NSW Public Private Partnership (PPP) **Policy & Guidelines**

Review for Consultation

NSW GOVERNMENT | Treasury

Preface

The NSW Treasury Infrastructure and Structured Finance Unit (ISFU) is currently undertaking a review of the 2017 NSW Public Private Partnership (PPP) Guidelines.

NSW Government Agencies and stakeholders across industry are invited to provide comments and feedback on this draft version of the 2021 Guidelines. Feedback should be provided through the downloadable template and submitted to ppp@treasury.nsw.gov.au **by 22 October 2021**.

ISFU invites feedback on all areas of the report, however a particular focus is welcomed on the following areas:

- Business case development and Procurement Strategy
- The extent of information requested from, and provided to, bidders during a procurement process
- Disclosure of the Public Sector Comparator (PSC) or Shadow Bid Model (SBM) to bidders
- Extent of guidance on environmental and planning approvals
- Provision of Government guarantees under the *Government Sector Finance Act (GSF) 2018*
- Clarity of mandated versus non-mandated requirements of the guidelines.

Note:

This report is a **draft version only** and is subject to change. To access the current NSW PPP Guidelines please visit: https://www.treasury.nsw.gov.au/projects-initiatives/public-private-partnerships/policy-guidelines-and-publications.

For enquiries regarding this review please contact ISFU at ppp@treasury.nsw.gov.au.

Contents

1 Executive Summary

1.1 Overview of these Guidelines

Public Private Partnerships (PPPs) can be broadly defined as long-term arrangements between the public and private sector for the financing, development and delivery of service enabling public infrastructure. They include, without limitation, social infrastructure Availability PPPs (for example, availability payment PPPs in health, education, transport and roads), Economic Infrastructure PPPs (for example, user fee PPPs in roads and water), joint financing arrangements and concession agreements.

The NSW Government retains the overall responsibility to meet its service delivery objectives and outcomes, regardless of any PPP entered into with a private sector entity.

PPPs usually have the following principal features:

1. Design and construction of public service-enabling infrastructure assets through public and/or private sector financing
2. A contribution by the NSW Government through land, capital works, availability payments, other payments, risk sharing, revenue diversion or other supporting mechanisms and
3. Engage the private sector for a specified period for the delivery of related services.

Any 'related services' contracted to the private sector should be determined on a project by project basis at the early planning stage of each infrastructure project.

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

1. The National Public Private Partnerships Policy and Guidelines (the National PPP Guidelines), and
2. NSW specific requirements in these NSW Public Private Partnership Policy & Guidelines (these Guidelines), updated from time to time.

CONSULTATION ISSUE 1:

Are there elements of the National PPP Guidelines that require review or updating in parallel with the NSW Guidelines? For example:

- **Calculation of the Public Sector Comparator (see section 5.2 of these Guidelines)**
- **Discount rate guidance (see sections 5.2 & 5.3.2 of these Guidelines)**
- **Guidance on contract management (see section 7 of these Guidelines)**

All NSW Government agencies (as defined in section 162 of the *Public Works and Procurement Act 1912*) (Agencies) are also subject to the mandatory parts of the NSW Government Procurement Policy Framework[1] (as updated from time to time) and all associated directions and policies of the NSW Procurement Board.

All NSW Government businesses and SOCs are subject to the applicable policies under the Commercial Policy Framework[2].

Local government councils are required to comply with separate guidelines as per Part Six of Chapter 12 of the *Local Government Act 1993*.

The requirements in the *Public Works and Procurement Act 1912*, the *Government Sector Finance Act 2018* (the GSF Act), the *Independent Commission Against Corruption Act 1988, the Government Information (Public Access) Act 2009* and other procurement-related legislation, policies and directions may also apply to the PPP project (e.g. the Infrastructure Investor Assurance Framework).

In NSW, PPPs are usually Joint Financing Arrangements (JFAs) as defined under the GSF Act (and in some cases also Joint Venture Arrangements (JVAs)) and require the Treasurer's approval[3].

PPP projects procured through an unsolicited proposals process must also comply with the Unsolicited Proposals: Guide for Submission and Assessment[4] (the Unsolicited Proposals Guide).

These Guidelines provide a transparent mechanism to competitively pursue innovative solutions to deliver improved services and to facilitate the NSW Government achieving better value for money. This is primarily achieved through optimal risk allocation, management synergies, encouraging innovation in operations, design and construction, efficient asset utilisation, and integrated whole-of-life asset management.

These Guidelines are based on the following principles:

1. Ensure PPPs are procured in a professional and transparent manner, minimising tender costs and providing fair opportunity to all prospective private sector participants.

1 Available at https://buy.nsw.gov.au/

2 Available at https://www.treasury.nsw.gov.au/information-public-entities/government-businesses/commercial-policy-framework

3 See *Government Sector Finance Act 2018 (GSF Act)*, particularly Part 6 Division 6.2 Section 6.11 (meaning of joint financing arrangement)

4 Available at https://www.nsw.gov.au/contact-us/unsolicited-proposals/

2. Ensure consistency of risk allocation between PPPs in NSW, except where there are project specific reasons to depart from this risk allocation.
3. Ensure stability of PPP delivery structures, with sustainable debt financing and robust commercial and financial structures.
4. The NSW Government will not guarantee private sector borrowings.
5. The delivery and operation of service enabling public infrastructure with an acceptable level of risk retained by the State.
6. Encourage innovation in the provision of infrastructure and service delivery.
7. Ensure the timely disclosure of information on contracts and tenders.
8. Support collaboration between Government and industry in risk allocation, consistent with principles outlined NSW Government's 10-point commitment to the construction sector.

In NSW, any public infrastructure project with a total estimated capital value exceeding $200 million must be assessed for possible PPP procurement as part of the development of a project's Strategic Business Case having regard to value-for-money drivers. This threshold also applies to smaller projects that may be bundled together, for example, a number of new and/or brownfield school projects.

CONSULTATION ISSUE 2:

Should the threshold value for assessing PPP suitability be raised from $100M to $200M? What is the minimum PPP contract value for it to be a viable delivery model?

Please include in your response supporting reasons, with consideration of the proportion of capital vs operational expenditure.

Responsible Agencies must consult with NSW Treasury as early as possible when developing a Business Case or Procurement Strategy for an infrastructure project or bundled projects with a total estimated capital value exceeding $200 million. This consultation should occur prior to engaging external consultants (for example, to prepare a procurement options analysis, preliminary risk allocation or Commercial Principles) or engaging with the market. NSW Treasury maintains pre-qualified lists of consultants with PPP, commercial, financial, legal, accounting and probity expertise. An assessment template to assist agencies is included in Appendix 4 of these Guidelines.

All major capital works projects which include PPP components, or which are procured via a PPP, are exempt from the requirements of TC16-11: *Mandatory Principal Arranged Insurance for all major capital works projects* to obtain principal arranged insurance from iCare.

CONSULTATION ISSUE 3:

Treasury Circular TC16-11 is currently under review. We invite feedback from market participants whether the exemption of principal-arranged insurance for PPPs is still valid.

1.2 What's new in these Guidelines?

This version of these Guidelines includes the following changes and/or new additions from the 2017 version:

1. Updated guidance around the Governance Framework and what it must include, such as details of the governance structure, terms of reference for the Steering Committee and Project Control Group, governance arrangements, review process, and change thresholds (Section 3.3).
2. Updated references and guidance on the application of the *Government Sector Finance Act 2018* (GSF Act), previously the *Public Authorities Financial Arrangements Act 1987* (Section 4.5).
3. Updated guidance on materially varying an existing PPP contract with an incumbent, or a member of an incumbent, PPP Consortium as part of an augmentation of the asset (Section 4.7.2.1.2).
4. Clarifying the need for a Procurement Strategy to include a procurements options analysis within the Final Business Case prior to seeking Cabinet or Budget approval (Section 5.1).
5. Combining the requirement to seek Government approval of the investment decision with the approval of the Procurement Strategy (Section 5.1).
6. Updates to commentary on the Public Sector Comparator and Shadow Bid Models (Section 5.2).
7. Distinguishing approaches between Availability PPPs and Economic Infrastructure PPPs (For example, see Section 5.3).
8. Expanded commentary on the public interest test (Section 5.6).
9. Contract management has been expanded and adjusted to recognise the different aspects of contract management during the delivery (i.e. construction) and operations stages, as well as the importance of providing management and senior management knowledge continuity from the procurement stage though delivery and onto the operations stage. A new sub-section details the requirements for managing performance during the operations stage when promised services and outcomes are expected to be realised (Section 7).
10. A new section has been included to reflect the impact of new accounting standard AASB 1509 *Service Concession Arrangements: Grantors* on PPPs. This section also sets out the requirement for Responsible Agencies to develop budget models to understand the financial liability and budget impacts that arise over the life of Availability PPPs (Section 8).
11. Further guidance material on the application of the Government Information (Public Access) Act 2009 (GIPA Act) to PPP projects (Section 9).
12. A new section on innovation delivered through PPP projects to encourage thinking about what a Responsible Agency may introduce into the PPP structure to add value (Section 10).
13. Addition of Appendix 3 as a source of relevant NSW Guidelines, Circulars and Policies.
14. Addition of Appendix 4 — PPP Assessment Framework, which provides guidance to Agencies on whether a capital project is potentially suitable for a PPP.
15. Addition of Appendix 5 — Managing Public Private Partnership (PPP) Contracts to incorporate the requirements of Treasury Circular TC15-16 (which will no longer apply from the date of these Guidelines), and clarifies when and under what circumstances NSW Treasury must be consulted regarding likely or proposed commercial or contractual changes to PPP projects.

Using these Guidelines

2

2.1 Relationship to other guidance materials

These Guidelines are intended to provide Agencies, private sector participants, advisers and other stakeholders with a streamlined guide on the NSW-specific requirements for PPP preparation, procurement and management. These Guidelines complement the National PPP Guidelines, and are intended to be consistent with the commitments in the NSW Government Action Plan — A ten point commitment to the construction sector[5].

Any reference to the 'Relevant PPP Authority' in the National PPP Guidelines refers to NSW Treasury, which is the authority responsible for the application of PPP policy within NSW, unless otherwise specified. Unless otherwise specified, references to 'NSW Treasury' in these Guidelines refer to NSW Treasury's Infrastructure and Structured Finance Unit (ISFU).

Appendix 3 *NSW Guidelines, Circulars and Policies* includes a non-exhaustive list of other materials relevant to PPPs. In the event of any inconsistency between these Guidelines and the documents in Appendix 3, an Agency must contact NSW Treasury for guidance on interpretation and precedence. These Guidelines are not intended to substitute the need for Agencies to be aware of the requirements of other applicable materials, including but not limited to, those in Appendix 3. The Responsible Agency must always inform itself of all Agency-specific laws and policies it is required to comply with.

These Guidelines apply to a wide range of projects and encompass both Economic PPPs and Availability PPPs. In the spirit of efficient procurement and minimising transaction costs, there may be cases where it is appropriate to depart from the processes set out in these Guidelines. In such cases, the Responsible Agency must seek guidance and, if appropriate, approval from NSW Treasury. Depending on the circumstances, approval from the Treasurer, the Treasurer's delegate, the portfolio Minister, or Cabinet (or a Cabinet sub-committee) — or a combination thereof — may be necessary. Agencies must consult with NSW Treasury as early as possible if considering any departure from the processes set out in these Guidelines.

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

5 https://www.infrastructure.nsw.gov.au/media/1649/10-point-commitment-to-the-construction-industry-final-002.pdf

2.2 Role of Agencies with NSW Treasury in PPP procurement and delivery

Generally, the Responsible Agency, subject to being accredited in accordance with the accreditation program for construction procurement, has overall responsibility for procuring and delivering a PPP consistent with these Guidelines, and for ensuring the project will meet its service delivery requirements and relevant outcome-focused performance objectives of the Agency.

For any project with an estimated total cost (ETC) greater than $200m, or any project that is likely to be procured as a PPP, Responsible Agencies must contact NSW Treasury as early as possible in the project development phase, i.e. during the development of the Strategic Business Case.

NSW Treasury:

1. Is the first point of contact in NSW for PPPs, potential PPPs and major structured financing transactions that may involve the private sector.
2. Can advise Responsible Agencies on any aspect of these Guidelines and the National PPP Guidelines.
3. Assists Responsible Agencies with all aspects of planning, procuring and managing PPP contract documents.
4. Must be involved in the procurement options analysis.
5. Can provide Responsible Agencies with best-practice templates for PPP documentation, including pre-procurement documentation, Expressions of Interest (EOIs) and Requests for Proposals (RFPs), and GSF Act approvals.
6. Should be involved in selecting commercial, financial and legal advisers and can provide templates for requesting proposals from advisers and evaluating such proposals.
7. Specialises in providing advice on commercial/financing aspects of PPPs, and the preparation of the Public Sector Comparator (PSC) and Shadow Bid Model (SBM).

Experienced NSW Treasury members must be invited to be a part of the Steering Committee and Project Teams and be involved in all interactive tendering and commercial discussions with potential, short-listed, and preferred bidders.

NSW Treasury must be consulted on various aspects of managing PPP contract documents, consistent with Appendix 5, for example material, contractual or commercial changes to existing PPPs.

3 Governance

MANDATORY MINIMUM REQUIREMENTS:

- **Every project must have a PPP Governance Framework that is consistent with the Oversight Framework for the NSW Infrastructure Program and these Guidelines.**
- **All PPPs must have in place a comprehensive Probity Plan and appoint a Probity Advisor or Auditor.**
- **All PPPs must comply with the NSW Supplier Code of Conduct.**

3.1 Role of Agencies

Each PPP project in NSW will have ministerial oversight of project procurement and implementation. The Minister of the Responsible Agency will have responsibility for delivering the PPP project and ongoing responsibility for the management and implementation of the project once the procurement process is complete.

