

BID COST CONTRIBUTIONS

POLICY

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PREFACE

The NSW Government can only achieve its infrastructure objectives in partnership with the private sector, and this depends on healthy ongoing competition between a capable field of construction and development firms, sub-contractors and the industry supply chain – not just now, but for years to come.

This Policy has been developed by the NSW Government's Construction Leadership Group (CLG) as part of its **NSW Government Action Plan – A Ten Point Commitment to the Construction Sector**. It has been endorsed by its member agencies, all of whom are engaged in the delivery of a large long term pipeline of infrastructure investment on behalf of the NSW Government.

The NSW Government recognises that high bid costs may, at times, be an impediment to participation in tender processes. One of the commitments in the NSW Government Action Plan is focused on reducing the cost of bidding where appropriate.

This document (the Policy) sets out the arrangements the Government has adopted to determine if, when and how it will make a financial contribution to partially offset the cost of bidding for construction and infrastructure projects in NSW.

This Policy is intended to:

- Promote and secure competition in the market, provided certain value for money considerations are met and specified criteria complied with;
- Guide project by project decision making on the provision of bid cost contributions;
- Advise the market about the circumstances in which bid cost contributions will be considered; and
- Provide additional clarity and standardise the application of bid cost contributions.

1 INTRODUCTION

1.1 Overarching policy

For all NSW Government construction projects with an estimated total capital cost over \$100 million, the NSW Government will consider making a contribution to eligible unsuccessful bidders of up to 50 per cent of the expected bid costs, as estimated by the Agency, where:

- the provision of a bid cost contribution has been demonstrated to provide value for money;
- the relevant bidder has submitted an appropriately developed bid but has not been awarded the relevant contract; and
- the proponent agrees that the intellectual property, as reasonably required by the Agency, will be vested with NSW Government.

Bid cost contributions will not be considered for projects with an estimated total capital cost of \$100 million or less.

1.2 Bid costs: definition

Bid costs are expenses borne by all proponents during the procurement phase of the project (prior to appointment of preferred bidder) that relate to their tender.

Bid costs can include:

- design costs,
- technical modelling,
- legal advice, and
- specialist reports required to develop a conforming bid.

These can include costs internal to the proponent, such as the cost of the in-house design team.

Eligible bid costs do not include:

- consortium members' overheads,
- costs incurred after the appointment of a preferred bidder, or
- mobilisation costs.

1.3 Who does this policy apply to?

This Policy applies to all NSW Government agencies undertaking procurement of construction projects which have estimated total capital cost in excess of \$100 million.

Agencies are to assess bid costs for major construction procurement in accordance with this policy, drawing on benchmarking information obtained from market soundings and project debriefs and shared between agencies through CLG and other forums.

1.4 Relationship to other documents

This Policy revises the NSW Government's previous policy on the payment of bid costs for Public Private Partnerships, as outlined in the NSW Public Private Partnership Guidelines 2017 (TPP17-07), and provides clarity and consistency on the treatment of bid costs for non-PPP projects.

In relation to the reimbursement of bid costs for Public Private Partnership projects, TPP 17-07 states that:

“Government will not normally reimburse bid costs.

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

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

This Policy also revises section 3.8 (Tendering Costs) of the Department of Finance, Services and Innovation's Market Approaches Guide and other internal agency procurement policies (e.g. the Engineering Contracts Manual Section 7 which provides guidance on administering of RMS' contribution to unsuccessful design and construct tenderers' tender design costs).

1.5 Contact

Enquiries and requests in relation to this policy should be submitted to the Infrastructure and Structured Finance Unit at NSW Treasury at:

Email: CLG@treasury.nsw.gov.au

Telephone: (02) 9228 4384

2 ROLES AND RESPONSIBILITIES

2.1 Proponent

Any party preparing and submitting a tender and intending to claim a bid cost contribution from the state (the Proponent) will be required to provide a statement of bid costs incurred at the end of each project to enable benchmarking of bid costs by Government.

2.2 Agencies

The NSW Government agency which has requested the tender (the Agency) will be responsible for applying this Policy, via the project governance structure. This includes applying the value for money assessment outlined in Section 3 and seeking relevant approvals within the NSW Government.

The Agency will collect statement of bid costs from each bidder at the end of each procurement process and provide this to the CLG to contribute to future benchmarking of bid costs by Government.

2.3 NSW Treasury

NSW Treasury will be the responsible custodian of this Policy, consulting as necessary through the CLG.

For each project where an Agency is proposing to contribute to bid costs, that Agency must first consult and obtain the agreement of NSW Treasury that its proposal is consistent with this Policy.

