core services that may result from the non conforming bid.

Note that the standard evaluation criteria for both conforming bids and variant conforming bids should include a value for money test on any proposed user charges. This test would also need to be applied in the evaluation of a non-conforming proposal.

Where the agency's evaluation panel concludes that a non conforming bid is the best proposal, the agency must:

- Demonstrate to the BCC why the proposal is the best proposal based on the above criteria and the other criteria used in the assessment process
- Update the public interest evaluation for the non conforming bid. If required by BCC, the agency must undertake a new community consultation program. In addition, the Department of Environment and Conservation or the Department of Planning may require the agency to undertake specific additional community consultation programs;
- Demonstrate to the BCC that direct negotiations should proceed with the proponent rather than competitively tendering the non conforming proposal, taking into account:
  - Any intellectual property contained in the non-conforming bid and whether it would be prudent to value and purchase the intellectual property
  - Timing of the required infrastructure and tender process
- The bid costs of the agency and bidders and the competitiveness of the current tender process and any future tender process
- Whether the solution provided in the non-conforming bid is consistent with the objectives of the current call for detailed proposals.

### 3.6.8 Best and Final Offer

Ideally, after the outcome of the evaluation process, a Preferred Proponent is selected. If a single Preferred Proponent cannot be identified but the Steering Committee believes a value for money solution can be achieved, a Best and Final Offer ("BAFO") may be used. The use of BAFOs has been successful in delivering value for money on previous projects. BAFOs may be appropriate to use where:

- Costs submitted by all bidders are too high, or
- A 'Preferred Proponent' cannot be clearly determined based on the evaluation criteria given in the Call, or
- All bidders submitted responses that are unclear or deficient in one or more areas.

It may be appropriate to inform the BCC of proceeding to a BAFO. The procuring agency should seek Treasury guidance on whether the BCC should be informed.

In order to minimise costs to the private sector and the Government:

- Only those bidders which are believed capable of delivering the desired results should be invited to participate in the BAFO;
- The BAFO should be completed within a short, well-defined period; and
- Agencies should only request one BAFO.

The bidders selected for the BAFO process should be provided with detailed questions relating to their proposals and/or informed of those parts of their proposal which are deficient. The bidders are then given the opportunity to revise their bids and eliminate any unacceptable conditions contained in their original proposals. The amended sections are then re-evaluated and re-scored according to the evaluation process defined in the Call.

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

Prior to requesting BCC approval to enter into contract negotiations with one or more proponents, the agency must, in conjunction with Treasury, develop a project-specific 'terms and conditions for negotiations of private sector infrastructure projects' agreement in the PSI-3 format (see Appendix 4).

The purpose of this is to inform the BCC of the nature of the commercial deal that the agency wishes 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 Government to support the project.

In addition, the agency submission should provide the information needed to estimate any likely contingent liability of the project on the Consolidated Fund.

## 3.7 Phase 4 - Negotiations and Contract Finalisation

### 3.7.1 Pre-selection negotiations

In certain circumstances it may be preferable to concurrently undertake negotiations with two or more bidders prior to finalising the evaluation process and selecting a preferred proponent, rather than undertaking a BAFO. If this is the case, the BCC must approve this process prior to commencing pre-selection negotiations.

Pre-selection negotiations should be used where the evaluation panel believe that greater interaction (than is usually present in a BAFO) is required with bidders to develop their proposals to a standard which justifies their appointment as preferred proponent.

These circumstances usually arise where:

- The main outstanding issue preventing a bidder from being appointed as preferred proponent, is their failure to accept Government's preferred risk allocation and
- The evaluation panel believes a higher level of interaction (than would be present in a BAFO) is required with bidders to resolve these outstanding contractual and risk allocation issues.

In order to maintain competitive tension and minimise bid costs, pre-selection negotiations should be undertaken within a tightly defined timeframe.

Negotiations should address all areas of deficiency in a bidder's proposal (design, construction, services, financial and contractual).

Given the high level of interaction during the pre-selection negotiations, agencies may elect to negotiate with each bidder on different risk allocation and contractual terms, reflecting the issues which are most important to that bidder. Advice should be sought from a probity auditor. The following rules should be adopted:

- The Call must specifically include a right for the agency to undertake pre-selection negotiations on different contractual terms with bidders

- Where different concessions are made to different bidders during the pre-selection negotiations, a risk adjustment is made for that concession, with the effect of either increasing or decreasing the perceived price of their bid
- If both bidders request the same amendment, then if the agency concedes the amendment to one bidder it must concede it to the other bidder, provided this is a sensible concession in the overall context of the other bidder's proposal.

### 3.7.2 Budget Committee of Cabinet requirements

Agencies must seek BCC approval prior to entering into negotiations with a preferred bidder, or prior to negotiating with any bidder. All actions listed in Phase 3 of Table 3.1 should be completed prior to approaching the BCC for approval to enter into negotiations.

In giving its approval the BCC will need assurance that it is unlikely that any new issues will arise that may materially alter the respective positions of the Government and the preferred bidder. The preferred bidder must not be made public until the BCC has approved the selection of the preferred bidder.

During negotiations agencies must remain aware of any potential new issues, including environmental and planning approvals and taxation treatment.

If significant variations arise in negotiations, agencies must seek BCC approval prior to signing any contract. All actions listed in Phase 4 of Table 3.1 should be completed prior to signing any contract.

### 3.7.3 Statutory approvals under the PAFA and SOC Acts

It is the Treasurer's responsibility under the PAFA Act to give approval for agencies to enter into joint financing arrangements.

As part of the process for seeking the Treasurer's approval, the 'terms and conditions for negotiations of private sector infrastructure projects' (refer PSI-3 in Appendix 4) should be updated to reflect any changes to the project made as a result of negotiations with the preferred proponent. The final project deed should also be forwarded to Treasury.

These are important steps in ensuring that the Treasurer is aware of the nature of the project prior to exercising his discretion to grant approval to the agency to enter into the joint financing arrangement.

In addition, 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 whether this approval is required for their particular privately financed project.

### 3.7.4 Accounting treatment

Agencies must assess the likely accounting treatment to be adopted for privately financed projects. A statement of accounting treatment is to be prepared, showing:

**(a) balance sheet**:

- Valuation, treatment and timing of assets to be passed to the agency at the end of any contract period
- Treatment and timing of any assets passed over to the private sector
- Valuation and treatment of any liabilities assumed
- Valuation and treatment of any contingent liabilities.

**(b) operating statement**:

- Treatment of any expenses to be incurred over the duration of the contract
- Treatment of any likely revenues to be received from the private sector.

**(c) statement of cash flows**:

- Treatment of any payments likely to be made to the private sector over the duration of the contract
- Treatment of any likely payments from the private sector

Agencies should refer to the relevant accounting standards proposed and, where reliance is placed on professional accounting opinions, copies of these should be attached to the statement.

The achievement of 'off balance sheet' transactions is not a motivation for the Government to deliver PFPs. The Government's key drivers are improved value for money in service delivery and appropriately balanced risk allocation.

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 PFP 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.

NSW Treasury is required to report the State's exposure to infrastructure projects with private sector participation when putting forward the annual Loan Council allocation and when making periodic reports to the Loan Council.

Exposure is to be estimated as the full contingent exposure measured by the Government's termination liability, in the case of private party default. If the termination liability does not include all forms of Government underwriting, the sum of the individual liabilities incurred under each clause of the project delivery contract may have to be estimated.

NSW Treasury will work closely with agencies in preparing an assessment of likely Loan Council impacts from private sector financing. The Treasury will normally use material contained in the statement of fiscal impacts, the economic appraisal and other supporting documentation.

### 3.7.5 Reimbursement of reasonable bidding costs

The Government may decide to terminate the 'call for detailed proposals' process for reasons other than value for money, commercial or technical considerations.

Under these circumstances, consideration may be given to reimbursing bidders' reasonable bidding costs. Any reimbursement will be based on the quality and quantity of information supplied by the proponent(s). Where reimbursement is paid, the agency will retain the proprietary rights to the bidding material. Any reimbursement will be at the sole discretion of the NSW Government.

# 4 Project Management Structure

The complexity and scale of PFPs requires a team-based management approach to ensure all the required skills are effectively applied.

Teams must have clear lines of accountability and sufficient flexibility to optimise the input of a diverse management team. In this way the public sector will reflect the breadth of skills brought to the project by a private sector consortium.

Experience and knowledge needs to be captured, retained and shared to enhance the likelihood of success of future PFPs.

This section outlines a suggested project management structure aimed at achieving these outcomes.

## 4.1 Steering committee

For major projects a steering committee should be established by the delivery agency. The committee's brief may differ depending on the project phase:

- Procurement phase - to guide the development of the project and deal with key issues, including the content of key documentation and overseeing the evaluation and selection of a preferred bidder; and
- Initial delivery phase (that is, the construction period and at least the first two years of operations) - to provide high level oversight of implementation and management of the contract.

For projects with a number of construction phases over many years, it may be appropriate for the Steering Committee to continue until the final constructed facility has been operating for two years.

Where more than one agency is involved in the project service delivery outcomes, the Director-General of NSW Premier's Department will appoint one of these agencies to lead the project and convene the steering committee. The other agencies will be represented on the committee.

The composition of the steering committee will be determined by the delivery agency.

An experienced officer from NSW Treasury will be a member of the Steering Committee. The Steering Committee may include representatives from other agencies or independent advisers as jointly approved by Treasury and the delivery agency or by the BCC.

## 4.2 Project manager

The CEO of the delivery agency should appoint a project manager either from the agency staff or on a contract. The project manager may be a member of the Steering Committee or may just report to the Committee.

The project manager is responsible for delivering the project and managing members of the project team, including external advisers and consultants. The project manager requires a good understanding of Government processes and well-developed commercial skills applicable to developing and negotiating contractual arrangements.

## 4.3 Probity auditor

A probity auditor should be appointed for large, complex, or sensitive PFPs to ensure that a transparent and robust process is followed. The probity auditor must be objective and also endorse the probity plan, monitor the bid process throughout, and provide advice to the project team, the steering committee and the CEO of the delivery agency.

## 4.4 Project team

The full team may not be brought together until the BCC has given an approval to seek EOI, although some resources will have been devoted to the project definition.

Figure 4.1 provides a typical project management structure, which includes the project manager and other specialist members of the team. Specialist knowledge required for the project, including financial, technical, operational, community relations, environmental, contractual and legal skills will vary with the type of project.