Where more than one Responsible Agency is involved in a project's service delivery outcomes, the Secretary of the NSW Department of Premier and Cabinet will appoint one of the Responsible Agencies to lead the project and convene a Project Steering Committee. The other Responsible Agencies will be represented as members on that Steering Committee.

3.2 Infrastructure Investor Assurance Framework

Infrastructure NSW (INSW) plays a role as the Gateway Coordination Agency for capital infrastructure projects and administers the Infrastructure Investor Assurance Framework (IIAF)[6]. As part of adhering to the protocols of the IIAF, the Responsible Agency is required to register with Infrastructure NSW all projects valued at an ETC greater than $10 million. The IIAF requires projects to be assigned a risk-based project tier with an endorsed Project Assurance Plan. Procurement complexity, including PPP as a procurement method, is one of the weighted criteria which impacts tier rating.

In certain circumstances, the Premier may authorise INSW (via Projects NSW) to 'step in' to carry out or take over major infrastructure projects[7].

6 https://www.infrastructure.nsw.gov.au/project-assurance/
7 Part 5 of the *Infrastructure NSW Act 2011*

3.3 Governance Framework

Every PPP project must have a detailed and documented PPP Governance Framework. This should be consistent with the principles outlined in the Oversight Framework for the NSW Infrastructure Program[8]. The PPP Governance Framework must be:

- Prepared (and updated) by the Responsible Agency in consultation with the Project Steering Committee, NSW Treasury and INSW
- Established at the conception of a project, ideally at the Strategic Business Case stage where a PPP is a potential procurement option and applied throughout the project's lifecycle. The PPP Governance Framework may be amended as necessary, in accordance with the process documented in the PPP Governance Framework
- Approved by Cabinet at the earliest opportunity, and no later than when Cabinet approves project funding or engagement with the market, whichever occurs first.

The Responsible Agency should contact NSW Treasury for further guidance in relation to the PPP Governance Framework. NSW Treasury can provide appropriate templates and must be consulted on the PPP Governance Framework prior to finalisation and submission to Cabinet. All decisions in relation to the PPP must be made in accordance with the PPP Governance Framework.

The PPP Governance Framework must include:

- **Details of the governance structure**, including:
  - Project Steering Committee, which must be established by the Responsible Agency Head and is accountable to Cabinet through the Responsible Minister and Agency head. The Project Steering Committee should endorse, prior to Cabinet's consideration, all key documents and decisions in relation to the PPP (or likely PPP) project, including, for example, Business Case, Procurement Strategy, Market Communication Strategy, EOI and RFP tender documents (including contracts), tender evaluation plans, Public Sector Comparator (PSC) and/or Shadow Bid Model (SBM), Commercial Principles, and final contracts. In addition, the Project Steering Committee will need to approve any proposed recommendations to Ministers and/or Cabinet. NSW Treasury must be invited to be a member of the Project Steering Committee
  - Project Control Group (PCG)
  - Working groups including type, lead and members (where applicable as determined by the Responsible Agency)
  - Project Director who is responsible for driving the overall project and managing the Project Team.
- **Terms of Reference (ToR) of the Project Steering Committee and Project Control Group** that are appropriate, given the project complexity. The ToR should include details of membership including the Chairperson, scope, roles and responsibilities, including the Chairperson's role, acting Chairperson arrangements, timing and frequency of meetings (for example, monthly, or after key milestones, including the end of phases) flow of information including process and timing for agenda items, minutes, meeting papers and reports, proxy and quorum arrangements, decision-making requirements (unanimous or majority), issues resolution, secretariat role and refer to Agency-specific policies, other governance bodies, and procedural documents.

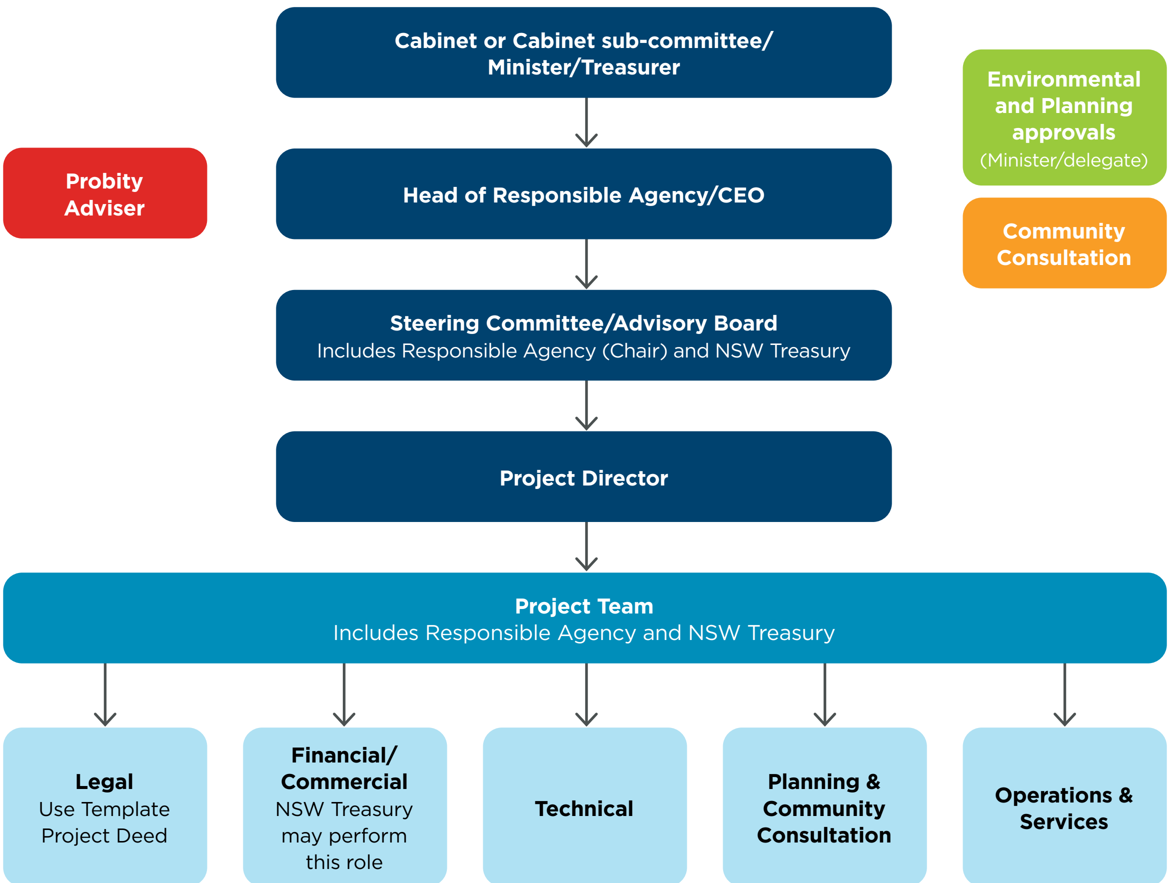
8 https://www.infrastructure.nsw.gov.au/media/2737/oversight-framework-the-framework.pdf

- **Details of how the governance arrangements (including roles and membership) could change** through the project lifecycle and how those transitions will be managed to ensure continuity, particularly in higher-risk project phases of procurement and delivery. For example, Steering Committee membership may differ depending on whether the project is in the procurement (tendering and negotiations) phase, the post-contract signing delivery phase (which includes construction), or the operations phase. For guidance on Governance Frameworks after contract signing, refer to Section 7.
- **Details of how the governance arrangements will address circumstances where the project has an interface with other projects** (for example, where there are enabling works or the project is part of a program or a stage in a larger project) that require shared understanding of significant issues and joint consideration of critical dependencies or linkages. This is particularly important where different Agencies are delivering the projects.
- **A review process** to determine the effectiveness of the Governance Framework and groups/roles within it.
- **As applicable, thresholds for changes** in project budget, schedule, or scope.

3.4 Project management structure

A typical high-level project management structure for NSW PPP projects is provided below.

Figure 3.1: Typical project management structure



3.5 Project Team and appointing Project Director and advisers

3.5.1 Project Team and Project Director

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

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

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

The Project Director should be appointed as soon as practicable. For likely PPPs, it is beneficial to engage a Project Director during the Business Case stage.

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

3.5.2 Advisers

NSW Treasury maintains lists of pre-qualified consultants with PPP, commercial, financial, legal, accounting, and Probity expertise. The Responsible Agency may also wish to consider using NSW Procurement's *Performance and Management Services Prequalification Scheme*, to shortlist and engage legal advisers and/or Probity advisers.

> CONSULTATION ISSUE 4:
>
> **NSW Treasury is concurrently reviewing its list of pre-qualified consultants. NSW Treasury invites feedback from consultants on pre-qualification capabilities and requirements.**

Legal advisers are required to review tender documentation and to prepare contractual documents, taking into account the NSW Treasury PPP tender templates and Template Project Documents for Social Infrastructure PPPs.

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

The services of environmental and planning approval expert(s) and community consultation expert should also be retained where appropriate. These services may be sourced externally or internally in some Responsible Agencies.

Prior to commencing procurement, the Responsible Agency should also engage geotechnical and other experts to carry out site investigations to inform early risk conversations with relevant market participants and develop commercial principles appropriate for the project. To minimise bid costs, these experts should be engaged on the basis that their reports can be relied on by bidders and novated to the successful bidder. Where practical, the scope of work of the geotechnical and other experts should be shared with potential bidders or short-listed parties so they can provide input.

CONSULTATION ISSUE 5:

NSW Treasury invites feedback on approaches to site investigations, early engagement with the market on managing site conditions, and optimal risk allocation for managing site condition risks.

3.6 Tender evaluation team members

Responsible Agencies, in consultation with NSW Treasury, should ensure tender evaluation members have the appropriate experience. Evaluation team members should either be experienced in tender evaluations or should be provided with appropriate guidance and training prior to commencement of the Interactive Tender Process (where applicable) and tender evaluation process.

Responsible Agencies should contact NSW Treasury for template evaluation plans. All tender evaluation team members should be briefed on the tender evaluation plans and probity requirements prior to commencing the tender evaluation. Members of specialist sub-panels or teams should have a high level of knowledge and expertise in the relevant specialist subject matter.

3.7 Probity requirements

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

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

1. A comprehensive probity plan — a probity plan that helps foster a probity culture and clearly defines the proper process, and
2. An appointed Probity Adviser or Auditor — providing independent advice and/or assessment throughout the Tender Process.

All PPPs must comply with NSW Government's Supplier Code of Conduct[9]. The Code establishes ethical standards and behaviours expected from the NSW Government and suppliers.

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

The NSW Government has established independent review mechanisms for complaints about tendering with Government Agencies to maximise community and business confidence in the NSW Government's tendering practices. Certain NSW Government bodies, including the NSW Ombudsman, the NSW Audit Office, the Independent Commission Against Corruption (ICAC), and the Information and Privacy Commission NSW may examine complaints about potentially corrupt conduct or other issues in the procurement process.

CONSULTATION ISSUE 6:

NSW Treasury invites feedback on any examples where probity requirements have been unwarranted or have impacted early engagement or collaboration during the procurement of a PPP project.

9 Further details are provided at https://buy.nsw.gov.au/policy-library/policies/supplier-code-of-conduct.

Approval processes

4

MANDATORY MINIMUM REQUIREMENTS:

- **The PPP procurement strategy must be approved by Cabinet as part of the Final Business Case.**
- **All PPP projects are subject to assurance reviews as required by the NSW Gateway Policy.**
- **The Chief Financial Officer (CFO) of the Responsible Agency must confirm accounting and budget positions and that the Financial Impact Statement (FIS) Table is complete and accurate for all Cabinet submissions.**
- **PPPs are Joint Financing Arrangements under the GSF Act and require the NSW Treasurer's approval.**
- **The Responsible Agency must consult with NSW Treasury before proposing to provide a discretionary GSF Act Guarantee.**
- **If the Responsible Agency becomes aware of a likely or proposed material contractual or commercial risk allocation change to an existing PPP during the delivery and operations phase, for example refinancing, NSW Treasury must be consulted prior to agreeing or negotiating such changes.**

4.1 Overview

The NSW Government approval process and an overview of required documentation[10] for each project phase is provided in Figure 4.1. Government PPP-related approvals are required at the investment decision to approve project funding (i.e. Final Business Case stage), including contingency and a provision for foreign exchange, and the procurement approach.

Government approvals are also required for PPPs prior to:

- Approaching the market with a formal EOI invitation — noting that an EOI may only be issued after project funding and the procurement method has been approved by Cabinet
- Issuing an RFP to the market

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

- Selecting a preferred proponent and executing contract
- Making material changes to key Commercial Principles, risks, State budget impacts, user fees (for example, tolls) and funding sources
- Terminating a procurement process
- Making material changes after contract execution to commercial terms or contracts if certain material and costly risks materialise, and
- Terminating any PPP contract.

4.1.1 Infrastructure Investor Assurance Framework Gateway Reviews

As part of the broader Government approval process, IIAF Gateway Reviews must be conducted prior to obtaining Cabinet approvals, consistent with Figure 4.1, at key decision points in a project's lifecycle. The IIAF Gateway Review process provides appraisals of infrastructure projects that highlight risks and issues which, if not addressed, may threaten successful delivery[11]. INSW and NSW Treasury can assist in ensuring Gateway Reviews are conducted in a timely manner when provided with appropriate notice of an upcoming Cabinet Approval point. All Gateway Reports should be provided to NSW Treasury following the review as soon as they are available.