2.4 Government

This Policy has been approved by the Expenditure Review Committee of Cabinet, and any material updates or alterations to the Policy must also be submitted to ERC for approval.

2.5 Construction Leadership Group

Agencies and NSW Treasury will prepare a summary report for the CLG each quarter to allow the implementation of this Policy to be monitored and reviewed, and to ensure its consistent application across Agencies.

3 ASSESSMENT PROCESS

This section outlines the process for determining whether and on what terms a bid cost contribution should be made, for calculating that contribution and for seeking approvals within NSW Government.

3.1 Determining whether a contribution be made

Objective

Bid cost contributions will be considered on a project by project basis. Bid costs contributions will only be paid if:

- the Mandatory Conditions have been met and
- a contribution to bid costs can be shown to represent value for money to Government.

Mandatory Conditions

On projects where the decision has been made to offer bid costs, contributions will only be paid where the following conditions have been met:

- a bid has been submitted which demonstrates that the Proponent has genuinely attempted to fully satisfy the intent of the Request for Tender.
- the Proponent agrees to make available to the State any project-specific intellectual property (IP) rights reasonably requested by the Agency.

Testing value for money

Contributions to bid costs will be considered on a case by case basis within the terms of this Policy.

The Agency will make an assessment of likely costs associated with preparing a bid for the project, based upon the definition of eligible costs set out in section 1.2, on industry benchmarking undertaken by CLG and/or through market soundings. An initial assessment of likely bid costs should be included in the Final Business Case for the project.

The following criteria are to be considered by Agencies, via the project governance structure, in deciding whether to pay bid cost contributions and, if so, the size of those contributions.

Market competitiveness

Contributions to bid costs should be offered only if it has been demonstrated to provide value for money. The Final Business Case should identify any expected constraints on attracting sufficient competition, the value of innovation, competitive processes and other factors which would commercially disadvantage the State, and refer to any market soundings or other research upon which this assessment is based.

Intellectual property

Agencies should identify whether, as a condition for making a bid cost contribution, they will require any project-specific IP from bidders to be made available to the State, to what extent and in what form.

Specified component of a tender

Agencies should consider whether bid cost contributions should be targeted at defined areas of the tender activities, for instance in relation to project design, rather than as a proportion of total eligible bid costs.

Other areas of consideration

Other areas of consideration in deciding whether to pay bid cost contributions include:

- whether the project involves complex and/or material design requirements,
- whether the bidders are required to exert non-typical effort (e.g. intensive interactive sessions, an excessive number of mandatory options or multiple best and final offers),
- whether there is need to encourage foreign bidders to increase competition,
- whether the reimbursement of bid costs would encourage innovation,
- whether the project requires specific or unique expertise from a niche group of bidders, and/or
- whether there is a sufficient level of market interest (e.g. number of bidders) in the project.

3.2 Calculating the contribution

The bid cost contribution should be calculated as a percentage of the estimated bid costs and included as part of costings in the Final Business Case. Unless there is a compelling reason, the percentage of eligible pre-estimated bid costs to be reimbursed should be no more than 50 per cent. The bid cost contribution should be expressed as a capped dollar value. It should be offered to each unsuccessful proponent who meets the Mandatory Conditions.

After the Final Business Case stage, the need for and extent of a proposed bid cost contribution estimate can be tested and refined in market soundings prior to a procurement process. Subject to obtaining the relevant approvals (see below), the Agency may wish to indicate its intentions in respect of bid cost contributions when it invites Expressions of Interest. In order to provide market certainty, the final amount of the contribution should be determined prior to the issue of the Request for Tender. Where the decision to pay a bid cost contribution or value approved to be offered is increased after the Final Business Case approval, the cost of the contribution will need to be met using project contingencies or existing Agency resources. Any request for additional funding will be subject to Cabinet consideration.

3.3 Seeking approval to make a contribution

The Agency should identify the potential need and rationale for a bid cost contribution, within the terms of this Policy, in the project's Final Business Case.

The estimated bid cost contribution should be supported by benchmarking data supplied by CLG and/or market soundings undertaken as part of the Final Business Case development.

Prior to the release of an Expression of Interest, Agencies wishing to pay bid cost contributions should seek NSW Treasury's agreement that conditions of this Policy are met. NSW Treasury's consent will be given provided it is satisfied that the proposed contribution is consistent with this Policy.

The proposed contribution should be included in the total project funding envelope presented to ERC or Cabinet for approval prior to the commencement of the procurement process.