While some specialist roles may be found within the delivery agency and others may be seconded from other departments, additional external legal and other specialist skills will be required. The project manager is responsible, through the steering committee, to the CEO of the delivery agency for delivering all critical elements of the project.

### Figure 4.1 Typical project management structure

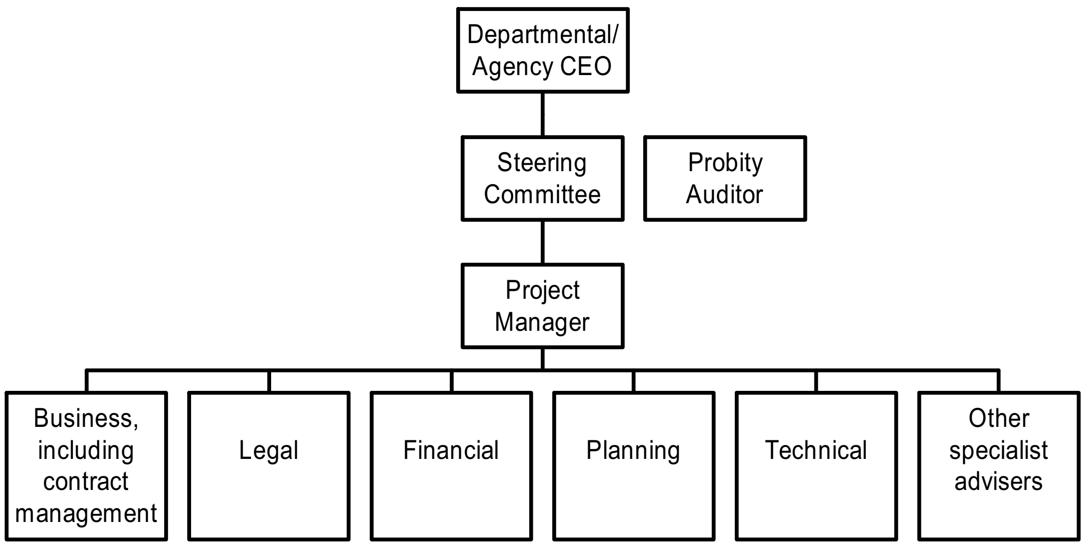

Photo courtesy of CityRail

## 4.5 Budget Committee of Cabinet review

The proposed project management structure is to be submitted to the BCC for endorsement when approval is being sought to call for EOIs.

## 4.6 Treasury Private Projects Branch

Treasury's specialist Private Projects Branch will be the focal point for economic and financial assessment and advice on all PFPs and will assist Government agencies more generally. The Branch will ensure application of these Guidelines.

The Branch will also promote best-practice PFPs by absorbing and disseminating the lessons of experience and consulting with other Governments on their experiences and practices.

The Branch should be consulted at an early stage in the development of a PFP proposal. The Branch will normally draw on expertise from across the public sector, and the expert advice of private sector consultants when required.

## 4.7 Management Structure during Implementation

After the contract becomes effective, management of the project will normally be transferred to an implementation team and ultimately to ongoing agency service delivery arrangements.

For many projects, it may be useful for the procurement steering committee to oversee the implementation of the project during the initial delivery phase (that is, during construction and at least the first two years of operations). The steering committee should at least meet quarterly.

For projects with a number of construction phases over many years, it may be appropriate for the steering committee to continue until the final constructed facility has been operating for at least two years.

The BCC may require regular progress reports for major projects so that it can monitor implementation. This will be determined on a case-by-case basis.

It may be useful, particularly for social infrastructure projects, to compile a contract administration manual to assist the agency in managing the contract during the construction and operational phases of the project. The Private Projects Branch of Treasury can assist with the preparation of this manual and can provide a pro-forma if required.

# 5 Disclosure Requirements and Project Reviews

Ensuring adequate and timely disclosure is essential in ensuring an open procurement process.

## 5.1 Public Disclosure of Information arising from NSW Government contracts

All PFPs are subject to Ministerial Memorandum No.2000-11 and the *Freedom of Information Amendment (Open Government—Disclosure of Contracts) Bill 2006*, as amended from time to time, which sets specific disclosure requirements arising from NSW Government tenders and contracts.

## 5.2 Contract Summary

In addition to the above disclosure requirements, 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 (that is, within 30 days after all conditions precedent to the contract have been satisfied) .

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

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

**Background to the Project**

- History of the project and its characteristics including a statement as to the nature of the relationship(s) between the Government and other parties created by the contract(s). (For example, "The NSW Government is seeking to ….; Party A can provide….; Party B wishes to finance… Party C is prepared to underwrite…)
- The full identify of the private party and its sponsors, including details of cross ownership of relevant companies.
- A list of the contract(s).
- A statement of the nature and purpose of the contract(s), including a general description of the parties' obligations (description of project to be completed or goods/services to be provided or property to be transferred).
- A general statement as to the nature of material which has been excluded on the basis that it is subject to obligations of confidentiality or is 'commercial in confidence' [27]

[27] See the Ministerial Memorandum 2000-11 and the *Freedom of Information Amendment (Open Government—Disclosure of Contracts) Bill 2006* for the list of items that qualify as 'Confidential Information'.

- The results of cost-benefit analyses
- The results of the Public Sector Comparator compared with the successful private sector proposal
- The significant evaluation criteria and the weightings used in tender assessment, including that for the Public Sector Comparator
- 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
- Activities of the State and contractor during the construction period; who is responsible for environmental, heritage, site risks, etc; staging and payment arrangements; site access, responsibility for completion and commissioning, etc.
- 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 (i.e. what happens if ownership of a party changes)
- The commencement date of the contract; the term of the contract including extensions of term and at whose option. This information would include details of future transfers of assets of significant value to Government at no or nominal cost, and details of the right to receive the asset as well as when this might occur
- Service delivery (including maintenance) and quality requirements in terms suited to the non-technical reader. Performance measurement may be linked to an agreed set of standards or key performance indicators, which will generally relate to the quality, amount and frequency of service provision
- What and when assets are to be transferred by the public sector to the contractor
- Operation and/or maintenance provisions in the contract expressed in non-technical terms
- The price to be paid by the public, and the basis for future changes in this price. This should include a statement setting out the basis on which price is computed or projected
- Provisions for renegotiation
- Significant guarantees or undertakings between the parties. This would include 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) by, for example, removing or limiting access to records, information, etc. that should otherwise be available
- A description of the events of default
- A description of termination rights (including for convenience, for default and any other grounds of termination
- A statement as to contractual remedies available to the Government in respect of breach or losses otherwise caused by the other party or parties, and remedies against the Government in any circumstances

- A description of exit/disengagement arrangements, including the basis for calculating the cost of disengagement
- A description of the situations in which the Government may exercise its contractual right to step-in (i.e. assume all or some of the service delivery obligations of the private party for a period of time)
- A description of any pre-determined dispute resolution process
- A description as to how insurance proceeds are to be used in the event they are called upon (eg. reinstatement of the asset, payment to the financiers)
- Any other key elements of the contractual arrangements if they have not been covered above.

If any amendments to the contract occur that change information contained in the previously published contract summary, the summary must be updated and a copy provided to the Auditor-General for audit within 30 days of the amendment becoming effective.

Within 90 days of receipt by the Auditor-General, the updated audited contract summary must be tabled in Parliament by the responsible Minister. After tabling the contract summary, the agency must advertise the availability of the updated contract summary in the Public Notices.

## 5.3 Post implementation reviews

A post implementation review will be undertaken on all PFPs. These will be a valuable tool in refining the processes used in developing private sector infrastructure projects. They will be undertaken jointly by NSW Treasury and the agency initiating the project and should include:

- Project formulation
- Project objectives
- Brief appropriateness
- Design performance
- Approvals process
- Project delivery
- Risk exposure/risk sharing
- Delivery time
- Budget performance
- Project management/procedures
- Functional competence of infrastructure, including networking and interfacing
- Project operations, including service delivery and financing
- Industrial relations management
- Environmental management
- Community relations
- Industry development.

The review should generally be initiated twelve months after operations have commenced, although it may be undertaken earlier. Service delivery performance and contractual compliance will be reviewed regularly throughout the life of the contract by the agency and, at least initially, by the steering committee.

# 6 Risk Management

It is not Government's aim to maximise risk transfer from Government to the private sector, but rather to optimise risk allocation so that value for money is maximised in each project on a whole-of-life basis.

A full risk analysis must be undertaken for each PFP. To minimise transaction cost, for social infrastructure projects Government will adopt a standardised risk management approach in accordance with the *Working With Government Risk Allocation and Commercial Principles for Privately Financed Projects (Risk Allocation and Commercial Principles for PFPs)*, where this results in value for money.

However, given the length of contractual arrangements, the likely complexity of issues involved and the unique characteristics of each project, risks must be considered on a case-by-case basis.

## 6.1 The risk management process

The process of risk management should start at the strategic planning stage of the project. The steps involved are:

**Establish context**:

- proposal familiarisation, i.e. identify project scope, objectives, assessment criteria, key elements and issues

**Risk analysis**:

- identify all potential risks
- assess potential likelihood and consequences of each
- screen or grade risks, identifying minor, moderate and major risks

**Risk response planning**:

- identify feasible responses to risks, including prevention, impact mitigation, transfer and acceptance
- select the best response for each risk
- develop risk action schedules and other management measures, as appropriate

**Document planning**:

- prepare a risk management plan for large/complex projects; prepare risk action schedules and measures for others

**Risk management implementation**:

- implement plan, action schedules and management measures
- monitor the implementation
- periodically review risks and evaluate need for additional risk management[28]

[28] For further details on risk management, refer to the Total Asset Management Planning Assessment and Decision Tools at http:// www.treasury.nsw.gov.au/tam/pdf/risk_management.pdf.

Optimal risk allocation is the principal driver of value for money in PFPs. This includes retaining only those risks that Government can manage more effectively than the private sector.

Risks that are outside the control of either party may be shared.

When Government focuses on contracting for service outcomes rather than building and maintaining infrastructure, the risks associated with the construction and ownership of the asset can be transferred to the private party. The latter can design, build, operate and maintain the asset at minimum whole-of-life cost.

Risk analysis will need to be reviewed at the key stages of a project as outlined in Table 3.1.