4.1.2 Preparation of accounting and budget position paper

For each Cabinet approval, Responsible Agencies are required to prepare and/or update an accounting and budget position paper, incorporating a Financial Impact Statement (FIS) Table (see Appendix 2). The Chief Financial Officer (CFO) of the Responsible Agency must confirm that the information contained in the accounting and budget position paper and FIS Table is complete and accurate for all Cabinet submissions.

4.1.3 Cabinet sub-committees and approvals

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

Separate Cabinet approvals can be combined in some cases. For example, the approvals to select a preferred proponent and execute contracts may be combined on the condition that final contracts are substantially in the same form as when the preferred proponent is selected. Cabinet approvals may be linked in the case where the Responsible Agency already has advanced project planning and documentation (perhaps because the project is like an existing PPP).

Refer to Section 4.2 for further detail. Responsible Agencies should contact NSW Treasury for guidance as to when Cabinet approvals can be combined or when additional Cabinet approvals are required (for example, for material commercial or contractual changes).

11 https://www.infrastructure.nsw.gov.au/project-assurance/

4.1.4 State Owned Corporations and public trading enterprises

With respect to PPPs procured by State Owned Corporations (SOCs) and any subsidiaries of a SOC or other public trading enterprises with a Board of Directors, approval by the Board is required prior to requesting Cabinet approval at each phase outlined in Figure 4.1.

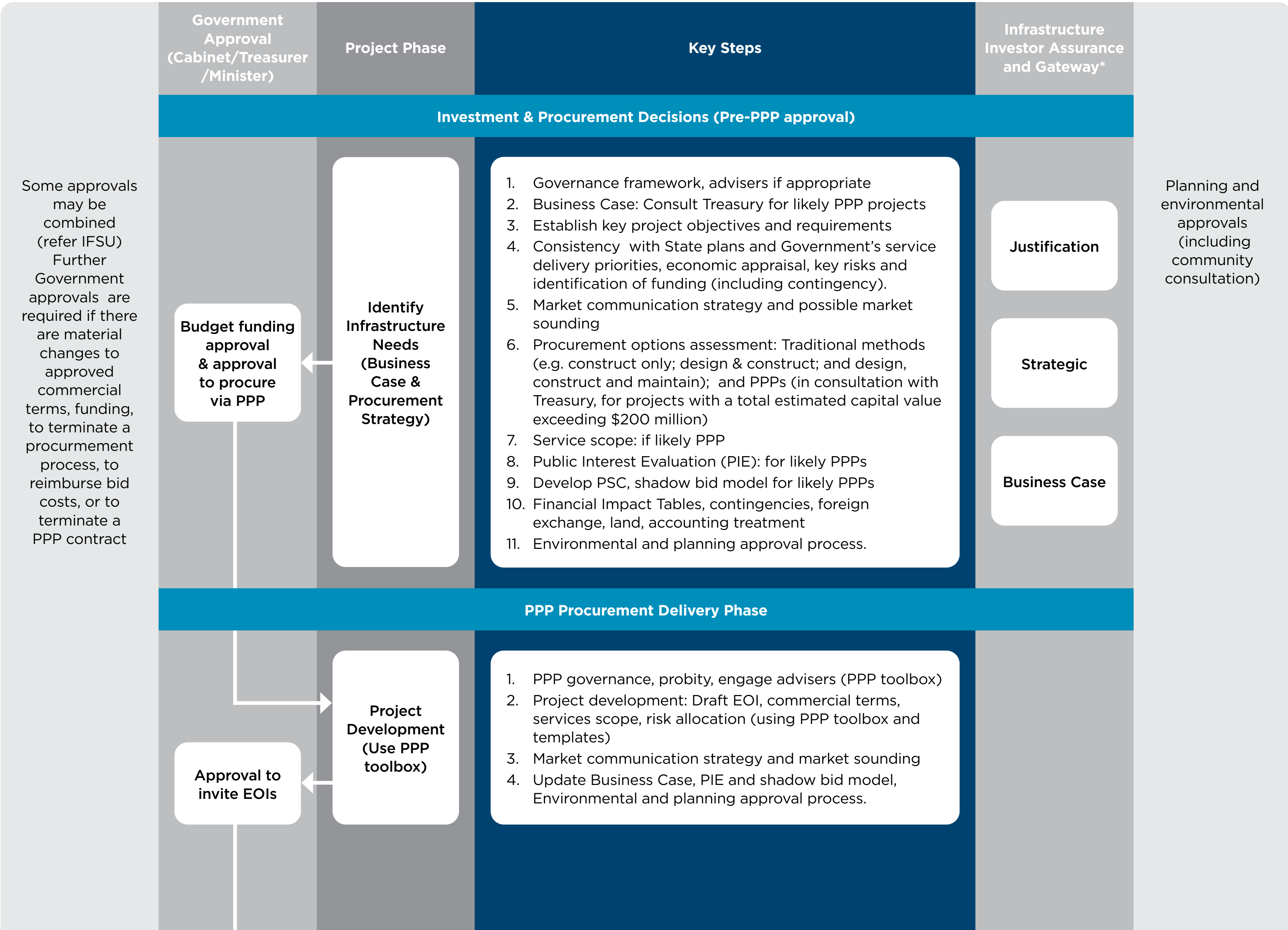
4.1.5 Environmental and Planning Approvals

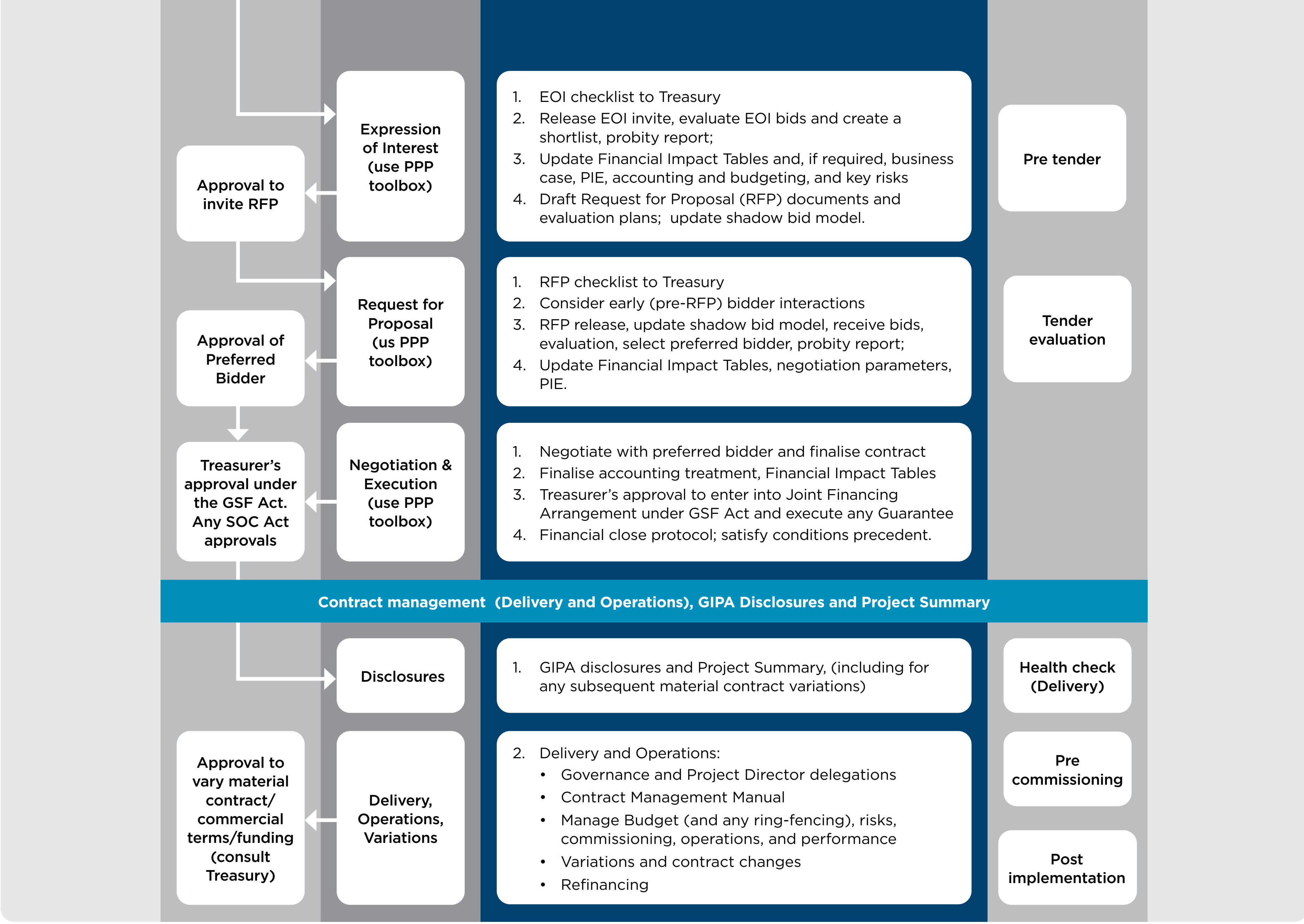
Work and documentation related to achieving key approvals needs to be progressed throughout the project planning and procurement phases. Cabinet should be informed of any key environmental and planning approval issues and risks as they arise. Refer to Section 4.4 for further details.

4.1.6 Financial Arrangements

In NSW, PPPs are generally JFAs, and in some cases also JVAs, which require approval by the Treasurer pursuant to the GSF Act and, if applicable, the *State Owned Corporations Act 1989* (SOC Act), as detailed in Sections 4.5 and 4.6.

Figure 4.1: Phases of Government approvals





The PPP toolbox is a set of templates to assist in preparing PPP related documents, including: Governance framework, EOI, RFP, PSCs and GSF letters.
* Note a Gateway check can occur at any time.

4.2 Cabinet approvals during PPP procurement

As summarised in Figure 4.1, Cabinet approvals, approvals from an appropriate Cabinet sub-committee, and Gateway Reviews are required at certain tender milestones and project key decision points (or 'gates').

At each milestone, Cabinet (or the appropriate Cabinet sub-committee) will consider any:

- Proposed material changes in the risk allocation
- Proposed (particularly bespoke) contract terms
- Forecast costs and funding updates, including contingency
- Accounting and budget impact on the Responsible Agency and the State
- Project scope
- Public interest and/or likely value-for-money outcome.

A Responsible Agency will be required to seek additional Cabinet (or appropriate Cabinet sub-committee) approvals during the PPP procurement process, if there are any material changes, including to the Business Case conclusions or project outcomes, or if any of the following apply:

- Material changes to the:
  - Forecast construction
  - Operating, or
  - Maintenance costs (particularly due to changes in project scope).
- Material changes to the revenue estimates or proposed or maximum user charges
- Additional funding (including funding for PPP procurement processes) is required from Government or from internally generated funds of the Responsible Agency
- There are significant changes in the likely or actual Planning Approval Conditions and these changes require additional public funding outside of the Responsible Agency's allocated contingency provisions
- There is a need to provide greater actual or contingent funding for exposures to State-borne risks
- There is a material change in the debt and/or equity financial markets that affects the viability and/or cost of the project, and/or
- There is any other material change to the agreed risk allocation or project costs and funding.

A further Cabinet (or appropriate Cabinet sub-committee) approval will be required prior to signing a contract if any material aspect of the negotiation terms previously approved by Cabinet (or an appropriate Cabinet sub-committee) has changed or cannot be met.

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

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

4.3 Government approvals and NSW Treasury consultation during delivery and operations

If the Responsible Agency becomes aware of a likely or proposed material contractual or commercial risk allocation change to an existing PPP, NSW Treasury must be consulted prior to agreeing or negotiating such changes. This includes the refinancing of any private sector debt, regardless of whether it is a consent or no consent refinance arrangement, or a change in control of a key private sector party. Refer to Section 7 and Appendix 5 for specific guidance.

The Responsible Agency may be required to obtain Treasurer approval and/or portfolio Ministerial approval, and/or Cabinet (or appropriate Cabinet sub-committee) approval prior to renegotiating any significant elements of, or agreeing to any material variations to a PPP, particularly where there is a significant budget risk or impact on the State's actual or contingent liabilities.

NSW Treasury, in consultation with the Department of Premier and Cabinet, will determine whether it would be appropriate to seek the approval of the Treasurer, portfolio Minister and/or Cabinet (or appropriate Cabinet sub-committee).

4.4 Environmental and planning approvals

Environmental and planning approval requirements are separate from the Cabinet approval requirements. However, the processes for obtaining environmental and planning approvals should occur in parallel with the Business Case and procurement processes, as demonstrated in Figure 4.1. Risks and costs associated with obtaining planning approvals should be considered at the outset as part of the Business Case development stage and updated as required throughout procurement and project delivery.

Under the *Environmental Planning and Assessment Act 1979* (EPA Act), consent must be obtained from the Minister for Planning (or, depending on the development, the Independent Planning Commission) for all State Significant Developments or Infrastructure under Part 4 and Division 5.2 of the EPA Act. Generally, service-enabling infrastructure PPPs are either State Significant Developments or State Significant Infrastructure, based on the project scope and capital investment value.

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

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

- Engage an internal or external planning expert and community consultation expert
- Consult with the appropriate planning approval authority, including discussions regarding the likely Planning Approval Conditions, and
- Inform Treasury, so it may facilitate these discussions via the Treasury Policy & Budget team.

This will assist in mitigating:

- Overall procurement costs for the Government and private parties, and
- Cost, affordability, and time risks associated with the planning approval process.

CONSULTATION ISSUE 7:

NSW Treasury invites feedback on the impact of the planning approval process on Responsible Agencies and bidders.

Likely development approval conditions and their associated costs need to be updated at the various project approval phases, in consultation with NSW Treasury. These costs may impact materially on Business Case conclusions, project budget, affordability and timing and commercial risk allocation. This may trigger the need to seek further Treasurer, portfolio Minister and/or Cabinet approvals (refer to Sections 4.2 and 4.3). The allocation of risks and costs relating to securing environmental and planning approvals and complying with any approval conditions must be detailed in the project deed, and for Social Infrastructure PPPs, should be consistent with the NSW Treasury Template Project Documents.

An appropriate contingency amount for cost risk associated with Planning Approval Conditions should be separately identified as part of the Responsible Agency's overall budget funding for the project. Management of contingency funding must comply with TC14-29: *Management of Contingency Provisions for Major Projects.*

4.5 Statutory approvals under the GSF Act

4.5.1 Approval to enter into Financial Arrangements

As stated above, PPPs are generally financial arrangements as defined in section 6.7 of the GSF Act, usually as JFAs, and in some cases also JVAs, defined in sections 6.11 and 6.12 respectively of the GSF Act.

Accordingly, before the Responsible Agency enters into PPP contract documents, the Treasurer's written approval is likely to be required under section 6.23 of the GSF Act upon the recommendation of the Responsible Minister for joint financing arrangements. Under section 6.23(5) of the GSF Act, an approval given for a JFA that is (or forms part of) a joint venture arrangement also operates as an approval for the JVA (but not vice versa), unless the approval provides differently.

NSW Treasury should be consulted on the appropriate wording for the Minister's letter containing the Minister's recommendation and requesting the Treasurer's written approval to enter into the PPP contract documents. Responsible Agencies should contact NSW Treasury for template copies of the Minister's letter, the Treasurer's response letter, and the formal written approval.

Responsible Agencies must engage with Treasury as early as possible once a procurement pathway has been determined. Treasury can assist in identifying whether and when GSF Act approvals may be required.

Prior to the Treasurer approving the entry into PPP contract documents, the Responsible Agency will need to provide the Treasurer (and NSW Treasury) with a copy of:

- A summary of the project, the project deed and supporting documents
- A summary of the major risks to the State under the project and how these have been addressed, and
- Final accounting and FIS Table, signed off by the CFO of the Responsible Agency.

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

4.5.2 Discretionary Government Guarantees for PPPs under the GSF Act

Pursuant to section 6.27 of the GSF Act, the State may guarantee the due performance of any obligations incurred by a Responsible Agency as a result of, or in connection with, the Responsible Agency entering into an authorised financial arrangement (Guarantee).

To avoid the process of the State simply guaranteeing its own obligations, State Guarantees may be considered only for those GSF Agencies[12] which (i) are a legal entity separate from the State, and (ii) whose liability is not already covered by the Crown Proceedings Act 1988.

State Guarantees are entirely discretionary and should only be provided on a case-by-case basis where there is a clear cost-of-financing benefit demonstrated by the Bidder to the State. NSW Treasury must be consulted regarding the appropriateness of providing such Guarantees.

In the event a Guarantee is considered appropriate, the NSW Treasury template PPP *Deed Poll of Guarantee* must be adopted. The list of 'Guaranteed Documents' is to be limited to those core project documents which form the basis of the financial arrangement and which contain the key financial obligations of the Responsible Agency. Responsible Agencies must consult with NSW Treasury prior to proposing or agreeing to changes to the:

- Guarantee
- Beneficiaries of the Guarantee, or
- Schedule of documents covered by the Guarantee.

4.5.3 Treasurer's GSF Act approval to amend a Financial Arrangement or Guarantee may be required in certain limited cases

In certain circumstances, amendments to previously signed PPP contract documents, which are financial arrangements, may also require the Treasurer's approval under the GSF Act. This will usually take the form of the Treasurer varying the previous approval provided for that financial arrangement.

12 As described in Section 2.4 of the GSF Act.

Responsible Agencies must consult with NSW Treasury prior to commencing contractual or commercial renegotiations with counterparties to PPP contract documents, consistent with:

- The terms of the Treasurer's existing approval to enter into PPP contract documents, and
- These Guidelines.

NSW Treasury will advise whether a Treasurer's approval or other Cabinet/Ministerial approval is required to amend any existing PPP contract documents, taking into account expert legal advice. NSW Treasury should be involved in the relevant contractual or commercial negotiations.

In certain limited circumstances an existing Guarantee may need to be refreshed or re-issued. Responsible Agencies must consult with NSW Treasury, especially where the project risks are changing.

Where the existing Guarantee is proposed to be amended or a new Guarantee is proposed to be issued, Responsible Agencies must consult with NSW Treasury as soon as possible prior to proposing or agreeing to a new Guarantee, or changes to the existing Guarantee or the beneficiaries, or the schedule of documents covered by the Guarantee.

4.6 Statutory approvals under the State Owned Corporations Act

Before entering into a PPP contract, State Owned Corporations (SOCs) or subsidiaries of a SOC may need to obtain written approval from their voting shareholders under section 19 or 20X of the *State Owned Corporations Act 1989* (SOC Act), unless the Treasurer gives written notice that it is not required. These approvals should be obtained prior to obtaining Cabinet and GSF Act approvals.

SOCs, or their subsidiaries, should confer with NSW Treasury to determine whether this approval is required for their particular PPP.

4.7 Direct negotiations

In addition to the evaluation criteria, other relevant legislation, policies, and processes must also be complied with, including:

- ICAC Direct Negotiations: Guidelines for Managing Risks (August 2018)
- NSW Procurement Policy Framework for Government Agencies (July 2015), and
- NSW Code of Practice for Procurement.

4.7.1 Unsolicited Proposals approval process

Unsolicited Proposals for PPPs are proposals initiated by a private sector proponent to deal directly with the Government, where the Government has not requested the proposal. Such proposals can be a source of innovative ideas about how to improve Government infrastructure and the delivery of Government services.

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

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

In certain circumstances, a Responsible Agency, in consultation with NSW Treasury, may directly deal with an incumbent PPP concessionaire, outside the framework of the Unsolicited Proposals Guide, as outlined below in Section 4.7.2.

4.7.2 Direct negotiations with an incumbent of an existing PPP concession

Where a proposal is from an incumbent, or a member of an incumbent PPP Consortium, to vary an existing concession, which may or may not include related new or modified infrastructure, the Responsible Agency and Proponent must comply with:

- The existing PPP contract documents (where relevant, and
- These Guidelines.

This is the case irrespective of whether the existing PPP contract documents contain specific modification or variation clauses.

For such variations, the Responsible Agency may not need to comply with the Unsolicited Proposal Guide.

4.7.2.1 Material variations to an existing PPP concession

In accordance with Appendix 5 of these Guidelines, a proposal to materially vary an existing PPP with an incumbent, or a member of an incumbent PPP Consortium, requires consultation with NSW Treasury and relevant Cabinet approvals prior to:

- Entering into direct negotiations with a Proponent
- Signing any Memorandum of Understanding or Heads of Agreement
- Materially changing any commercial terms previously approved by Cabinet, and
- Signing amending documents.

The Responsible Agency, in consultation with NSW Treasury, must:

- Establish an appropriate PPP Governance Framework, with NSW Treasury representation, and a Negotiation Plan at the outset, and
- Assess the proposal, at the very least, against the "Minimum Criteria for Evaluating Commercial or Contractual Change" as set out in Appendix 5, relating to:
    - Value for money
    - The benefits and costs of the changes to Government and the private party,
    - Impact on the State budget and project affordability

- The impact on the allocation and management of risks and avoiding creating an undesirable precedent
- Continuing viability of the project and
- External market forces.

4.7.2.2 Augmentations

In addition to Sub-section 4.7.2.1, above, when materially varying an existing PPP with an incumbent, or a member of an incumbent PPP Consortium for an augmentation, the Responsible Agency should also:

- Invest significant time in establishing a Negotiation Plan and strategic objectives at the start of the augmentation procurement process to guide the process, scope and risk allocation, and to test the success of outcomes achieved
- Adopt early, open, and collaborative communications and stakeholder engagement — internally with Government stakeholders, and externally with the Proponent
- Follow the original project risk allocation with any changes made as a result of specific project/scope changes
- Provide price guidance on capital expenditure to the Proponent early in the procurement process to manage price expectations
- Ensure the integrity of the value-for-money benchmark by dedicating appropriate resourcing, and
- Ensure project deadlines are meaningful and realistic.

Project need, funding and Procurement Strategy

5

MANDATORY MINIMUM REQUIREMENTS:

- **A public infrastructure project with a total estimated capital value exceeding $200 million, must be assessed for possible PPP procurement.**
- **The Business Case and Procurement Strategy must be completed prior to seeking Cabinet approval for the Final Investment Decision.**
- **A preliminary Public Sector Comparator and a Shadow Bid Model (SBM) must be developed during the Business Case and Procurement Strategy phases unless otherwise agreed with NSW Treasury.**
- **A Public Interest Evaluation (*see Appendix 1*) must be completed and submitted for Cabinet consideration prior to proceeding to market.**

5.1 Business case and Procurement Strategy

The Responsible Agency must identify public infrastructure needs to achieve its service delivery objectives in line with its Outcomes and Business Plan[13].

A Final Business Case is commonly used to support the Government's investment (funding) decision. Simultaneously, Responsible Agencies must develop a Procurement Strategy including a procurement option analysis in consultation with NSW Treasury to support the procurement decision.

The Responsible Agency must complete the Final Business Case and Procurement Strategy (including procurement option analysis) prior to seeking Cabinet or budget approval to fund and procure the infrastructure project and associated services. The investment decision and procurement decision should be sought concurrently, and the investment (funding) decision must be based on the chosen procurement method determined by the Procurement Strategy, unless otherwise approved by Cabinet.

Prior to the NSW Government approving the investment and procurement decisions, the Responsible Agency must have undertaken IIAF Gateway Reviews 2 and 3[14] on the Final Business

13 Outcome budgeting encompasses and integrates all aspects of performance accountability. A Cluster Outcomes and Business Plan sets out outcome-focused performance objectives and how to achieve them.

14 https://www.infrastructure.nsw.gov.au/project-assurance/resources/nsw-gateway-reviews/gates-1-6/.

Case and Procurement Strategy, respectively. Gate 2 assesses the robustness of the Final Business Case prior to funding approval and readiness to progress to the procurement stage. Gate 3 assesses delivery readiness to release substantive procurement documents (e.g. Request for Tender) to the market to seek a commercial offer.

5.1.1 Preparation of Business Case and Procurement Strategy

A Responsible Agency must consult NSW Treasury as early as possible when developing a Business Case and Procurement Strategy for a likely PPP. This consultation should occur prior to engaging external consultants, preparing a procurement options analysis, preliminary risk allocation or Commercial Principles, or engaging with the market (including conducting market soundings). As stated in 3.5.1, NSW Treasury maintains lists of pre-qualified consultants with PPP, commercial, financial, legal, accounting, and Probity expertise.

In NSW, a public infrastructure project with a total estimated capital value exceeding $200 million, must be assessed for possible PPP procurement, having regard to value-for-money drivers as part of the Procurement Strategy. This threshold also applies to smaller projects that may be bundled together as part of a single bid or tendering offer, for example a number of new and/or brownfield school projects.

Business Cases must be prepared consistent with relevant policies in Appendix 3.

During the development of a Business Case — irrespective of the procurement method — a successful procurement will be facilitated by:

- Establishing project objectives and outcomes. This involves determining what the Responsible Agency and Government is trying to address, for example:
  - Greater use of public transport
  - Reducing pressure on the health or justice system
  - Improving quality of service
  - Introducing innovation
  - Urban renewal
  - Improving commuter times/information and IT efficiency, and
  - Removing trucks from surface streets.
- Clarity on the appropriate risk allocation for project specific risks; and
- The Responsible Agency committing to a realistic project and procurement timetable that is defensible. The timetable should consider:
  - Any constraints for construction start/end dates
  - Land acquisition process
  - EPA process
  - Establishing Project Team and advisers
  - Market soundings and interactions with potential and short-listed bidders (particularly for complex projects)
  - Time needed to obtain other approvals (including approvals from Cabinet, Treasurer and/or Ministers, as well as Commonwealth departments and Agencies), and
  - Resolving any unique project-specific risk allocation issues and preparation and evaluation of tenders.

The timetable should also take into consideration the number and timetable of other infrastructure projects in Australia that may impact bidder capacity.

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

5.1.2 Identifying procurement risks

The Responsible Agency should prepare a realistic and complete set of cost estimates reflecting current and potential market conditions. This should include, but not be limited to, land acquisition costs, likely development approval condition costs, procurement costs and an appropriate separately identifiable amount for contingencies for the occurrence or realisation of risks, including any interest rate or foreign exchange risk.

It is important to identify the extent to which the project will be exposed to financial risks such as foreign exchange (FX) and/or interest risks. If a material amount of goods or services are likely to be sourced from foreign jurisdictions, variations in the exchange rate between Australian dollars and the foreign currency in which these goods and services are denominated could lead to fluctuations in the project cost and, in extreme cases, jeopardise the affordability of the project. Material FX risks should be highlighted in the Business Case as early as possible, provided for through the project's contingency provision, and continually monitored throughout project procurement. Any material FX risk should also be flagged with TCorp, facilitated by NSW Treasury, to determine if hedging is appropriate.