## 6.2 Risk identification and allocation

Risks are usually identified by reference to generic risk categories and/or based on different phases of the project. This section of the Guidelines identifies the common risks which can be found in most PFPs. This is intended as a guide only. The identification, allocation and management of risks must ultimately be considered case by case.

Risks clearly identifiable at the time the contract is entered into are allocated in the most favourable way to the party best able to control occurrence and the consequences of their occurrence.

However, some risks are difficult to allocate in advance because they may not be controllable or fully identifiable. These risks should be determined on a case-by-case basis and may be shared or assessed when they occur. What is important is that their existence is recognised and that their occurrence and their consequences are specified, where possible.

One way to contractually address this is through a material adverse effect regime. "Material adverse effect" regimes specify those risk categories which, if they materialise, will have a material adverse effect on the project and are to undergo a special process of assessment and allocation between the parties.

These regimes offer flexibility and comfort to the private party by specifying the outcome (e.g., the restoration of the private party's position before the event) to be achieved through various measures adopted by the parties when a risk in the specified categories materialises. They also ensure that the Government does not pay a premium for a risk that may never materialise or the consequences of which cannot be predicted with any certainty.

### 6.2.1 Site Risk

Site risk is the risk that:

- the project land will be unavailable or unable to be used:
  - at the required time or
  - in the manner or the cost anticipated or
- the site will generate unanticipated liabilities,

with the result that the contracted service delivery and/or projected revenues are adversely affected.

Specific examples of site risk include:

- the risk of unanticipated geo-technical conditions increasing the cost of construction
- the risk of unanticipated contamination
- the risk of delays in obtaining statutory approvals
- the risk of delays caused by the discovery of indigenous and non-indigenous artefacts and
- the risk of native title claims being made on the land.

Generally site risk will be allocated to the private party. However in certain circumstances it maybe appropriate for Government to accept some site risk. For further guidance on when Government may accept some site risk, see Chapter 4 (Site conditions and suitability), Chapter 5 (Environmental issues), Chapter 6 (Native title and artefacts), Chapter 7 (Planning and other approvals) and Chapter 8 (Site access) of the *Risk Allocation and Commercial Principles for PFPs.*

### 6.2.2 Design, Construction and Commissioning risk

Design, construction and commissioning risk is the risk that the design, construction or commissioning of the facility (or certain elements of those processes) is carried out in a way that results in adverse consequences on cost and/or service delivery.

Specific examples of design, construction and commissioning risk are:

- the risk that the facility as constructed is unsuitable for the delivery of both the contracted services and the core services provided by Government
- the cost of complying with environmental and planning conditions and ensuring that construction and commissioning of the project does not inadvertently cause environmental harm
- the risk of defects arising in the facility
- the risk of delays to the completion of construction.

These risks are particularly salient in relation to the facility's fitness for purpose. To minimise Government's exposure to such risks (except where the agency has statutory responsibility for design and operating standards), agencies should avoid heavily specifying or formally endorsing a design.

Design, construction and commissioning risk should be allocated to the private party as part of the private party's acceptance of solution risk (i.e. that the solution - including design, construction programs etc - is capable of meeting the contractual requirements of Government. This includes the requirement to complete and commission the facility by the appropriate target dates.

In certain cases Government may consider accepting certain aspects of design, construction and commissioning risk by granting relief to, or compensating, the private party with respect to certain events.

Further information on the circumstances in which Government may accept limited Design, Construction and Commissioning risk is provided in Chapter 5 (Environmental issues), Chapter 7 (Planning and other approvals), Chapter 10 (Design), Chapter 11 (Construction and Completion), Chapter 12 (Relief), Chapter 13 (Force Majeure) and Chapter 14 (Compensation) of the *Risk Allocation and Commercial Principles for PFPs*.

### 6.2.3 Sponsor Risk

In establishing a project consortium, the sponsor typically establishes the private party in the form of a special purpose vehicle (SPV), which contracts with Government.

The SPV is simply an entity created to act as the legal entity of a project consortium. Because the arrangement is financed through non-recourse debt, creditors have access to the project's cash flows but limited recourse to the sponsors' balance sheets.

Sponsor risk is the risk taken by Government that the SPV, or its sub-contractors, will not fulfil their contractual obligations and that:

- Government will be unable to either enforce those obligations against the sponsors, or recover some form of compensation or remedy from the sponsors for any loss sustained by it as a result of the SPV's breach, or
- the sponsor(s) will prove to be inappropriate or unsuitable for delivery of the project.

An agency's exposure to sponsor risk can be mitigated both contractually and through the operation of the evaluation process.

The SPV will typically have no historical financial or operating records that Government can assess. During the evaluation processes agencies should assess the SPV's ability to fulfil their project obligations, by evaluating individual consortium members' historical performance. This will include their performance on projects where consortium members have previously worked together.

The project consortium must be carefully assessed for probity, financial viability and competence to deliver the infrastructure and services required. If there is a likelihood of the SPV not being significantly capitalised after financial close, Government should generally seek security before entering into the contract.

Security may be in the form of guarantees from the sponsors or parent companies (parent guarantees) or in the form of performance bonds that ensure that the private party is fully committed to delivering the required outputs.

When deciding whether to request this from the private party, agencies should refer to Chapter 15 (Protection against late or insufficient service delivery) of the *Risk Allocation and Commercial Principles for PFPs*.

Government can also lessen sponsor risk by retaining an appropriate level of control over changes to the ownership of the SPV. However, value for money can only be maintained if the benefits of imposing restrictions outweigh the costs (see further Chapter 22 (Change of Ownership) of the *Risk Allocation and Commercial Principles for PFPs*.)

### 6.2.4 Financial Risk and Benefits

Financial risk includes the risks that:

- Private finance will not be available
- The project will not prove financially robust
- Changes in financial parameters will alter the bid price before financial close.

If a project fails to gain finance or fails financially later, Government is affected because it must obtain alternative services. These risks may be lessened by requiring bids to be fully underwritten in both debt and equity, and by Government not automatically accepting the lowest bid.

Further risks associated with changes in financial parameters before financial close may be assumed or shared by Government depending on the circumstances (e.g., by agreeing to accommodate interest rate changes during that period).

During the term, the private party may also receive benefits from refinancing the project. Where a refinancing creates a premium through lower interest margins (mature markets) or benchmark interest rates, Government may seek to share in those benefits. Arrangements for premium sharing must be clearly established in the contract.

Sierra Drive Primary School (Photo courtesy of Department of Education and Training and Hansen Yuncken)

### 6.2.5 Operating risk and the Payment Mechanism

Operating risk is the risk that the process for delivering the contracted services (or an element of that process, including the inputs used within or part of that process) will be affected in a way which prevents the private party from delivering the contracted services according to the agreed specifications and/or within the projected costs.

As part of the private party's acceptance of solution risk (i.e., the private party is given freedom to structure the services in any way it sees fit, so long as the services are capable of meeting the output specification), operating risk should be allocated to the private party.

However, in certain cases Government will accept certain components of operating risk. The circumstances in which Government will accept components of operating risk are discussed in Chapter 24 (Change in Law), Chapter 23.3 (Government initiated modifications to the service standards) and Chapter 20 (Benchmarking/Market Testing) of the *Risk Allocation and Commercial Principles for PFPs*.

Operating risks are reflected in both the contractual provisions and the payment mechanism. The payment mechanism is particularly important in social infrastructure projects. Developing a payment mechanism requires two core principles:

- Firstly agencies must develop some mechanism to measure the performance of the private party. Performance measurement is critical to PFPs because Government is procuring a service of stated quantity, quality and availability. Performance measurement may be linked to an agreed set of standards or key performance indicators, which will generally relate to quality, timeliness, or other service delivery requirements.
- Secondly it is important to ensure that payments are unitised, so that the overall payment can be reduced if services do not meet or satisfy the agreed set of standards or key performance indicators.

### 6.2.6 Market Risk

Market risk is the risk that:

- demand for a service will vary from that initially projected; and
- the price for a service will vary from that initially projected,

so that the total revenue derived from the project over the project term will vary from initial expectations.

Generally demand risk is to be borne by the private party. In the case of economic infrastructure, both demand and price risk is borne by the private party. However, the price may be regulated either via the contract or by regulatory means.

With respect to social infrastructure projects, Government generally takes demand risk by making payments based on availability rather than use. Price risk is generally borne by the private sector, but limited price risk is accepted by Government through indexing the service fee and benchmarking certain services (see Chapter 20 (Benchmarking/Market Testing) of the *Risk Allocation and Commercial Principles for PFPs*).

### 6.2.7 Network and interface risk

Network risk arises where the contracted services or method of delivery of those services are linked to, rely on or are otherwise affected by certain infrastructure, inputs and other services or methods of delivering the contracted services.

Interface risk is the risk that the contracted services will not be compatible with the delivery of core services and vice versa.

While network risk is often within the control of Government, its community obligations can be in competition with the goal of efficient management of the network. Therefore Government generally only accepts network risk where there is a change in the network which actively discriminates against the project and directly affects project viability.

Provided that Government does not materially change its service delivery, the private party should be responsible for, and bear the risk of, ensuring that the contracted services are compatible with the Government's services.

### 6.2.8 Industrial relations risk

The private party will take and manage the industrial relations risk relating to their workforce, in a manner consistent with that party's obligations under employment legislation.

### 6.2.9 Legislative and Government policy risk

Legislative and Government policy risk is the risk that Government will exercise its powers and immunities, including but not limited to the power to legislate and determine policy, in a way which negatively impacts or disadvantages the project.

Government will accept some aspects of this risk by:

- warranting its ability to contract; and
- agreeing to accept the risk of certain changes in law (see further Chapter 24 (Change in Law) of the *Risk Allocation and Commercial Principles for PFPs*).

### 6.2.10 Force Majeure risk

Force Majeure risk refers to the risk that events may occur which will have a catastrophic effect on either party's ability to perform its obligations under the contract.

Force Majeure risk is generally outside of the control of both Government and the private party. Accordingly, Force Majeure risk is a shared risk (see further Chapter 13 (Force Majeure) of the *Risk Allocation and Commercial Principles for PFPs* for details on how this risk is shared).

### 6.2.11 Asset Ownership Risk

Asset ownership risk is the risk:

- of maintaining the asset to the requisite standard, including the risk that the cost of maintenance may increase during the term; or
- of premature obsolescence; or
- that the construction of competing facilities will occur.