NSW Treasury has introduced financial risk policies to assist Agencies with managing their risks, for example TPP18-03: *NSW Government Foreign Exchange Risk Policy*. The policy sets out the core requirements and relevant guidance for Agencies to manage financial risk exposures and is designed to improve project cost certainty and provide a cost-efficient management of financial risk. The Responsible Agency should consult NSW Treasury when the project is, or is likely to be, exposed to financial risks.

The Responsible Agency should develop the FIS in a Cabinet Submission in consultation with NSW Treasury to summarise all financial information for likely PPPs. The FIS must be reviewed and endorsed by the Responsible Agency's CFO and NSW Treasury prior to seeking Cabinet approval.

5.2 Public Sector Comparator and Shadow Bid Model

In NSW, a preliminary Public Sector Comparator (PSC) and a Shadow Bid Model (SBM) must be developed for likely PPPs during the Business Case and/or Procurement Strategy phases as minimum requirements, unless otherwise agreed by NSW Treasury.

The PSC and SBM are intended to inform the likely value-for-money drivers and the likelihood of achieving value for money in the case of a PPP procurement.

PSC:

- Represents the State's best and/or likely alternative to the PPP
- Value for money is determined by evaluating and comparing the price and non-price aspects of the bids (refer to Section 6.5.5) against the PSC, noting the final risk adjusted tender price is compared to the PSC to determine value for money to the State.

SBM:

- Represents the Responsible Agency's best estimate of the private consortia's bid price to deliver the output specification under a PPP project structure
- Should reflect the private consortiums expected costs, capital structure and Commercial Principles
- Serves as a basis for evaluating and interrogating the reasonableness of the bids, enabling the evaluation panel and advisors to validate and challenge the bids on a comparable basis.

The PSC and SBM require a high level of technical expertise in project costing, financing and risk analysis. The Responsible Agency is required to consult with NSW Treasury, and the PSC and SBM must be developed in conjunction with NSW Treasury. Responsible Agencies should engage various technical experts to advise on capital and operating cost estimates, as well as any revenue estimates. Given estimates are subjective, they should be verified through benchmarking analysis, independent review or other checks. Stress testing of model robustness and key assumptions should be conducted.

The National PPP Guidelines provide detailed guidance on constructing PSCs for social infrastructure. Responsible Agencies must consult with NSW Treasury to obtain the appropriate discount rates (including risk-free rate) for the PSC and SBM used in social and economic infrastructure projects.

The assessment of SBM and the bid should use the same discount rate and may vary subject to the level of systematic risk transferred to the private sector. The SBM may also be used as an indicator of affordability. The Responsible Agency must consult with NSW Treasury immediately if at any time affordability issues are likely to arise.

After a project is approved for PPP procurement, the PSC and SBM are to be refined within the approved parameters/limits and updated in line with the terms of the Request for Proposal (RFP), draft deed and output specification.

Both the PSC and the SBM are dynamic and should be updated as new information is received but should be finalised prior to, or soon after, RFP release. The PSC and/or SBM must not be modified after the opening of bids unless there is an obvious significant error or new information which impacts on the estimated forecasts. Any such changes must be documented, consulted on and approved prior to making any modifications to the PSC and/or SBM.

5.3 Public Sector Comparator: Availability and Economic Infrastructure PPPs

5.3.1 PSCs for Availability PPPs

PSCs for availability-based infrastructure are calculated as the estimated net present value (NPV) of a project's expected cash flows based on traditional infrastructure procurement and delivery and whole-of-life project costs discounted by the risk-free rate. The rationale for this calculation methodology is that revenue derived from social infrastructure is primarily sourced from the Responsible Agency (for and on behalf of the NSW Government), through availability-based payment mechanisms. The PSC for social infrastructure projects is cost-driven, and the

Responsible Agency (for and on behalf of the NSW Government) generally retains most, if not all, of the demand risk.

The cash flows for availability-based infrastructure in the PSC include three core components:

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

5.3.2 PSCs for Economic Infrastructure PPPs

Similar to availability-based Infrastructure, the PSC for economic infrastructure is also an estimate of the whole-of-life cost of the project if delivered by the Government, including any third-party revenue components to generate a commercial return such as toll revenue or user charges. Accordingly, this may be viewed as two separate and distinct cash flows for the purposes of PSC analysis.

The Responsible Agency should apply the risk-free rate in accordance with the National PPP Guidelines (Volume 5: *Discount Rate Guidance*) to discount the whole-of-life project cost in the economic infrastructure PSC and separately apply a different discount rate to the third-party revenue component to reflect the uncertain nature of the third-party revenue.

In determining the discount rate for third party revenue, the Responsible Agency should consider deriving a Weighted Average Cost of Capital (WACC) of a private company with similar projects of comparable risk to third party revenue. The Responsible Agency should consider the beta, cost of capital and capital structure of companies that are exposed to the inherit risk of similar third-party revenues.

The PSC for economic infrastructure is then calculated as the sum of the two components shown below:

1. The Net Present Cost (NPC) of the project's whole-life-costs based on traditional infrastructure procurement discounted by the risk-free rate, and
2. The NPV of the third-party revenue generated from the project discounted by WACC.

5.4 Market Communication Strategy

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

- The NSW Government's key project messages, objectives and expected outcomes for delivering Government services

- A realistic project and procurement timetable, and
- The process for communicating changes to key project information, including delays or if project delivery is to be accelerated.

This Market Communication Strategy should take into account the probity framework (refer to Section 3.7) and be updated at each key project phase, including prior to the EOI and RFP release, as shown in Figure 4.1. The Market Communication Strategy should also consider the key principles in the NSW Interactive Tendering Guidelines[15].

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

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

5.5 Market soundings

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

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

- Establish private sector interest and market capacity, including:
  - Advisors and the role of equity
  - Debt and equity providers
  - Design and construct contractors, and
  - Operation and maintenance contractors.
- Help develop key project objectives, taking into account NSW Government priorities
- Help inform project and service scope
- Help inform, develop and resolve complex design, engineering and commercial risk allocations and mitigations, which may include feedback on any proposed:
  - Conditional Debt Pay Down (CDPD) structure or other NSW Government funding such as capital contributions
  - Intended flexibility within the structure
  - Interface risks.

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

15 See http://www.infrastructure.nsw.gov.au/media/2449/insw_interactivetenderingguidelines.pdf

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

- Have prepared a Market Communication Strategy (refer to Section 5.4)
- Have clear objectives regarding the outcomes of the market sounding process and communicate these objectives to the potential bidders
- Provide information on the status of the project (for example, Business Case phase, to communicate that a procurement decision has not been made)
- Do not set expectations regarding the project if they have not received approvals for Government funding or Procurement Strategy
- Use the opportunity to inform the development of, or revisions to, the Market Communication Strategy to be used during any Tender Process, and
- Have potential bidders sign an appropriate confidentiality deed poll.

5.6 Public Interest Evaluation for likely PPPs

5.6.1 Purpose

The purpose of the public interest test is to assess whether the structure of the PPP project adequately protects the public interest. Public interest is an important part of PPP planning, project development and approval of the Business Case.

PPPs need to undergo a Public Interest Evaluation (per Appendix 1) to ensure that the PPP is in the public interest. The Public Interest Evaluation must be submitted to, and subsequently be considered by, Cabinet prior to proceeding to the market, and must be updated throughout the procurement process, as detailed in Figure 4.1. Cabinet may also require updates to the Public Interest Evaluation to be submitted at other points during the Tender Process.

5.6.2 The test for assessing the public interest

Responsible Agencies are accountable for assessing public interest issues associated with a PPP procurement.

Appendix 1 provides a Public Interest Evaluation test incorporating the eight elements to be considered when seeking approval to commence procurement. The test necessitates an 'on-balance' determination as to whether the public interest can be adequately protected. This requires a judgement as to whether the failure to adequately protect any individual public interest element is a significant concern and whether it outweighs (on its own, or together with other failures) the benefits to the collective public interest arising from the potential PPP being delivered.

Procurement: Expression of Interest, Request for Proposals and negotiations

6

MANDATORY MINIMUM REQUIREMENTS:

- **Responsible Agencies must submit a completed EOI checklist to NSW Treasury prior to the release of the EOI.**
- **Responsible Agencies must submit a completed RFP checklist to NSW Treasury, prior to releasing the RFP documents.**
- **The Responsible Agency must prepare a document based on the NSW Treasury project deed commercial principles to confirm agreement and consistency with the project approach.**
- **Where a Responsible Agency has a project-specific reason to deviate from provisions in the Template Project Documents, the Responsible Agency must show cause and seek approval from NSW Treasury for any departures.**
- **Responsible Agencies must consult with NSW Treasury to determine and agree on the appropriateness of a CDPD and the quantum for each specific project.**

The National PPP Guidelines detail the required documentation and procedures at each phase of procurement. The following Sections highlight a number of additional NSW requirements, consistent with the objective of minimising bid costs.

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

6.1 Market Communication Strategy

As presented in Figure 4.1, an updated Market Communication Strategy documenting the process for communicating with potential and short-listed bidders should be submitted at each Cabinet approval (refer to Section 5.4).

6.2 Market sounding

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

6.3 Expression of Interest phase

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

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

The EOI documentation and requirements should clearly:

- Identify the procurement approach, outline the contract structure, and a high-level risk allocation
- Include a clear delineation of scope of the PPP package and interfaces with the different project packages in the event the project comprises a number of contract packages, of which one is a PPP, and
- Communicate which technical advisers and documents are required to be identified and those that the Responsible Agency expects to contribute during the EOI stage.

Responsible Agencies should provide sufficient flexibility to allow consortia to procure specialist advisers, which are not key to shortlisting, after shortlisting has occurred. This may increase competition among specialist advisers and enable consortia to obtain improved pricing.

6.3.1 Expression of Interest checklist

Prior to releasing the EOI, the Responsible Agency must submit a completed checklist to NSW Treasury to confirm they are ready to release the EOI documents and manage the EOI process. As per Section 3 of these Guidelines, the governance structure should endorse issuing EOI documents.

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

6.3.2 Information provided to bidders

Responsible Agencies should consider the accuracy and completeness of information to be provided to bidders at the EOI phase, particularly in respect of technical documentation. Where information is incomplete, or not provided to bidders with sufficient time to analyse it, bidders will likely view the project as higher risk. Bidders may spend additional bid costs to expedite analysis and/or derive further information, or heavily qualify their EOI response.

Responsible Agencies should only provide information that they are confident will remain relevant at the RFP phase to avoid releasing multiple versions of the same information.

As presented in Figure 4.1, certain documents may need to be updated prior to requesting Cabinet approval to proceed to the RFP phase and announcing Short-listed Bidders. This includes:

- Changes to key information or assumptions
- Updating the Business Case
- Public interest evaluation (Appendix 1), and
- FIS Table (see Appendix 2).

6.4 Early (pre-Request for Proposal) bidder interactions

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

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

The Responsible Agency should be cognisant of the probity framework in these interactions.

The Interactive Tender Process during the RFP phase is outlined in Section in Section 6.5.3.

6.5 Request for Proposals phase

Responsible Agencies should consider approaches to minimising bid costs by:

- Only requesting information in the returnable schedules that is required to effectively evaluate proposals
- Deferring requesting information that is not required for evaluation to the post-preferred bidder or post-contract award stage
- Considering whether full documents are required to be prepared by the bidders (for example, communication plans, operating plans, or full subcontracts) or if less developed documents would be sufficient (for example, outlines of plans, a selection of plans but not all, or term sheets instead of full documents)
- Ensuring that there is a clear link between each piece of information requested and the evaluation criteria to which they apply.

Responsible Agencies, in consultation with NSW Treasury, should develop the RFP documentation based on the NSW Treasury PPP templates. The RFP documentation should be complete and accurate and include comprehensive contractual and technical documentation. Providing complete and accurate documentation will ensure Short-listed Bidders are aware of, and have sufficient time to consider, the contract terms that the Responsible Agency is seeking. Bidders should also be asked to submit a fully marked up project deed.

CONSULTATION ISSUE 8:

NSW Treasury invites feedback on further initiatives that may materially reduce the cost of bidding on NSW projects.

Prior to releasing the RFP documents, the Responsible Agency must submit a completed checklist to NSW Treasury to demonstrate its readiness to release quality RFP documents and can effectively manage the RFP process. This will assist the likelihood of receiving quality bids from bidders on time with few addenda.

The checklist is designed to ensure that the RFP has been prepared such that:

- Bid costs are minimised
- NSW Government's project and services objectives are clear, and
- Only quality and necessary information is received at the RFP stage.

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

6.5.1 Template Project Documents for infrastructure

Responsible Agencies are required to adopt the suite of template contractual documentation (Template Project Documents) that has been developed by NSW Treasury for PPP projects, unless otherwise agreed with NSW Treasury.

The aim of the Template Project Documents is to provide a consistent and efficient risk allocation, whilst recognising that the Responsible Agency may require flexibility to accommodate project specific requirements. By maintaining consistency in approach across projects, the Responsible Agency and the private sector participants are collectively incentivised to minimise time and resources required to draft and negotiate project documentation. This enables the Responsible Agency and the private sector to focus on key project issues and provides greater certainty around the terms on which both parties consented to contract and undertake the project.

The Template Project Documents, which include templates for the project deed, the financier's tripartite agreement, and other key project documents, will form the basis of contractual documentation to be released to bidders as part of the RFP documentation. The Responsible Agency must prepare a document based on the NSW Treasury project deed commercial principles to confirm agreement and consistency with the project approach. Where a Responsible Agency has a project-specific reason to deviate from provisions in the Template Project Documents, the Responsible Agency must show cause and seek approval from NSW Treasury for any departures.

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

- Adjustment of the relief and compensation regimes to align with the delivery and operational stages of a project
- Inclusion of a two-stage completion process comprising technical completion and commercial acceptance
- An ability of the State to pay down a portion of senior debt once the facility is operational
- Reduced 'asset-related' requirements
- Adjustments to the treatment of uninsurable risks
- Requirement to comply with relevant building codes, including the NSW Code and Guidelines for the Building and Construction Industry
- Provisions in relation to privacy, governance, community, health and safety.

Key areas of the Template Project Documents that will need to be adjusted for project specific requirements are:

- The services specification
- Payment mechanism, and
- The associated Key Performance Indicators (KPIs).

6.5.1.1 Conditional Debt Pay Down contribution

The template project deed includes an ability for the State to pay down a portion of senior debt. If a Conditional Debt Pay Down (CDPD) is included in the project deed, the Responsible Agency must pay down the agreed amounts once the project is completed and operational, subject to the Project Company's satisfaction of CDPD conditions. These conditions may include, but are not limited to:

- No outstanding major default; and
- The CDPD amount allocated directly to paying down outstanding debt.

Once a CDPD has been made, the availability payment from the State will step down by pre-agreed amounts in accordance with a CDPD protocol.

The State's incorporation of a CDPD in the project deed and the quantum of that payment will be determined on value-for money-grounds, taking into account a corresponding reduction in risk to the project in the post-construction environment.

Responsible Agencies are required to consult with NSW Treasury to determine and agree on the appropriateness of a CDPD, and the quantum for each specific project.

6.5.1.2 State capital contributions

The State may consider making Capital Contributions during and/or at the end of construction period. State Capital Contributions should only be made against key identifiable milestones subject to satisfying certain conditions. The State may make this decision if there are capacity constraints on the private debt and capital markets at the time, taking into account the size, complexity and estimated cost or value of the project's infrastructure. In this case, the template project deed terms would need to be adjusted to include this project specific requirement.

6.5.1.3 Output specifications and KPIs

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

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

- KPI and performance regimes should be output based
- Only set KPIs which are required to drive the desired performance, with a small number of critical service obligations to be measured
- KPIs should relate to performance only. Issues related to availability of the facility should be dealt with in determining the availability payments. There should be a clear separation between which elements of the services specification relate to availability issues and which relate to performance issues.
- KPI definitions should be tested to ensure they:
  - Relate to events within the Project Company's control and they do not encourage perverse provider behaviour, and
  - Avoid duplication where other mechanisms, such as an element of demand risk or the default regime, exist to drive desired behaviour.
- Detailed testing should be undertaken to ensure the calibration of the KPIs and payment mechanism results in appropriate abatements (commensurate with importance) for the specified performance issue.

6.5.1.4 Taxation

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

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

For those tax risks that can threaten the viability of a project, Responsible Agencies should consider requiring the private party to obtain a binding ruling from the Australian Taxation Office as a condition precedent to the contract becoming effective.

6.5.2 Disclosure of Public Sector Comparator and Shadow Bid Model

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

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

CONSULTATION ISSUE 9:

NSW Treasury invites feedback on the disclosure of the PSC to Short-listed Bidders. Please include in your response supporting reasons and examples of impacts on bid efficiency, innovation and value-for-money outcomes. In your feedback, please also consider the content of the disclosure.

The results of the PSC will usually be made public in the Project Summary following financial close.

6.5.3 Interactive Tender Process

The RFP should include an Interactive Tender Process (ITP) where Responsible Agencies and NSW Treasury hold a series of individual workshops with Short-listed Bidders in accordance with the NSW Interactive Tendering Guidelines[16], and the procedures and timetable set out in the RFP and the probity framework.

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

The objective of the ITP is to:

- Improve the quality of bid submissions
- Ensure bids meet key project objectives
- Minimise overall transaction costs, and
- Ultimately deliver better outcomes for the public, through clear communication of the Government's requirements and priorities.

The sessions should facilitate a frank discussion of the NSW Government's project affordability requirements. Responsible Agencies should contact NSW Treasury for a copy of the ITP Protocol template.

The ITP should include a planning workshop with each Short-listed Bidder and the Department of Planning, Industry and Environment, so that Bidders have an opportunity to discuss the development approval process and any conditions that have been set, or are likely to.

16 http://www.infrastructure.nsw.gov.au/media/2449/insw_interactivetenderingguidelines.pdf

The Responsible Agency should request that bidders submit a proposed agenda or key issues in advance of the ITP workshop. This allows the procurement team to prepare clear guidance for the workshop.

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

All ITP sessions should have the Probity Adviser in attendance.

6.5.4 RFP submission requirements

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

6.5.5 Evaluating PPP bids and value for money

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

As explained in Section 3.6, all evaluators should have the appropriate technical skills to undertake the task and be experienced in PPP evaluation, or provided with appropriate training to undertake the evaluation.

Evaluation of PPP bids is undertaken in accordance with the tender evaluation plans and probity requirements, including by:

- Assessing bids against the non-price criteria
- Comparing price proposals, and
- Making a value judgment on which bidder provides the best value, taking into account both the non-price assessment and the price comparisons of each bidder.

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

6.5.5.1 Value for money

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

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

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

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

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

- Interrogation of the Proponent's financial models to determine the reasonableness of any infrastructure, land acquisition, service, and maintenance cost estimates, and
- If relevant, revenue estimates (including the appropriateness and acceptability to the NSW Government of any user fees or prices, and reasonable estimates for forecast quantity levels).

This evaluation may include the use of independent experts or valuers, benchmarking analysis, sensitivity testing, and where appropriate, the use of comparative financial models like PSC or SBM, based on a Reference Project.

- An appropriate return on the private sector's investment
- Formal risk adjustment of the cost and revenue estimates where appropriate
- The amount of any contingency provision, particularly in the case of infrastructure related proposals
- Ensuring there is no double-counting for risk adjustments across each of:
  - The individual cost line items (or revenue line items)
  - An appropriate rate of return
  - The amount of the contingency provision.

6.5.5.2 Use of weightings

The NSW Government does not use a formulaic approach by applying weightings when evaluating bids.

Weightings and formulas may place undue emphasis on particular factors, such as price, rather than overall value for money drivers, including design or operating innovation and efficiencies. For example, formulas cannot take proper account of the fact that a bidder may have deficiencies on essential requirements that would be too timely, risky and costly to overcome, if the bidder also offers a substantially lower price.

6.5.6 Affordability issues during procurement

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

6.5.7 Reimbursement of bid costs

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

The NSW Government's *Bid Cost Contributions: Policy, 2018* states that 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 percent of the expected bid costs, as estimated by the Responsible Agency, subject to several value-for-money considerations.

For each project where the Responsible Agency is proposing to contribute to bid costs, the Responsible Agency must first consult and obtain confirmation from NSW Treasury. NSW Treasury's ISFU administers the Bid Cost Contributions policy.

6.6 Negotiation and contract finalisation

6.6.1 Negotiation Parameters

Before seeking Cabinet approval to begin contract negotiations with one or more Proponents, the Responsible Agency, together with NSW Treasury, must complete the following tables in Appendix 2:

- Table 3: *Financial Impact Statement Table for approval to appoint Preferred Bidder*, and
- Table 4: *PPP Negotiation Parameters*.

Any departures from the Commercial Principles underpinning the RFP documentation and prior Cabinet approvals are required to be explained.

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

> CONSULTATION ISSUE 10:
>
> **NSW Treasury invites feedback on the efficiency of the post bid/pre preferred phase.**

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

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

6.6.2 Financial close

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

Contract management: Delivery and operations

7

MANDATORY MINIMUM REQUIREMENTS:

- **Responsible Agencies must comply with the requirements of Appendix 5 when administering PPP contracts from contract close.**
- **Responsible Agencies must consult with NSW Treasury prior to negotiating or agreeing proposed contractual or commercial changes to existing PPP projects.**
- **Responsible Agencies must consult and seek advice from NSW Treasury on any proposed PPP refinancing, even where formal consent is not required.**

The National PPP Guidelines: Volume 2 Practitioners Guide, Chapter 7 and Appendix H provides useful Guidance on contract management during the delivery (i.e. construction phase) and operations stages.

After contract execution, delivery and ongoing contract management of the project during the delivery stage will usually be transferred to a delivery Project Director and an implementation Project Team, overseen by a Project Steering Committee.

During the operations stage, the project will generally be managed by a representative of the Responsible Agency.

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

7.1 Engaging the delivery Project Director prior to delivery stage

An appropriately qualified delivery Project Director (who may be different from the procurement Project Director) should be engaged several months prior to the end of the procurement stage. This will facilitate a smooth and efficient transfer from the procurement stage to the project delivery stage. It will also ensure that from day one of the delivery stage, the delivery Project Director has the benefit of:

- Knowledge transferred from the procurement team to the contract management team
- Invoking the contract management strategy immediately upon contract execution

- A solid understanding of the contract, and the Responsible Agency and private sector's deliverables
- The basis for the risk allocations, and
- The Responsible Agency's project budget and EPA requirements.

This knowledge will help to ensure that value for money, contractually agreed risk allocation and the intended project objectives are maintained throughout project delivery and operations stages. There is also benefit in the delivery team having access to the procurement team for better continuity as the project transitions into the delivery phase.

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

The delivery Project Director and senior management of the Responsible Agency must comply with Appendix 5 of these guidelines and other relevant NSW Government policies (refer to Section 7.4)

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

It is highly advisable that the delivery Project Director and implementation Project Team members undertake contract management for PPPs training, which is normally provided annually or semi-annually through a joint arrangement between Partnerships Victoria and NSW Treasury.

7.2 Project Steering Committee during delivery

The Project Steering Committee (Committee) will generally be chaired by a senior person of the Responsible Agency with responsibility for delivering and managing the PPP project during the delivery stage. Other Committee members should include senior personnel from:

- NSW Treasury
- Department of Premier and Cabinet
- Other relevant Agencies, and
- May also include independent experts.

The delivery Project Director should attend all Committee meetings and is responsible for ensuring appropriate secretariat services are provided to the Committee.

The Committee will usually meet monthly during the delivery.

The Committee will oversee a number of key activities and issues, which may include:

- Ensuring the delivery Project Director is efficiently managing the project to achieve successful delivery of the PPP project. This will include managing contractor and client performance, monitoring construction progress and quality, managing stakeholders, managing any changes to scope, and ensuring that risk allocation is in accordance with the project deed
- Providing strategic direction through expertise, capabilities, knowledge and guidance to the delivery Project Director and implementation Project Team
- Ensuring a coordinated, whole-of-Government position and approach to the PPP project

- Ensuring a contract administration manual is produced for use by the Responsible Agency. This should include all of the Responsible Agency's obligations over the life of the contract to help ensure they are met on time and in accordance with the required processes outlined in the contract
- Helping to ensure the Responsible Agency meets their obligations for project disclosures on time. This includes GIPA Act disclosures, and Project Summaries (refer to Section 9)
- Managing and mitigating material risks, including securing EPAs (if not achieved prior to contract close), as well as completion and commissioning risks
- Ensuring ongoing consultation with stakeholders and the community, as required and consistent with EPA conditions
- Where required, assist in managing relationships between the delivery Project Director, implementation Project Team, and the Project Company. This may include assisting with formal and informal disputes and performance issues, including a sensible and practical approach to enforcing abatements
- Monitoring and keeping the PPP project within the Responsible Agency/project budget provisions including any specific provisions for:
  - Contingencies
  - Timely payments of any State lump-sum contributions, and
  - Regular monthly/quarterly service payments within the terms of the contracts.
- Overseeing proposed amendments and changes to any contract and or commercial requirements (further details below), including ensuring public disclosure requirements are met (refer to Section 9)
- Facilitating compliance with the IIAF, including post-contract award Gateway Reviews at pre-commissioning and post implementation stage, gateway health checks, in addition to any other IIAF reporting requirements
- Ensuring relevant Cabinet sub-committees are updated, as may be appropriate, on key activities including milestones, budget (including any contingency) and management of key risks
- Overseeing the handover of assets (if any) and transition procedures ahead of the operations stage.

7.3 Managing performance during the operations stage

The operations stage is generally the period of the PPP project with the longest duration. It is the key period when delivery of the promised services and outcomes is expected to be realised.

During the operations stage the delivery Project Director and Committee generally focus on:

- Monitoring the delivery of the contracted services, and realisation of the promised benefits
- Resolving any legacy issues
- Maintaining relationships between the Responsible Agency and the Project Company's representative, and ensuring that the quality of management control meets contracted requirements

- Ensuring there is no take-back of risk allocated to the Project Company
- As appropriate, managing payments, any application of abatements and budget requirements for the PPP (refer to Section 8)
- Maintaining and updating the Contract Management Plan
- Collecting operational performance data
- Managing communications between the parties and other stakeholders
- Reporting to the Responsible Agency and Treasury on delivery of the project's objectives
- Managing any changes during the operations stage to output specifications, service levels, legislative and environmental changes
- Managing any material changes to the PPP arrangements — (refer to Sections 7.4 and 7.5)
- Training and succession planning, and
- Ultimately, preparing for handback arrangements toward the end of the concession.

The Responsible Agency must ensure commitment to adequate resources during this stage.