The result of this type of risk is that the economic value of the asset may vary, either during or at the end of the contract term, from the value upon which the financial structure of the project was originally based.

In economic infrastructure projects Government will transfer asset ownership risk. However, Government may, on a value for money basis, retain the risk that competing facilities may be constructed reducing the economic value of the asset.

In social infrastructure projects, asset ownership risk is allocated to the private party (except for technology risk). The risk that competing facilities may be constructed is not generally relevant to social infrastructure projects, as Government pays a fixed service fee.

However, where a private party's bid is predicated on a third party revenue source, Government may consider, on a value for money basis, accepting the risk that construction of competing facilities may adversely affect that third party revenue source.

### 6.2.12 Tax risk

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 PFPs. Tax risk is the responsibility of the private party, and 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.

## 6.3 Risk Matrix

All of the significant risks associated with a project should be tabulated and categorised in a risk matrix, which also provides a description of the risk and mitigation measures and identifies the preferred risk allocation.

The risk matrix can be a useful mechanism for Government and the private sector. During both pre-tender and tender phases, the risk matrix can assist Government practitioners to define relevant project risks and their proposed allocation, whether allocated implicitly through the structure or by way of a take-back by Government.

During negotiations the matrix can work as a checklist to ensure all risks are addressed. After the contract has been signed, the matrix can be a useful summary of the risk allocation effected by the contract. The value and usefulness of the risk matrix is directly related to the way the risks are treated.

While commonplace in the market, risk matrices have their limitations. If used in their simplified form, the actual allocation of risk accomplished by both the structure and detail of the contract can be misrepresented.

For example, the use of ticks to identify the existence of a particular risk in both Government and private party columns gives little indication of the detail of the allocation. The project structure and the contract, and not the risk matrix, are the tools by which risk allocation is achieved.

A risk matrix should be developed and maintained for each PFP and included in the submission to the BCC at each stage of the approval process.

Appendix 3 of these Guidelines provides further guidance on risks and risk allocation.

# 7 Public Sector Comparator

The essential rationale for the Government's use of private finance arrangements for infrastructure provision is improved value for money. A Public Sector Comparator (PSC) will be developed for all proposals to assist the Government in determining whether a private finance arrangement offers superior value for money over traditional methods of Government delivery.

A preliminary PSC should be developed prior to issuing an EOI, and should be fully updated prior to the receipt of responses to the Call for Detailed Proposals.

## 7.1 The role of a Public Sector Comparator

A PSC is a model of the costs (and in some cases, revenues) associated with a proposal under a Government financed method of delivery. A PSC:

- Is based on the most efficient likely method of providing the defined output currently available to the public sector
- Takes into account the potential impact of risks on the costs (and revenues) associated with a proposal over its life
- Is expressed in terms of the net present cost (or benefit) to government of providing the output, over the life of the proposed contract period
- The PSC reference project will be defined and costed to provide the same level and quality of service expected of the private sector.

The reference project may include elements of private sector provision and risk transfer, such as provision of the facility under a design and construct contract or a maintenance contract, with the private sector. These approaches are consistent with current methods of delivery.

However, the PSC will not include private financing of the project over its life.

Given that the PSC is a valuable tool for Government in determining value for money, it is important that it is prepared carefully and comprehensively. However, the PSC is a quantitative benchmark with inherent limitations because:

- It requires costs and revenues to be forecast over the life of the proposed contract period. It is difficult, even for the most skilled experts, to make accurate estimates over such a long time-frame
- Estimating the impact of risks on costs (and revenues) over the life of an asset is a complex and often subjective exercise.

The PSC therefore provides Government with an approximate measure of the range of outcomes that Government is likely to face in delivering a project under traditional methods. To maintain its usefulness as a tool, the PSC will be:

- Accompanied by qualitative considerations in determining the potential value for money of a private finance arrangement
- Subject to sensitivity testing and scenario analysis to determine the robustness of its underlying assumptions, and their impact on the PSC's results
- Sufficiently flexible to allow new information to be incorporated as it comes to light, enhancing the integrity of the PSC as a benchmark while maintaining the probity of the project development and tender assessment processes.

The qualitative considerations that will support the PSC include:

- Risks not easily or confidently quantified
- The identity, credit standing and proven reputation of the bidder
- Differences in the deliverable service not able to be quantified or adjusted for
- Any wider net benefits or costs that a private finance arrangement may entail. For example, wider social benefits may include earlier or more flexible provision of important infrastructure services than would be possible under a public procurement, or the establishment of better benchmarks for publicly delivered services.

The Government is flexible about disclosing a summary of a PSC in tender documents. Disclosure is more likely to happen where it is obvious that this will 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.

**Table 7.1 Differences between economic and social infrastructure delivery**

| Economic Infrastructure | Social Infrastructure |
|---|---|
| Revenues are often from third parties—subject of market-based resource allocation | Usually paid from consolidated revenues—subject to Government resource allocation decisions |
| Infrastructure provider faces genuine market risk | Usually no market risk to provider of infrastructure—payment streams are usually subject to long-term contract or budget allocation |
| Traditionally delivered through a Government Business Enterprise (including a State-owned corporation) | Traditionally delivered through a general Government agency |
| Revenue risks are a key driver of financial outcomes | Cost risks are a key driver of financial outcomes |

## 7.2 Approaches to constructing a PSC

The NSW Government is typically involved in the provision of economic and social infrastructure, either as a procurer or facilitator. The key differences between the two types of infrastructure are outlined in Table 7.1.

The NSW Government will develop each PSC on a basis that is consistent with the nature of the proposed project.

## 7.3 Economic infrastructure

PSCs for stand-alone economic infrastructure projects (such as road and transport projects, which generate third-party revenue) will usually be developed on a project financed basis.

This approach reflects:

- The importance of revenue and revenue risk in determining the financial outcome of the project
- The usual method of delivering such infrastructure (i.e. Through a stand-alone government business and in accordance with the nsw government's commercial policy framework)[29].

The project delivery vehicle will normally be assumed to be a special purpose vehicle operating under the *State Owned Corporations Act 1989*. 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
- Debt guarantee, reflecting the margin between the project's credit rating and the AAA-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.

Constructed in this way, PSCs for economic infrastructure can serve two functions:

- As an initial test of the commercial viability of the project
- As a benchmark for testing value for money in bids received.

## 7.4 Social infrastructure

PSCs for 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. There is limited or no third-party revenue generated by the infrastructure.

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 under the traditional funding method

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[29] 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 http://www.treasury.nsw.gov.au.

- A competitive neutrality adjustment (if applicable), covering any expenditure-based taxes, fees and charges that the agency is not required to make by virtue of its Government-owned status
- 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.

## 7.5 Technical Issues

Construction of a PSC requires a high level of technical expertise in project costing, financing and risk analysis.

NSW Treasury is responsible for advising on the value for money aspects of private financing arrangements, including the development of PSCs.

Treasury will assist agencies throughout the project development process and provide advice on technical issues, such as the discount rate to be used in comparing bids to the PSC.

Eastern Creek Alternative Waste Technology Facility (Photo courtesy of WSN Environmental Solutions)

# 8 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 PFP projects and a probity auditor will be appointed for large, complex and unusually sensitive projects.

By adopting a clear probity process, all parties are assured of the integrity of the awarding process.

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.[30]

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 ICAC may examine complaints about potentially corrupt conduct in the procurement process.

The NSW Government's Code of Practice for Procurement[31] 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 through to project completion.

[30] A pro-forma for a probity process deed can be obtained from the Private Projects Branch, NSW Treasury.

[31] Further details are provided in http://www.treasury.nsw.gov.au/procurement/procure-intro.htm.

# Appendix 1 Business Case Requirements

A business case must be submitted to Treasury prior to an Agency seeking Budget Committee approval to procure new infrastructure. The business case must contain the following elements[32]:

1. **Scope and objectives of project**, and analysis of how the project fits into:
   - the Government's strategic planning outcomes and priorities;
   - the Agency's strategic objectives and Results and Services Plan (RSP), Statement of Business Intent or Statement of Corporate Intent – e.g., explanation of the services the project will support; the results or outcomes these services will contribute to; and the gap in that service delivery at present;
   - the Agency's Total Asset Management Plans[33], an integrated set of five documents comprising:
     - the Asset Strategy, which is supported by
     - the Capital Investment Strategic Plan
     - the Asset Maintenance Strategic Plan
     - the Asset Disposal Strategic Plan
     - the Office Accommodation Strategy.

2. **Economic Appraisal report[34]**, including but not limited to:
   - demand studies, pricing analysis, surveys
   - costs – capital, operating, maintenance
   - benefits, where quantifiable
   - basis for assumptions, methodology - data sources, references.

3. **Supporting information underlying the Economic Appraisal**, which may take the form of Technical/Impact Reports – including but not limited to:
   - site evaluation report, including any geological or heritage related reports
   - land and/or property valuation reports
   - engineering reports

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[32] Note that, solely for the purpose of Agency submissions to Treasury in support of budget funding bids, this list of requirements supersedes the Business Case requirements covered by Premier's Department Circular 2000-79 dated 21 December 2000.

[33] TAM Policy, Guidelines and reporting requirements are accessible on Treasury's Website: www.treasury.nsw.gov.au. Whilst State-owned Corporations are not bound by TAM policy, their asset strategies should as far as practicable be consistent with the principles of TAM.

[34] Refer to NSW Government: *Economic Appraisal Guidelines* (TPP No.97-2, June 1997). An abbreviated version of the Economic Appraisal guidelines is provided in *Economic Appraisal: Principles and Procedures Simplified* (TPP 99-1, March 1999). The full text of the Economic Appraisal guidelines is available on the Treasury website:http://www.treasury.nsw.gov.au. Whilst SOCs are generally not required to undertake economic appraisals, they must do so for PFP projects.

- market studies, traffic studies, other relevant material providing information on utilisation/demand/supply of the service
- environmental reports
- social impact studies;
- value management studies - to develop options for an economic appraisal, not to produce a preferred option.