The Committee should meet at least twice a year, or as otherwise agreed.

Regular reporting of the project and contractor performance, and benefits realisation remains important.

7.4 Managing PPP Contracts

The Project Director, Responsible Agency representative and senior management of the Responsible Agency must comply with the requirements of Appendix 5 when administering PPP contracts from contract close.

The Responsible Agency must consult with NSW Treasury prior to negotiating over and agreeing to proposed contractual or commercial changes to existing PPP projects. This consultation may be formal or informal. Depending on the materiality of the proposed change, limited or no further consultation with NSW Treasury may be required after the initial notification.

NSW Treasury will:

- Provide expert commercial and financial advice, and avoid setting undesirable precedents and unnecessary deviations from the Template Project Documents (refer to Section 6.5.1)
- Assist in resolving disputes prior to escalation
- Assist in retaining external experts if appropriate, and
- Advise on approval processes and the application of NSW PPP policies.

Some proposed changes or events are automatically considered material and will likely require ongoing NSW Treasury consultation and advice, in addition to possible Ministerial, Treasurer and/or Cabinet approvals. These include:

- Changes to conditions precedent
- Changes to environmental and planning approval conditions
- Refinancing (refer to Section 7.5)
- Changes of control
- Omission of services

- Breaches
- Defaults
- Step-in, and
- Termination events.

Other proposed changes or events may or may not be considered material depending on specific circumstances. These may include changes to project scope, performance issues, disputes, relief and compensation events, and changes to the payment mechanism. NSW Treasury should be consulted on changes so that it can be determined whether the proposed change is material (refer also to Section 4.5.3).

In evaluating likely or proposed material contract or commercial changes to a PPP project, the Responsible Agency and NSW Treasury (specifically ISFU) will, at a minimum, evaluate the changes against the following criteria:

- Value for money
- Benefits and costs of the changes to Government and the private party
- Impact on the State budget and project affordability
- Impact on the allocation and management of risks and the likelihood of creating undesirable precedents
- Continuing viability of the project
- External market forces.

7.5 Contract management: Refinancing events and issues

Depending on the specific provisions of the PPP project deed, the Responsible Agency will usually need to consent to:

- A proposed refinancing by the Project Company, which exceeds the quantum and tenure of debt as envisaged at financial close, and
- Updated Base Case Financial Models associated with any refinancing.

The Responsible Agency must consult and seek advice from NSW Treasury on the proposed refinancing, including the updating of the Base Case Financial Model, as soon as the Responsible Agency is aware formally or informally of an upcoming refinancing, regardless of whether or not the Responsible Agency needs to provide formal consent to the refinancing.

A Responsible Agency is also required to notify NSW Treasury and confirm any non-consent refinancing.

NSW Treasury advice will draw from experience in connection with other PPP project refinancing processes, particularly in the case of refinancing that:

- Results in a new or revised Base Case Financial Model
- Gives rise to a refinancing gain share
- Increases the amount of outstanding debt, relative to the current Base Case Financial Model
- Defers the amortisation of debt relative to the current Base Case Financial Model

- Incorporates an exotic swap, and
- Increases, or is likely to increase or adversely change, the State's risks or liabilities, whether actual or contingent.

7.5.1 Project deed minimum requirements — Refinancing

Unless otherwise agreed with NSW Treasury, Responsible Agencies must incorporate the following principles in the PPP project deed with respect to a refinancing:

- In principle, any proposed refinancing should not result in a debt balance, at any time between the date of the refinancing and the end of the concession, greater than the projected debt balances in the original Base Case Financial Model without prior consultation with NSW Treasury[17]
- The transaction costs relating to future debt refinancing should be appropriately allocated in the previously agreed Base Case Financial Model, and
- Any refinancing gains are to be shared between the NSW Government and the private party on a 50:50 basis. A refinancing gain will occur when the projected equity return at the time of the refinancing (taking into account the refinancing) is above that reflected in the previous agreed Base Case Financial Model.

To the extent a refinancing results in a gain, the NSW Government's share in a PPP refinancing gain will be returned to the Consolidated Fund, either as a lump sum or through a reduction to the ongoing quarterly service payments, and the Responsible Agency's financial estimates adjusted accordingly.

NSW Treasury will also advise whether consent relating to GSF Act approvals is required, including whether any associated Guarantee needs replacing or updating (refer also to Section 4.5).

Responsible Agency consent to any refinancing (including consent deeds) should not include amendments to the associated PPP project deed or any other PPP documents. Any amendments to the PPP project deed or any other PPP document must be contained in an amending (and restatement) deed.

17 Refinancing is considered a Category A material event requiring NSW Treasury (ISFU) consultation: See Appendix 5 of these Guidelines.

Accounting and budgeting for PPPs

8

MANDATORY MINIMUM REQUIREMENTS:

- **All Agencies must comply with any relevant accounting standards.**
- **The Responsible Agency must consult with NSW Treasury to assess the requirement of AASB 1059 and form an accounting position for all PPPs at each project milestone.**
- **Responsible Agencies must prepare and update the accounting and budget paper including FIS Table, ensuring sufficient time is allocated for review by NSW Treasury.**
- **The CFO of Responsible Agencies must confirm the information contained in the accounting and budget paper including FIS Table is complete and accurate for all Cabinet submissions.**
- **Responsible Agencies are required to develop a budget model for Availability and Economic Infrastructure PPPs in consultation with NSW Treasury post-contract award.**
- **Responsible Agencies are required to develop a payment mechanism model in consultation with NSW Treasury in the period between the awarding of the project and prior to the project reaching commercial acceptance.**

8.1 Accounting and budget paper and the Financial Impact Statement Table (FIS)

Responsible Agencies are required to prepare and update an accounting and budget paper, including the FIS Table (see Appendix 2) at each project milestone, and if new project information would result in significant changes to the accounting or budget treatment.

The accounting and budget paper must be consistent with all Australian Accounting Standards (AASBs). In many instances, PPPs would be accounted for under AASB 1059 *Service Concession: Grantors*. However, some PPPs may not fall within the scope of AASB 1059 and other accounting standards apply e.g. AASB 16 *Leases*.

NSW Treasury's Accounting Policy branch is responsible for accounting policy guidelines. The Responsible Agency is required to follow all policies and guidance published by NSW Treasury's Accounting Policy branch. In particular, the policies and guidance on the AASB 1059 webpage[18] are relevant to PPPs, including the following:

- TPP19-06: AASB 1059 Service Concession Arrangements: Grantors — Scoping
- TPP15-02: Budgeting for availability based Public Private Partnerships[19].

The Responsible Agency is required to consult with NSW Treasury to assess the requirement of AASB 1059 and form an accounting position for all PPPs at each project milestone.

The accounting and budget paper must identify the following items as minimum requirements:

- Balance sheet, income statement and cash flow impacts of the PPP project
- Budget result impacts, total net lending impacts, net debt impact and CAPEX in accordance with the FIS Table (see Appendix 2)
- Estimated full contingent exposure to the NSW Government, including the:
  - Possible termination liability, in the case of private party default or voluntary termination by the NSW Government, and
  - Sum of any individual actual or contingent liabilities under specific clauses of the project delivery contract, combined with the probability of each outcome, and
- Transparent disclosure of the impact of key assumptions, such as CDPD
- Adjustments for forthcoming likely new accounting standards, as appropriate from the Responsible Agency's perspective, General Government Sector, and Total State Sector.

Responsible Agencies should consult with NSW Treasury to agree on the accounting treatment and budget impacts for all PPP transactions at each project milestone. In addition, the CFO of Responsible Agencies is required to confirm that the information contained in the accounting and budget paper including FIS Table is complete and accurate for all Cabinet submissions. NSW Treasury recommends the Responsible Agency allows sufficient time, particularly in the lead up to contract close, to prepare the FIS Table due to the level of complexity and coordination required of stakeholders.

The Auditor-General will ultimately be issuing to Parliament an audit opinion on the financial statements of the Responsible Agency and the whole-of-government accounts. These audits include considerations of the accounting treatment for any PPPs. In some cases, the views of the Audit Office may differ from NSW Treasury's view. Responsible Agencies should therefore keep the Audit Office updated on the proposed accounting treatment for a PPP project, especially if there are unique aspects to the transaction.

NSW Treasury issues an annual Treasury Circular on early close reporting procedures (for example, TPP21-01: *Agency Direction for the 2020-21 Mandatory Early Close*[20]), which requires accounting treatment of significant and complex transactions to be resolved at an early stage. Responsible Agencies are required to comply with this Circular. For further information, Responsible Agency should consult with NSW Treasury for guidance on specific information relating to accounting policies.

18 Refer to https://www.treasury.nsw.gov.au/information-public-entities/accounting-policy

19 In the event of discrepancies between TPP15-02 and these Guidelines, these Guidelines will prevail.

20 Up to date at the time of publication of these Guidelines. Refer also to Treasurer's Direction on *Mandatory Early Close as at 31 March each year* (TD19-02)

8.2 Budget model development for Availability PPP projects

Responsible Agencies are required to budget for financial liability and budget impacts that arise over the life of the project, including financing costs. This includes budgeting for the capital, operational and financing elements of availability payments (also known as service payments) in accordance with relevant accounting standards, and NSW Treasury guidelines and policies.

In order to budget for financial liability and budget impacts associated with social infrastructure PPP projects, Responsible Agencies are required to develop a budget model in consultation with NSW Treasury after the contract is awarded. The development of the budget model should be included in the scope of work for the financial adviser at the time they are engaged by the Responsible Agency on the PPP.

The budget model is intended for budgeting purposes and should reflect the Base Case Financial Model agreed at the time of financial close. In consultation with NSW Treasury, the Responsible Agency is required to update the budget model for any changes prior to the annual State budget.

8.3 Payment mechanism model for Availability PPP projects

Availability PPP projects are funded from service payments made by the Responsible Agency to the private sector, in accordance with the payment mechanism in the associated project deed and relevant schedules, such as the Payment Schedule and Performance Regime. The Responsible Agency is required to develop a payment mechanism model in consultation with NSW Treasury once the project has been awarded, but prior to reaching commercial acceptance.

GIPA Act disclosures and Project Summaries

9

MANDATORY MINIMUM REQUIREMENTS:

- **All PPPs must comply with disclosure requirements as set out in the *Government Information (Public Access) Act 2009* (GIPA Act) and to Ministerial Memorandum No.2007-01 *Public Disclosure of Information Arising from NSW Government Tenders and Contracts* (M2007-01).**
- **Responsible Agencies must disclose Project Summaries on the NSW Treasury PPP website within 90 days of the contract becoming effective.**

9.1 GIPA Act requirements

All NSW PPPs are subject to Ministerial Memorandum No.2007-01 *Public Disclosure of Information Arising from NSW Government Tenders and Contracts* (M2007-01) and the *Government Information (Public Access) Act 2009* (GIPA Act), which set out specific disclosure requirements arising from NSW Government tenders and contracts.[21]

Sections 29 and 30 of the GIPA Act list the specific information that must be disclosed publicly in respect of class 1 and 2 government contracts (respectively) that have (or are likely to have) a value of $150,000 (including GST) or more within 45 working days after the contract becomes effective. The information must be disclosed in the relevant Responsible Agency's government contracts register, which is published on the Government tenders website, or the Responsible Agency's website (see section 35 of the GIPA Act).

For class 2 contracts which have (or are likely to have) a value of $5 million or more (class 3 contracts), a copy of the contract must be disclosed (see section 31 of the GIPA Act).

The requirement for the disclosure of information about the contract (for class 1 and 2 contracts), or the contract itself (class 3 contracts), does not extend to confidential information, or if there is an overriding public interest against the disclosure (see section 32 of the GIPA Act). Information and contracts are only required to be made publicly available for the public access period (see section 34 of the GIPA Act).

21 For further details see Part 3 Division 5 of the GIPA Act, which outlines specific disclosure requirements for PPPs.

Any material variation(s) to the contract must also be disclosed within 45 days of the variation(s) becoming effective (see section 33 of the GIPA Act). For guidance on the application of the GIPA Act, please refer to the Responsible Agency's Legal team.

9.2 Project Summaries for PPPs

9.2.1 Preparation, Approval and Updates of Project Summaries

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

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

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

In updating a Project Summary, Responsible Agencies should follow the same processes to prepare, approve and disclose the update as that undertaken for the original Project Summary.

In certain cases, it may be more appropriate to prepare a stand-alone addendum to a Project Summary or prepare a new Project Summary, rather than revising a previous Project Summary.

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

9.3 Content of Project Summaries

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

The Project Summary must have two distinct parts:

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

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

Project Overview

1. Introduction, including:
   - Overview of project
   - Purpose of the Project Summary, including disclaimer that the Summary should not be relied upon for legal purposes.
2. Project Description:
   - Main parties (including consortium members) to the core Project Contracts
   - Project objectives
   - Description of infrastructure, scope and site (with any maps and/or diagrams)
   - Project timetable
   - Project value and main funding source(s).
3. History of the project and Strategic Need:
   - This Section could summarise the historical development of the project, non-confidential aspects of the Business Case and cost-benefit analysis, and relate the project to Government infrastructure/service plans.
4. Procurement:
   - Approach overview, including whether a competitive 2-stage PPP tender was used or procurement was via an unsolicited proposal
   - A summary of the Public Interest Evaluation
   - Tender or other evaluation/assessment criteria
   - Value-for-money rationale.