4. **Financial Appraisal**[35] (agency perspective) – including but not limited to:
   - costs – capital, operating, maintenance; provision for contingencies
   - data sources, references for assumptions (e.g., CPI, building price index, wage increases; internal rate of return/hurdle rate; assumed Government contribution if any; and so on)
   - financial impacts, including the retiring of older assets and associated operating and maintenance savings
   - any third party revenues, source for revenue assumptions (e.g., for a road project, could include basis for traffic forecasts and alternative tolling regimes)
   - justification for assumed discount rate.
5. **Financial Impact Statement** (impact on the State Budget)
   - agency financial impact (savings and costs): broad implications for the agency, such as additional staff, equipment, and so on
   - financial impacts on other agencies
   - preliminary accounting treatment - Impacts on Statement of Financial Performance and Statement of Financial Position.
6. **Risk Assessment, Mitigation and Valuation** (if appropriate):
   - identify key sources of risk
   - information sources, including probability and impact of certain risks occurring or not occurring on similar projects.
7. **Gateway Review Report**

   The Gateway Review[36] consists of a series of structured reviews that examine procurements at six key decision points (or gates) in the procurement cycle. These ‘gates’ are Strategic, Business Case, Procurement Strategy, Tender Review, Pre Commissioning and Post Implementation.

   For the purposes of capital expenditure reviewed by Treasury, Gateway Reviews are mandatory only at the Business Case gate. However, as a matter of good business practice, agencies are encouraged to conduct Gateway Reviews at all six ‘gates’ in the procurement process.

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35 Refer to NSW Government: *Financial Appraisal* (TPP No.97-4, July 1997) on the Treasury website: http://www.treasury.nsw.gov.au.

36 For more detail on the Gateway Review process and documentation, refer to Treasury’s Website: www.treasury.nsw.gov.au. SOCs are not bound to follow the Gateway Review process, but for high-risk projects or projects that exceed $50m in value, an independent review of a business case should be conducted by using the Gateway Review process or an alternative system.

# Appendix 2 Public Interest Evaluation

## 1 Introduction

Ensuring that a PFP meets the public interest requires:

- Ensuring that procuring the project as a PFP is in the public interest and
- After a decision has been made to procure a project as a PFP, ensuring that the procurement process is structured so as to ensure that the project continues to be in the public interest.

To deliver in this regard, when requesting a project to be procured as a PFP the procuring agency must establish to the BCC's satisfaction that it is in the public interest to procure the project as a PFP. The public interest evaluation will be updated

- Prior to the issue of the call for detailed proposals, with any significant variations reported to BCC
- After finalising the evaluation of the call for detailed proposals and submitted to BCC for consideration
- Prior to Government signing the contract documents, with any significant variations in the public interest evaluation reported to the BCC.

## 2 Publicly disclosing the Public Interest Evaluation

A summary of the findings of the public interest evaluation will be published concurrently with the issue of the EOIs. A summary of updated public interest evaluations will be published concurrently with the issue of the call for detailed proposals and as part of the contract summary.

## 3 Public Interest Evaluation

This evaluation will concentrate on the following.

### 3.1 Whether the project is effective in meeting Government's objectives

Is the proposed project consistent with:

- The agency's budget, service objectives and delivery strategy?
- The government's short and longer term policy objectives for that agency or portfolio?
- The government's legislation and policies relating to employment and the environment?
- Concurrent government initiatives/projects (potential for extra benefits/synergies or detriment/conflicts)?
- Economic and regional development in the area concerned, including investment and employment growth?

### 3.2 Value for Money

- Does the project offer better value for money than the best practicable public sector delivery model? This would include consideration of any proposed upfront fees[37].
- Where the project involves a user charge to be paid by the public, is the level of the user charge appropriate and related to the benefits to be received by the user under the project?
- Where the project involves a contribution by taxpayers, is the level of contribution reasonable?

### 3.3 Community Consultation

- Who are the individuals/groups (i.e. employees, unions, community groups and local councils) likely to be affected by the project?
- What will be 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?
- Has a community consultation process been developed which:
  - ensures participation by the affected individuals/groups during the Expression of Interest and short listing phase and ensures that those views are taken into account and given fair consideration?
  - in the case of large, complex or controversial projects, ensures participation of the affected individuals/groups after contract signing, during construction and during the commissioning stage of a project?
  - complies with legal requirements, broader policy standards and Government commitments to those affected individuals/groups?
- How have issues raised by the community as part of any community consultation processes been addressed or how will they be addressed?

### 3.4 Consumer Rights

- Does the project provide sufficient safeguards for service recipients, particularly those for whom Government has a high level of duty of care, and/or the most vulnerable including:
  - Does the project comply with relevant statutory requirements and Government policies relating to consumer rights?
  - Has the agency undertaken appropriate steps to identify:
    - Individuals/groups to whom the Government has a high level of duty of care?
    - The special needs and rights of those individuals/groups?
  - Has the agency assessed whether those special needs and rights are met by the project and if not what provisions and mechanisms can be introduced to address those deficiencies?

[37] It may be appropriate in some PPP projects to provide for an upfront fee. It will depend on the scope and type of transaction, and may only occur with Cabinet endorsement in the context of a specific project.

### 3.5 Accountability and Transparency

- Are the proposed 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?

### 3.6 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, including:
  - Has the agency identified the nature and extent of public access needed?
  - What is the extent to which the project plans to meet these needs?
  - Does the project protect third party access to essential major 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 the specific statutory requirements and Government policy standards relating to public use and access?

### 3.7 Health and Safety

- Has the agency identified all public health and safety standards that Government is required to meet under law, Government policy or from Government's political accountability to the public?
- 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 agency propose to address this deficiency?

### 3.8 Privacy

- Has the agency identified user rights to privacy and the Government's obligations to the public under law and Government policy?
- 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 agency propose to redress this deficiency?

# Appendix 3 Risk Table

The risk table on the following pages outlines the risk category, description, consequence, mitigation and preferred allocation in relation to the following areas:

- Site risks
- Design, construction and commissioning risk
- Sponsor
- Financial
- Operating
- Market
- Network and interface
- Industrial relations
- Legislative and government
- Force majeure
- Asset ownership

**Important note:**

The risk and preferred risk allocations identified in this table are guides only, and should not be considered a substitute for detailed analysis on a case-by-case basis. For example, economic infrastructure projects that do not rely on a Government-sourced revenue stream can sometimes accommodate greater risk transfer to the private sector.

Acknowledgment: This Appendix is substantially reproduced from *Partnerships Victoria* Guidance Material with the permission of the State of Victoria. 

| Risk Category | Description | Consequence | Preferred allocation | Mitigation |
|---|---|---|---|---|
| **Site Risks** | | | | |
| Existing structure (refurbishment/ extensions) | The risk that existing structures are inadequate to support new improvements. | Additional construction time and cost. | Private party. | The private party will be able to manage this risk by commissioning expert engineering reports which can be used to assess and cost the management of this risk in its bid. |
| Site conditions | The risk that unanticipated adverse ground conditions are discovered which cause construction costs to increase and/or cause construction delays. | Additional construction time and cost. | Generally this risk will be allocated to the private party. However in certain circumstances it may be appropriate for Government to accept some site risk. For further guidance on when Government may accept some site risk, see Chapter 4 (Site conditions and suitability) and Chapter 5 (Environmental issues) of the *Risk Allocation and Commercial Principles for PFPs*. | The private party can mitigate and manage this risk through site inspections, testing and due diligence. |
| Approvals | The risk that necessary approvals may not be obtained or may be obtained only subject to unanticipated conditions which have adverse cost consequences or cause prolonged delay. | Delay in works commencement or completion and cost increases. | The private party, unless Government assumes this risk (refer to Section 3.2.4.) | Refer to Section 3.2.4 for ways of mitigating planning approval risk. |
| Environmental (1) | The risk that the project site is contaminated requiring significant expense to remediate. | Clean-up costs and delay (recognising that the ultimate responsibility for clean-up remains with the polluter, if available). | Generally this risk will be allocated to the private party. However in certain circumstances it maybe appropriate for Government to accept some contamination risk. For further guidance on when Government may accept some contamination risk, see Chapter 5 (Environmental issues) of the *Risk Allocation and Commercial Principles for PFPs.* | The private party can mitigate this risk by commissioning expert reports and possibly through insurance. |

| Risk Category | Description | Consequence | Preferred allocation | Mitigation |
|---|---|---|---|---|
| Environmental (2) | The risk that prior to financial close offsite pollution has been caused from a Government preferred site to adjacent land. | Clean-up liability (recognising that the ultimate responsibility for clean-up remains with the polluter, if available). | Government may assume responsibility by way of indemnity or obligation to compensate for unidentified off-site pollution pre-financial close where the site is a Government site. | Government can mitigate this risk by commissioning contamination reports, given that Government should also have greatest knowledge of the past uses of its site |
| Environmental (3) | The risk that prior to financial close (in the case of a non-Government site) or after financial close (for either a non-Government or Government site) off-site pollution is caused to adjacent land. | Clean up liability (recognising that the ultimate responsibility for clean-up remains with the polluter, if available). | The private party. | The private party can manage this risk by controlling activities on the site after financial close. |
| Clean-up and rehabilitation | The risk that the use of the project site over the contract term has resulted in a significant clean up or rehabilitation obligation to make the site fit for future anticipated use. | Financial liability on residual owner<br><br>(recognising that the ultimate responsibility for clean-up remains with the polluter, if available). | Generally this risk will be allocated to the private party (whether Government is to resume possession of the site or not), except to the extent that Government has accepted contamination risk. | The private party can mitigate and manage this risk by managing the use of the asset.<br><br>Government may require sinking funds if it is to resume the site and its use is liable to result in significant clean-up / rehabilitation cost. |
| Native title | The risk of costs, delays and compensation or risk of injunction and/or invalidity of approvals. | Delay, cost and compensation. | Government will usually accept this risk on Government preferred sites. | Government can mitigate and manage this risk by searching relevant registers, making enquiries if appropriate and where required, obtaining expert advice.<br><br>There are also a number of mechanisms available under the *Native Title Act 1993* (Commonwealth). |
| Cultural heritage | The risk of costs and delays associated with archaeological and cultural heritage discoveries. | Delay and cost. | Government will usually accept this risk on Government preferred site. Where the private party chooses the site, this risk will be allocated to the private party. | This risk can be managed and mitigated by searching relevant registers, making enquiries if appropriate and where required obtaining expert advice. |

| Risk Category | Description | Consequence | Preferred allocation | Mitigation |
|---|---|---|---|---|
| Availability of site | The risk that tenure/access to a selected site that is not presently owned by Government or the private party cannot be negotiated. | Delay and cost. | The private party, as it makes the decision to bid on a non-preferred site. | This can be mitigated by requiring bidders to secure access to the site prior to contract signing. |
| **Design, construction and commissioning risk** | | | | |
| Design | The risk that the design of the facility is incapable of delivering the services at anticipated cost. | Long term increase in recurrent costs –possible long term inadequacy of service. | The private party will be responsible except where an express Government mandated change has caused the design defect. | The private party can manage this risk by trying to pass the risk to its builder/architects and other subcontractors, although it will continue to remain primarily liable under the contract with Government. |
| Construction | The risk that events occur during construction which prevent the facility being delivered on time and on cost. | Delay and cost | The private party will be liable unless the event is one for which relief as to time or cost or both is specifically granted under the contract. | The private party will generally manage this risk by entering into a fixed term, fixed price building contract to pass the risk to a builder with the experience and resources necessary to satisfy the private party's construction obligations under the contract. |
| Commissioning | The risk that either the physical or the operational commissioning tests which are required to be completed in order for the provision of services to commence, cannot be successfully completed. | For the private party and its financiers -delayed/ lost revenue for Government - delayed service commence-ment. | The private party, although Government will assume an obligation to cooperate and facilitate prompt public sector attendance on commissioning tests. The private party will not be able to earn revenues until the facility is commissioned. | The private party will manage this risk by using an expert design, construction, operations and project management team. |
| **Sponsor risk** | | | | |
| Probity | The risk that after execution of contracts the private party is found to be an improper person for involvement in the provision of the contracted services. | Possible cessation of service to Government, management crisis~~,~~ and/or forced change in ownership. | Government. | Government can mitigate this risk by assessing the probity of the private parties and their sponsors when evaluating the bids.<br>Further the contract will generally have provisions allowing Government to ensure continuity of physical delivery of essential services. |

| Risk Category | Description | Consequence | Preferred allocation | Mitigation |
|---|---|---|---|---|
| Financial | The risk that after execution of contracts the private party becomes insolvent or financial demands on the private party or its sponsors exceed its or their financial capacity causing corporate failure. | Possible cessation of service to Government, forced change in ownership and/or possible corporate failure causing financial loss to private party. | Government ultimately bears this risk because it can affect the provision of adequate public services. This is despite the fact that Government would have the right to terminate the private party in such circumstances. | Government may mitigate this by ensuring the project is financially remote from external financial liabilities, ensuring adequacy of finances under loan facilities or sponsor commitments supported by performance guarantees; and by due diligence on private parties (and their sponsors). Contractual provisions will allow the Government to ensure continuity of physical delivery of essential services. |
| Technical | The risk that the private party is unable to deliver the required infrastructure and/or operational systems in the required timeframes. | Non-delivery or cessation of service to Government. | Government ultimately bears this risk because it can affect the provision of adequate public services. This is despite the fact that Government would have the right to terminate the private party in such circumstances. | Government will mitigate this risk by assessing the experience and technical competence of the private party to deliver the required infrastructure and operational systems. Contractual provisions will allow the Government to ensure continuity of physical delivery of essential services and to abate service payments for non-performance. |
| Operational | The risk that the private party is unable to effectively manage the service delivery operations. | Cessation or reduced quality of service to Government. | Government ultimately bears this risk because it can affect the provision of adequate public services. | Government can mitigate this risk by assessing the experience and competence of the private party to manage and deliver the required services. Private party may be required to provide performance guarantees during the operation phase. Contractual provisions will allow the Government to ensure continuity of physical delivery of essential services and to abate service payments for non-performance. |

| Risk Category | Description | Consequence | Preferred allocation | Mitigation |
|---|---|---|---|---|
| Change in ownership | The risk that a change in ownership or control of the private party results in a weakening in its financial standing or support or other detriment to the project. | Government assurance of the financial robustness of the private party may be diminished and, depending on the type of project, probity and other non-financial risks may arise from a change in ownership or control which may be unacceptable to Government | This is generally a shared risk in the sense that the Government will bear the risk that the change in ownership has an adverse effect on the project and the private party bears the risk that the revised structure inhibits its ability to perform the project leading to termination. | Government can mitigate this risk by requiring its consent prior to any change in control. |
| **Financial risk** | | | | |
| Interest rates pre-completion | The risk that prior to completion interest rates may move adversely thereby undermining bid pricing. | Increased project cost. | Government usually takes interest rate risk up until financial close and during the operations period but not during the constructions period(s). The private party takes this risk during the construction period(s). | Both Government and the Private Party would manage this risk by hedging interest rates. |
| Financing unavailable | The risk that when debt and/or equity is required by the private party for the project it is not available then and in the amounts and on the conditions anticipated. | No finance to progress or complete construction. | Government ultimately bears this risk because it can affect the provision of adequate public services. This is despite the fact that Government would have the right to terminate the private party in such circumstances. | Government will try to mitigate this risk by requiring all bids to have fully documented financial commitments with minimal and easily achievable conditions. |

| Risk Category | Description | Consequence | Preferred allocation | Mitigation |
|---|---|---|---|---|
| Further finance | The risk that where Government is required under the contract to pay for a variation, the private party cannot obtain finance. In this case, the Government must pay for the variation upfront instead of through an adjustment of the service charge. | No financing available to complete further works required by Government. | Government takes the risk that private finance is unavailable. | Government can mitigate this risk by:<br>contractually requiring the private party to exercise commercial and prudent endeavours to obtaining financing acceptable to Government or<br>where it believes such variations are inevitable (particularly during the construction phase) requiring the private party to put in a place a variation facility. |
| Refinancing benefit | The risk (upside) that at completion or other stage in project development the project finances can be restructured to materially reduce the project's finance costs. | A beneficial change in the financing cost structure of the project. | The benefit of this risk will be shared equally by Government and the private party. | Government will contractually require the private party to share half of any gains made during a refinancing (subject to the project meeting its projected equity return). |
| Tax changes | The risk that before or after completion the tax impost on the private party, its assets or on the project, will change. | A negative effect on the private party's financial returns and in extreme cases, it may undermine the financial structure of the project so that it cannot proceed in that form | Private party. | The private party can mitigate against this by ensuring that its financial returns can withstand such change.<br>With respect to specific infrastructure taxation particularly that relating to transactions with Government, the private party will be required to obtain a private tax ruling from the ATO. |
| **Operating risk** | | | | |
| Inputs | The risk that required inputs cost more than anticipated, are of inadequate quality or are unavailable in required quantities. | Cost increases and in some cases adverse effect on quality of service output. | This risk is generally allocated to the private party, although in limited circumstances Government may take back some of this risk through benchmarking or where it controls inputs, eg water catchment. | The private party can manage this risk through long term supply contracts where quality/quantity can be assured. |

| Risk Category | Description | Consequence | Preferred allocation | Mitigation |
|---|---|---|---|---|
| Maintenance and Refurbishment | The risk that design and/or construction quality is inadequate, resulting in higher than anticipated maintenance and refurbishment costs | Cost increases where private party has assured whole of life obligation and adverse effect on delivery of contracted services and, in core services model, a corresponding adverse effect on Government ability to deliver core services. | Private party. | The private party can manage this risk through long term sub-contracts with suitably qualified and resourced sub-contractors and through formal or informal consultation processes with Government. |
| Changes in output<br>Specification outside agreed specification range | The risk that Government's output requirements are changed after contract signing whether pre or post commissioning. | A change in output requirements prior to commissioning may necessitate a design change with capital cost consequences depending on the significance of the change and its proximity to completion.<br>A change after completion may have a capital cost consequence or a change in recurrent costs only; for example where an increase in output requirements can be accommodated within the existing facility capacity. | Government. | Government can mitigate this risk to an extent by minimising the chance of its specifications changing and, to the extent they must change, ensuring the design is likely to accommodate it at least expense.<br>This will involve considerable time and effort in specifying the outputs up front and planning likely output requirements over the term. |

| Risk Category | Description | Consequence | Preferred allocation | Mitigation |
|---|---|---|---|---|
| Operator failure | The risk that a sub-contract operator may fail financially or may fail to provide contracted services to specification. | The failure may result in service unavailability, an inability for Government to deliver core services and, in each case, a need to make alternate arrangements for service delivery with corresponding cost consequences | The private party. | The private party can manage this risk by carrying out necessary due diligence on all subcontractors.<br>Government may carry out due diligence on principal subcontractors for probity and financial capacity and commission a legal review of the major sub-contracts including the guarantees or other assurances taken by the private party. If failure does occur the private party may replace the operator or Government may require operator replacement. |
| Technical obsolescence or innovation | The risk of the contracted service and its method of delivery not keeping pace, from a technological perspective, with competition and/or public requirements. | The private party's revenue may fall below projections either via loss of demand (user pays model) payment abatement (availability model) and/or operating costs increase. For Government, consequence may be failure to receive contracted service at appropriate quantity/quality including adverse effect on core service delivery in core service model. | The private party except where contingency is anticipated and Government agrees to share risk possibly by funding a reserve. | The private party can manage this risk by arranging a contingency/reserve fund to meet upgrade costs subject to Government agreement as to funding the reserve and control of reserve funds upon default.<br>This risk can also be mitigated through its monitoring obligations in the contract and the development of detailed, well-researched output specifications (Government) and design solution (private party). |
| **Market risk** | | | | |
| General economic downturn | In a user pays model, the risk of a reduction in economic activity affecting demand for the contracted service. | Revenue below projections. | The private party, except to the extent that Government has committed to an availability payment element or agreed to provide redress for impact of Government subsidised competition. | Where Government is the primary off-taker the private party will seek an availability payment element; otherwise the private party will ensure robust financial structure and sponsor/financier support/competition. |

| Risk Category | Description | Consequence | Preferred allocation | Mitigation |
|---|---|---|---|---|
| Competition | In a user pays model the risk of alternate suppliers of the contracted service competing for customers. | Revenue below projections arising from a need to reduce the price and/or from a reduction in overall demand, because of increased competition. | The private party, except to the extent that Government has committed to an availability payment element or agreed to provide redress for impact of Government subsidised competition. | The private party can manage this risk by reviewing likely competition for service and barriers to entry |
| Demographic change | The risk of a demographic/socio-economic change affecting demand for contracted service. | Revenue below projections. | The private party, except to the extent that Government has committed to an availability payment element. | The private party can manage this risk by reviewing likely competition for service and barriers to entry. |
| Inflation risk | That value of payments received during the term is eroded by inflation. | The diminution in real returns of the private party. | The private party takes risk on the methodology adopted to maintain value. Government shares to the extent of agreed indexation. | The private party can mitigate this risk by seeking an appropriate mechanism to maintain real value, eg via linkage to CPI.<br>Government should undertake its own due diligence on the indexation procedure to ensure that its payments do not overcompensate for inflation and to avoid any double payment for after costs adjustments, eg on changes in law. |
| **Network and interface risk** | | | | |
| Withdrawal of support network | The risk that, where the facility relies on a complementary Government network, that support is withdrawn or varied adversely affecting the project. | Negative patronage and revenue consequence. | Government, where the change discriminates against the project. | The private party will seek financial redress against change which unfairly discriminates against the project, particularly on a user pays project where revenue is directly affected. Under an availability model, the private party will seek to avoid abatement where the cause of unavailability is due to Government withdrawal of a support network. |
| Changes in competitive network | The risk that an existing network is extended/changed/ re-priced so as to increase competition for the facility. | Negative patronage and revenue impacts. | The private party, except to the extent that Government provides redress for appropriate, discriminatory changes. | The private party will seek financial redress against change which unfairly discriminates against the project by Government subsidising competition (existing or new). |

| Risk Category | Description | Consequence | Preferred allocation | Mitigation |
|---|---|---|---|---|
| Interface (1) | The risk that the delivery of core services in a way which is not specified/anticipated in the contract adversely affects the delivery of contracted services. | Adverse effect on delivery of contracted service, potential for default by private party and possible need for Government to make other arrangements for service provision. | The private party except to the extent that Government provides redress. | Government manages core service activities allowing it to influence the materialisation of interface risk and its consequences. Other mitigants include an up-front assessment (by both Government and the private party) of the likely interface issues, continual review and monitoring and development of a communications strategy in respect of delivery of the two related services. Government will also specify in the contract the extent of core services and the way in which they will be delivered so that only manifest and adverse changes and deficiencies can trigger this risk. |
| Interface (2) | The risk that the delivery of contracted services adversely affects the delivery of core services in a manner not specified/anticipated in the contract. | Adverse effect on delivery of core services, default by private party and possible need for Government to make other arrangements for core service provision. | Private party. | The private party can mitigate this risk by managing the way in which it delivers the contracted service activities. |
| **Industrial relations risk** | | | | |
| Industrial relations and civil commotion | The risk of strikes, industrial action or civil commotion causing delay and cost to the project. | Cost and time delay. | Private party, except to the extent that Government grants relief or extensions of time. | The private party or its sub-contractors can manage this risk through the way it manages project delivery and operations. |
| **Legislative and Government** | | | | |
| Approvals | The risk that additional approvals required during the course of the project cannot be obtained. | Further project development or change in business operation may be prevented. | The private party unless Government has initiated the change requiring approval. | The private party should manage this risk by using expert advice and by consulting with relevant planning authorities. |

| Risk Category | Description | Consequence | Preferred allocation | Mitigation |
|---|---|---|---|---|
| Changes in law (1) | The risk of a change in law of the State Government only, which could not be anticipated at contract signing and which is directed specifically and exclusively at the project or the services and which has adverse capital expenditure or operating cost consequences for the private party. | A material increase in the private party's operating costs and/or a requirement to carry out capital works to comply with the change. | Government, although the parties may share the financial consequences of capital cost increases in an agreed way, for example by the private party meeting a percentage of the cost up to a specific limit and Government meeting any excess. | Government may mitigate its liability for such change by monitoring and limiting (where appropriate) changes which may have these effects or consequence on the project and via mechanisms in the contract allowing the sharing of some of the financial consequences of a change in law or where appropriate, in a user pays model based on a regulatory regime which allows pass-through to end users. |
| Changes in law (2) | In some cases, the risk of a change in law (at whatever level of government it occurs) which could not be anticipated at contract signing which is general (ie not project specific) in its application and which causes a marked increase in capital costs during the operations phase and/or has substantial operating cost consequences for the private party. | The requirement on the private party to fund and carry out capital works or meet a marked increase in operating costs to comply with the change. | Government, although the parties may share the financial consequences of capital cost increases in an agreed way, for example, by the private party meeting a percentage of the cost up to a specific limit and Government meeting any excess. | Government mitigates its exposure to this risk by excluding compensation for changes in tax law or changes for which the private party is compensated under a CPI adjustment.<br>Further Government usually specifies a regime for the sharing of financial consequences of changes in law up to a specified threshold after which Government meets any excess and where appropriate, in a user pays model having in place a regulatory regime which allows pass-through to end users. |
| Regulation | Where there is a statutory regulator involved there are pricing or other changes imposed on the private party which do not reflect its investment expectations | Cost or revenue impacts. | Private party. | Private party to assess regulatory system and may make appropriate representations. |

| Risk Category | Description | Consequence | Preferred allocation | Mitigation |
|---|---|---|---|---|
| **Force majeure** | | | | |
| Force majeure | The risk that inability to meet contracted service delivery (pre or post completion) is caused by reason of force majeure events. | Loss or damage to the asset, service discontinuity for Government (may include inability to deliver core service) and loss of revenue or delay in revenue commencement for private party. | The private party takes the risk of loss or damage to the asset and loss of revenue. Government takes some risk of service discontinuity both as to contracted service and core service, subject to insurance availability, and will need to arrange alternative service provision the cost of which will be met from redirected service payments and (if insurable) any shortfall made up from insurance proceeds. | The private party is given relief from consequences of service discontinuity. If uninsurable, private party may establish reserve funding. Government to establish contingency for alternate service delivery. If insurable, private party must ensure availability of insurance proceeds towards repair of asset and service resumption and Government is to be given the benefit of insurance for service disruption costs. |
| **Asset ownership risk** | | | | |
| Technical obsolescence | The risk that design life of the facility proves to be shorter than anticipated accelerating refurbishment expense | Cost of upgrade | The private party, but in certain high technology projects costs may be anticipated and shared | The private party may have recourse to designer, builder or their insurers |
| Default and termination | The risk of 'loss' of the facility or other assets upon the premature termination of lease or other project contracts upon breach and without adequate payment. | Loss of investment of private party; possible service disruption for Government. | The private party will take the risk of loss of value on termination. | The private party (and its debt financiers) will be given cure rights (time and opportunity) to remedy defaults which may lead to termination including under a tripartite deed with financiers. If termination occurs pre completion Government may (but need not) make payment for value in the project on a cost to complete basis. If it occurs post completion Government may negotiate a payment, generally based on fair market value less all amounts due to Government. Government will require step in rights to ensure access and service continuity until ownership/control issues are resolved. |

| Risk Category | Description | Consequence | Preferred allocation | Mitigation |
|---|---|---|---|---|
| Residual value on transfer to Government | The risk that on expiry or earlier termination of the services contract the asset does not have the value originally estimated by Government at which the private party agreed to transfer it to Government. | Capital costs incurred to upgrade the asset to the agreed value and useful life or asset demolished or removed. | Government (to the extent that the private party is unable to fund any required rectification of the asset). | Government will impose on the private party maintenance and refurbishment obligations, ensure an acceptable maintenance contractor is responsible for the work and commission regular surveys and inspections. It may also direct funds from the project into dedicated controlled sinking fund accounts to accumulate funds sufficient to bring the asset to agreed condition and/or (if required) obtain performance bonds to ensure the liability is satisfied. |

# Appendix 4 Proformas

## Statement of Economic Development Impacts (PSI-1)

The purpose of this document is to identify the direct/indirect and short/long term economic development impacts from this project if it proceeds with private sector participation.

**Project Description**

**Short Term Impacts**

| | |
|---|---|
| Direct Impacts | |
| Private Investment | $ |
| Additional Employment | No. |
| Transfer Employment (from public to private sector) | No. |
| Indirect Impacts | |
| Additional Investment in Australia and New Zealand (ANZ) | $ |
| Additional Employment in ANZ | No. |
| Local R&D | $ |
| Exports | $ |
| Local Industry Participation | |
| Key elements of the local industry participation plan: | |
| Local content | % |
| No. of Agreements (Technology Transfer with ANZ companies) | No. |
| Value of joint R&D Projects | $ |
| No. Joint Marketing and Export Arrangements (with ANZ companies) | No. |
| Other Aspects | |
| Comment: | |

**Medium to Long Term Impacts**

**Global Strategy**

Are there any impacts on the global strategies of private sector proponents, over the medium to long term particularly in relation to:

| | |
|---|---|
| Supply | Yes/No/NA |
| Investment | Yes/No/NA |
| Research and Development | Yes/No/NA |
| Exports | Yes/No/NA |
| Technology Transfer | Yes/No/NA |
| Other | Yes/No/NA |
| If yes please comment: | |

## NSW Treasury - Statement of Fiscal Impacts (PSI-2)

All financial data is to be presented in nominal values

**Project Description**

| | |
|---|---|
| Duration of Contract | |
| Pricing Policy | |
| Total Funding Required | $M |
| Construction Cost | |
| Financing Costs during Construction | |
| Other (including value of assets dedicated to project, eg land) | |
| Total Funding Required | $M |

**Sources of Funds**

Private Sector Equity

Project Debt

Public Sector Contributions

Agency Funds

State Budget

Public Sector Loans

Other

Total Funding Required

| **Government Contingent Obligations** | **$M** |
|---|---|
| Description of any Government contingent obligations, guarantees, or underwriting proposed. | |
| Assessment of monetary value of Government contingent obligations | |

## NSW Treasury - Statement of Fiscal Impacts (PSI-2) - continued

### Impact on Sponsoring Agency

| | Total | Per Annum |
|---|---|---|
| | $M | $M |
| Balance Sheet | | |
| Assets | | |
| Liabilities | | |
| Total | | |
| Operating Statement | | |
| Expenses | | |
| Revenues | | |
| Total | | |

### Residual Assets

Description of any residual assets to be transferred to the agency on contract expiry.

Estimate of asset value $M

### Impact on Other Agencies

| | Total | Per Annum |
|---|---|---|
| | $M | $M |
| Description of impact on other agencies. | | |
| Financial impact for each affected agency: | | |
| Balance Sheet | | |
| Assets | | |
| Liabilities | | |
| Total | | |
| Operating Statement | | |
| Expenses | | |
| Revenues | | |
| Total | | |

### State Budget Impact

| | Total | Per Annum |
|---|---|---|
| | $M | $M |
| Capital Budget | | |
| Outlays | | |
| Receipts | | |
| Total | | |
| Recurrent Budgets | | |
| Outlays | | |
| Receipts | | |
| Total | | |

# NSW Treasury - Terms and Conditions for Negotiations of Private Sector Infrastructure Projects (PSI-3)

The Terms and Conditions Agreement jointly completed by Treasury and the agency.

**Agency**

**Private Consortium**

Parent Company and Special Purpose company

**Private Sector Bankers**

**Project Costs** Nominal Dollars $M

Land Cost

Construction Cost

Capitalised Interest

Financed by:

Government Contribution

Private Sector Equity

Private Sector Debt (List Sources)

**Purpose**

A full description of the proposed project

**Operations & Maintenance**

Description of operational costs and revenues

**Term**

Construction Period

Debt finance term

Franchise period

Proposed Completion Date

Project Construction Contract

Equity Investor Commitment

**Other Contractual Terms or Risk Allocation as appropriate for the Project**

(give details)

## GUIDE TO COMPLETING PRO FORMAS

**Costs**
The agency should engage consultants and legal counsel normally on the basis of fixed price or capped arrangements. The agency should normally fund from internal sources all related expenses associated with consultants and legal counsel.

**Escalation Formula**
Description of cost and revenue escalation formula.

**Project Cash Flow Model**
Agency to develop a Project Cash Flow Model and agree it with Treasury. Its primary purpose would be to calculate the forecast costs and revenues associated with the project and determine the financial risk and rewards to Government

**Government and Private Sector Undertakings**
Agency to provide a detailed list of those items of the project that would be subject to negotiations before final contract signing.

**Benefits to Government**
Agency to prepare a financial analysis that shows a net benefit to Government from delivery of the project via private sector financing as opposed to the normal Government delivery process.

**Economic Development Impact Appraisal**
Agency to provide a description and quantification of the economic development benefits from investing in the project including investment, employment, exports, R&D and other benefits.

**Risk Management Plan**
Agency to list the major risk aspects associated with the project and the management processes to alleviate those risks.

**Loan Council Treatment**
Treasury to prepare an assessment of the likely Loan Council treatment of the project.

**Events of Default and Compensation**
Agency to list default conditions and compensation payments that would be associated with the final contract.

**Accounting Treatment**
Agency to prepare a statement of the accounting treatment for the proposed project covering balance sheet and operating statement.

**Taxation Treatment**
Agency to provide preliminary assessment of the likely position regarding a tax ruling for the project.

**Agency Budget Plan**
Agency to prepare a cash flow plan covering the Government costs.

**Foreign Exchange Risk**
Agency to establish need for foreign exchange coverage.

**Conditions Precedent**
Agency to list likely conditions precedent to be included in the contract.

# Appendix 5 Glossary

### *Acronyms*

| | |
|---|---|
| ANZ | Australia/New Zealand |
| BAFO | Best and Final Offer |
| BCC | Budget Committee of Cabinet |
| BOO | Build, Own, Operate |
| BOOT | Build, Own, Operate, Transfer |
| BOT | Build, Operate, Transfer |
| CEO | Chief Executive Officer |
| CISP | Capital Investment Strategic Plan |
| DA | Development application |
| D&C | Design & Construct |
| DBFM | Design, Build, Finance, Maintain |
| DCM | Design, Construct, Maintain |
| EA | Environmental Assessment |
| EIS | Environmental Impact Statement |
| EIA | Environmental Impact Assessment |
| EOI | Expression of Interest |
| EP&A Act | *Environmental Planning and Assessment Act 1979* |
| ICAC | Independent Commission Against Corruption |
| IIG | Infrastructure Implementation Group, Premier's Department |
| LEP | Local Environment Plan |
| OIM | Office of Infrastructure Management, NSW Treasury |
| PAFA | *Public Authorities (Financial Arrangements) Act 1987* |
| PFP | Privately Financed Project |
| PPP | Public Private Partnership |
| PSC | Public Sector Comparator |
| REF | Review of Environmental Factors |
| SIS | State Infrastructure Strategy |
| SOC Act | *State Owned Corporations Act 1989* |
| SPV | Special Purpose Vehicle |
| SEE | Statement of Environmental Effects |
| SEPP | State Environmental Planning Policy |
| SOC | State Owned Corporation |
| SSS | State Significant Site |
| TAM | Total Asset Management |

### *Definitions*

**Agency** For the purpose of these Guidelines, the term includes NSW Government departments, statutory authorities, statutory corporations and Government business enterprises.

**Bidder** A respondent to a request for expressions of interest or an invitation to submit a bid in response to a call for detailed proposals. 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. Government will normally contract with only one lead party (bidder), which is responsible for the provision of all contracted services on behalf of the consortium.

**Business case** A business case sets out a preliminary view on how the project will be delivered. It also provides an analysis of the various impacts of the project and an indication of the likely level of market interest. The business case provides information, allowing Government to decide whether to support a proposed project before significant resources are spent on its development.

**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.

**Capital expenditure** An amount used during a particular period to acquire or improve long-term assets, such as property, plant or equipment.

**Commissioning** The proving processes involving the start-up of operations to deliver the contracted services as specified.

**Competitive Neutrality** Removal of any net advantages (or disadvantages) that accrue to a Government business simply by virtue of being owned by Government.

**Default** The failure of a party to perform a contractual requirement or obligation, including failures to meet deadlines, to perform to a specified standard, to meet a loan repayment or to meet its obligations in relation to a risk that has materialised.

**Demand management** The use of pricing mechanisms or other methods to manage demand eg. to delay the need for new infrastructure.

**Detailed Proposal** A response by a short listed bidder to a call for detailed proposals. A call for detailed proposals details Government's objectives, service delivery requirements, policy and commercial matters, material background information and the processes for lodging and evaluating submissions. It also sets out Government's role and intentions for the infrastructure to be built and explains how checks and balances are observed in the process to ensure impartiality.

**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.

**Economic infrastructure** Fixed assets that support economic activity and development in a fundamental way. Typical examples of economic infrastructure are networks of roads and telecommunications facilities, airports, ports, water storage distribution and sewerage, railways, electric power generation and distribution facilities.

**Expression of Interest (EOI)** A response to a call by a Government department or agency for expressions of interest from the private sector in a project. EOIs are used to evaluate the capability of bidders to deliver a project and may be used to gather some information from bidders on particular approaches that may be accommodated in the call for detailed proposals. Based on the information presented in EOIs, bidders are short listed to provide a detailed proposal (see above).

**Force majeure** Acts of God and other specified risks (eg. terrorism), beyond the control of the parties to the contract, which prevent or delay performance of a party's non-financial obligations under the contract.

**Intellectual Property (IP)** Inventions, original designs and practical applications of good ideas protected by statute law through copyright, patents, registered designs, circuit layout rights and trademarks; also 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.

**Loan Council** A body with Federal and State representation, which aims to constrain the public sector's call on national savings primarily through the limits it places on borrowing by the public organisations.

**Loan Council Allocation (LCA)** The LCA is the borrowing allocation to be nominated to Loan Council by the Commonwealth, States and Territories. It is based on the deficit/surplus in addition to some memo items. Final negotiations and endorsement of each LCA are the responsibility of the Loan Council.

**Output specification** The output or performance specification sets out the services that Government is seeking to procure, and the performance levels required for each of those services.

**Outsourcing** The practice of contracting out Government services to the private sector.

**Preferred bidder** A bidder selected by Government to develop its proposal during the negotiation period in sufficient detail to enable the execution of the final contract.

**Private party** The private sector entity with which Government directly contracts. Traditionally the private party has been a company, known as a special purpose vehicle, created specifically for the project. The private party is not limited to this form and can be set up under a number of structures, including a joint venture and a trust structure.

**Probity** Uprightness, honesty, proper and ethical conduct and propriety in dealings. Used by Government to mean good process.

**Probity auditor** An independent expert retained to audit the bidding process at critical stages. The probity auditor will assess and report on whether the process has been conducted according to the required standards of probity. Before a contract is executed, the probity auditor reports to the agency CEO and the project steering committee on the bidding process.

**Project manager** The project person who has overall responsibility for delivery of the project and leadership of the project team, including external advisers and consultants.

**Project team** Under the guidance of the steering committee, the project team is responsible for the day-to-day administration of the project until commissioning, to ensure deadlines are met and technical difficulties resolved.

**Public Sector Comparator (PSC)** The hypothetical risk-adjusted whole-of-life cost of Government delivering the project output specifications. As well as adjustments for retained and transferable risks, the PSC includes an adjustment for competitive neutrality. The PSC is used as the benchmark for assessing the potential value for money of private party bids in PFP projects.

**Raw PSC** The hypothetical whole-of-life cost of Government delivering the project output specifications, with no adjustment for risk or competitive neutrality.

**Reference project** The most likely and efficient form of public sector delivery that could be used to satisfy all elements of the output specification. It forms the basis of the PSC (see above).

**Retained Risk** The value of those risks or parts of a risk that Government proposes to bear itself under a PFP arrangement.

**Risk allocation** The allocation of responsibility for dealing with the consequences of 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.

**Risk management** The identification, assessment, valuation, allocation, mitigation and monitoring of risks associated with a project. The aim is to reduce their variability and impact.

**Risk matrix** A method of presenting all possible significant risks likely to be encountered in a project, the magnitude and likelihood of the risks occurring, their areas of impact, the allocation of risks between parties and the risk mitigation techniques to be employed.

**Social infrastructure** Although loosely used, this term generally refers to items of physical infrastructure that aid the provision of social, rather than economic or industrial, services. Hospitals, schools, police stations, day care centres and prisons are examples of social infrastructure.

**Special purpose vehicle (SPV)** In establishing a project consortium, the sponsor or sponsors typically establish the private party in the form of a special purpose vehicle (SPV). The SPV is simply an entity created to act as the legal manifestation of a project consortium. The SPV itself has no historical financial or operating record that Government can assess.

**Steering committee** A committee that directs the development of a project.

**Transferable Risk** The value of those risks (from Government's viewpoint) that are likely to be allocated to the private party under a PFP delivery method.

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Working with Government Guidelines for Privately Financed Projects