Key Commercial and Contractual Features

1. Contract Overview:
   - List of contacts and parties and/or a diagram illustrating the relationship
   - Term (construction/delivery phase(s), operational commissioning and operating phase), and any option to extend the term.
2. Risk Allocation table of major risks including:
   - Environmental and planning approvals, native title, heritage, site and site access
   - Design, construction and commissioning
   - Asset ownership and residual value risk
   - Operational risks
   - Finance and market risks, including price, volumes, inflation, exchange rate and refinancing
   - Insurance risk
   - Liabilities and indemnity provisions
   - Change in Law.

3. General obligations of Project Company in delivery and operation phases (in non-technical language), including reporting obligations and any benchmarking processes.
4. Government contributions/obligations and any CDPD obligations.
5. User fees (if applicable), including escalation.
6. Payment mechanism, performance standards, key performance indicators and measurement.
7. Change and project modification procedures.
8. Any unique compensation or material adverse effect arrangements.
9. Default and termination arrangements, including step-in arrangements (State and financiers).
10. Change of control and assignment provisions.
11. Handover obligations.
12. Guarantees and security arrangements.
13. Any other key or unique elements of the contractual arrangements if they have not been covered above.

10 Innovation through PPPs

The integration of the financing, development and delivery of service enabling infrastructure through PPPs may provide greater opportunities for innovation in comparison to traditional infrastructure procurement and delivery. Innovations may be realised at various stages of the PPP value chain, from procurement, to the design, financing, and operation and maintenance of the asset.

10.1 Procurement

The procurement phase of a PPP may afford opportunities for the realisation of innovation in both the commercial development of the project in the procurement stage and through the allocation of risk between the parties. Such innovations may be achieved through:

1. The efficient integration of the combined strengths and specialist expertise of various counterparties through the procurement process, in turn providing opportunities for greater scope and value optimisation, and streamlining the procurement and delivery of the asset.
2. The implementation of contractual mechanisms in the project deed to allow for increased flexibility in the construction, operation, management and eventual transfer of the asset.
3. The implementation of private sector corporate arrangements that seek to optimise regulatory, tax and accounting outcomes that may have a consequential reduction in costs for both the Project Company and the Responsible Agency.
4. The introduction of collaborative contracting arrangements to allow for innovative risk and cost allocation between the Responsible Agency and the Project Company which extend throughout the whole asset lifecycle, including through operations, upgrades and eventual handback.

10.2 Design

Innovation in design may be achieved through greater emphasis on outcomes and whole of life optimisation from the integrated PPP delivery partner model, including but not limited to:

1. Designing infrastructure to minimise the life cycle cost of the project through, for example, the implementation of technological innovations and improved ESG performance features.
2. Challenging existing design assumptions to achieve efficiency gains, construction and maintenance cost reductions and environmental policy objectives, which may result in potentially greater economic, environmental and social outcomes for relevant stakeholders and the wider community.

10.3 Commercial Development

While the key purpose of most PPPs is to provide particular service-enabling capability, PPPs may deliver improved value for money when the Project Company is able to provide commercial development within the Project offering. The delivery of commercial opportunities is usually not possible by the public sector.

Complimenting a service providing PPP project with any commercial development does require careful consideration. The commercial development must provide some benefit to the core service-enabling asset.

Previous examples have provided improved amenity to the users of the asset, strengthening green credentials and the provision of accommodation or car parking facilities (for example) to support the asset.

10.4 Financing

PPP's increasingly enable the interrogation and inclusion of alternative financing sources and structures. For example, innovations may be realised in PPPs through:

1. The availability of Commonwealth funding and funding from independent federal agencies such as the Clean Energy Finance Corporation and the National Housing Finance and Investment Corporation.
2. The availability of alternative sources of financing which may not be available under traditional forms of procurement, including, for example, ESG-linked and green loans, low-cost subordinated debt, and multi-tranche securities.
3. The implementation of innovative financing and refinancing structures, including fixed-rate interest swaps, hedging, and alternative drawdown mechanisms.

10.5 Operation and Maintenance

PPP's may afford the ability for the Responsible Agency and the Project Company to realise innovation during the operation and maintenance phase. Such innovations may be delivered through:

1. Implementation of targeted KPI's in the project deed, calibrated to incentivise efficiency, mitigate costs and reward active involvement of equity sponsors of the Project Company.
2. The introduction of flexible payment regimes to account for events beyond the control of the private entity arising during the long-term operations of the asset.
3. The negotiation of commercial agreements to share facilities with the community, such as sporting facilities.
4. Demand and occupancy risk being managed by the Project Company.

CONSULTATION ISSUE 11

Treasury invites feedback on other areas in which innovation can be incorporated into the delivery of PPPs. Please provide examples where possible.

Acronyms

CDPD	Conditional Debt Pay Down
CFO	Chief Financial Officer
EOI	Expression of Interest
EPA Act	*Environmental Planning and Assessment Act 1979*
ETC	Estimated Total Cost
FIS Table	Financial Impact Statement Table
GCA	Gateway Coordination Agency
GIPA Act	*Government Information (Public Access) Act 2009*
GSF Act	*Government Sector Finance Act 2018*
ICAC	Independent Commission Against Corruption
IIAF	Infrastructure Investor Assurance Framework
INSW	Infrastructure NSW
ISFU	Infrastructure and Structured Finance Unit of NSW Treasury
ITP	Interactive Tender Process
JVA	Joint venture arrangement
KPI	Key Performance Indicator
NPC	Net Present Cost
NPV	Net Present Value
PCG	Project Control Group
PIE	Public Interest Evaluation
PPP	Public Private Partnership
PSC	Public Sector Comparator
RFP	Request for Proposal
SBM	Shadow Bid Model
SOC	State Owned Corporations
SOC Act	*State Owned Corporation Act 1989*
TAM	Total Asset Management
ToR	Terms of Reference
WACC	Weighted Average Cost of Capital

Glossary

Term	Meaning
Agencies	The executive branch of the Government of New South Wales, is made up of a number of departments, state-owned corporations and other agencies[22] in accordance with the *Government Sector Employment Act 2013* (GSE Act) (and other relevant legislation).
Availability PPP	A PPP project where the government pays the private party a Service Payment for the availability of an asset. The Service Payment also covers the provision of ongoing maintenance and operational services to the asset for the duration of the PPP contract. Typically, the private party will be responsible for designing, building, financing, maintaining, and operating the asset.
Base Case Financial Model	Project Company's audited financial model for the PPP project.
Bidder	A respondent to an EOI request or an invitation to submit a bid in response to a RFP. Typically, a bidder will be a consortium of parties, each responsible for a specific element, such as constructing the infrastructure, supplying the equipment, or operating the business.
Business Case	A documented proposal to meet the Government's objectives that is used to inform an investment and/or policy decision and complies with the NSW Government Business Case Guidelines. It contains analyses of the costs, benefits, risks and assumptions associated with various investment, and policy options linked to policy or program outcomes. It also informs future implementation, monitoring and evaluation.
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 Contributions	NSW Government capital contributions to the project during the construction period.
Commercial Principles	Set out the NSW Government's preferred risk allocation for privately financed infrastructure projects.
Committee	Refer to Project Steering Committee.

22 https://www.nsw.gov.au/departments-and-agencies

Term	Meaning
Condition Precedent	Certain conditions that are required to be satisfied prior to the majority of the project agreement becoming effective.
Conditional Debt Pay Down	A bullet lump sum repayment from the NSW Government during the operations phase to pay down a significant proportion of private debt finance used to fund a project. A CDPD is normally conditional on the project achieving proven operational performance. Flexible triggers may be appropriate for the State to extract maximum value from its commitment.
Consortium	Those private party entities who together intend to deliver a PPP.
Contract Management Plan	A tool to implement and manage the contract as agreed. It gives an overview of the governance of the contract from an operational, financial and performance reporting perspective.
Contractual Close	The date when contracts are executed.
Discount Rate	The rate used to calculate the present value of future cash flows, usually determined on the basis of the cost of capital used to fund the investment from which the cash flow is expected.
Economic Infrastructure PPP	A PPP where the private party derives revenue from third parties (for example, user charges) and therefore takes on the demand risk. Typical examples of economic infrastructure are networks of roads and telecommunications facilities, airports, ports, water storage and sewerage, railways, electric power generation and distribution facilities.
Expressions of Interest (EOI)	The tender phase used to shortlist bidders to proceed to submit more detailed proposals.
Final Business Case	The primary document for a Gate 2 review under the NSW Gateway Policy that justifies the project scope and investment as an appropriate and deliverable response to the established service need, and which will maximise benefits at optimal cost and complies with the NSW Government Business Case Guidelines.
Financial Close	The date of satisfaction of the last Condition Precedent is known as Financial Close. Whilst a contract is binding once signed, a contract only becomes completely effective at Financial Close.

Term	Meaning
Gateway Coordination Agency (GCA)	There are three Gateway Coordination Agencies: 1. INSW — Responsible for Gateway Reviews of capital infrastructure projects. 2. The Department of Customer Service (DCS) — Responsible for Gateway Reviews of information and communications technology (ICT) projects. 3. NSW Treasury — Responsible for Gateway Reviews of major recurrent projects. NSW Treasury is the Policy Owner and is responsible for the overall Gateway Policy. For capital or ICT projects to be delivered by INSW or the ICT and Digital Government Division of DCS respectively, Treasury is the GCA. This is to maintain the separation and independence of the GCA role from the delivery role.
Gateway Reviews	A project assurance process that mandates independent peer reviews at critical decision points in a project life cycle.
Incentivised Target Cost Contract (ITC)	The ITC form of contract prioritises collaboration between the parties as a key enabler of successful delivery. The shared risk regime allows for a joint management approach and is structured to provide time certainty. The ITC includes incentives and KPIs to encourage collaboration and efficiencies.
Intellectual Property	Inventions, original designs and practical applications of good ideas protected by statute law through copyright, patents, registered designs, circuit layout rights and trademarks; trade secrets, proprietary know-how and other confidential information protected against unlawful disclosure by common law and through additional contractual obligations such as Confidentiality Agreements.
Interactive Tender Process (ITP)	The process of conducting workshops and consultations with short-listed bidders and the project team, generally during the RFP phase.
National PPP Guidelines	The suite of guidance (Policy Overview and Volumes of Detailed Guidance) that form the national guidance on PPPs. See: https://infrastructure.gov.au/infrastructure/ngpd/index.aspx
Net Present Cost	The equivalent cost at a given time of a stream of future net cash outlays (calculated by discounting the actual values at the appropriate Discount Rate).
Net Present Value	The equivalent value at a given time of a stream of future net cash inflows (calculated by discounting the actual values at the appropriate Discount Rate).

Term	Meaning
NSW Gateway Policy	Published by NSW Treasury as TPP 17-01[23] dated February 2017 (as updated from time to time).
NSW Government Business Case Guidelines	Published by NSW Treasury as TPP 18-06[24] dated August 2018 (as updated from time to time).
Nominal	The forecast expressed in current dollar, escalated, and inflated terms.
Planning Approval Conditions	Conditions of environmental and planning approval from any consenting authority with jurisdiction over the project.
Preferred Bidder	A Short-listed Bidder selected following the RFP evaluation to proceed to the negotiation and completion phase.
Probity	Uprightness, honesty, proper and ethical conduct and propriety in dealings.
Procurement Strategy	A procurement strategy entails an appropriate procurement process and plan that is proportionate to the nature, size, complexity, value, and risk of the service-enabling infrastructure being procured. The Procurement Strategy should consider and document how risk and liability will be apportioned between the parties, based on each party's abilities to manage the risks.
Probity Auditor/ Adviser	An independent expert retained to monitor the procurement process at critical stages, assessing and reporting whether the process has been conducted to the required standards of probity.
Project Company	A company created by the project's private partner, usually in the form of a Special Purpose Vehicle (SPV), to develop and manage the project.
Project Director	The person engaged by the Responsible Agency with overall accountability for procuring and/or managing the project during delivery and operations. The procuring Project Director may differ from the delivery and operations Project Director.
Project Steering Committee	The Committee or Board of departmental/agency representatives, chaired by the Responsible Agency and including NSW Treasury, established by the Responsible Agency and/or Cabinet to oversee the procurement of the PPP project and deal with key issues.

23 https://www.treasury.nsw.gov.au/sites/default/files/2019-02/TPP17-01%20NSW%20Gateway%20Policy%20-pdf.pdf#:~:text=The%20policy%20establishes%20the%20overarching,to%20Government%20as%20the%20investor

24 https://www.treasury.nsw.gov.au/sites/default/files/2021-05/TPP18-06%20%20NSW%20Government%20Business%20Case%20Guidelines.pdf

Term	Meaning
Project Summary	The document that is released to the public following the contract becoming effective that sets out the key aspects of the project, including key contract terms.
Project Team	The group of specialists and departmental/Agency representatives, established by the Responsible Agency, that is responsible for assisting the Project Director to deliver the project (including developing project documentation and undertaking evaluation processes).
Proponent	See Bidder.
Public Interest Evaluation	An assessment prior to a PPP procurement, and updated throughout the procurement process, that the PPP is in the public interest.
Public Private Partnership (PPP)	A concession (usually long-term) arrangement between the public and private sector for the delivery of service enabling public infrastructure, including social infrastructure, economic infrastructure, and joint financing arrangements. The State may contribute to the project by providing land or capital works, through risk sharing, revenue diversion, or purchase of the agreed services.
Public Sector Comparator (PSC)	An estimate of the net present value of a project's whole-of-life costs and revenues using the most efficient and likely form of Government delivery. If the NPC of the PPP is less than the PSC, then it is considered value for money.
Public non-financial corporations (PNFC)	Government-controlled agencies where user charges represent a significant proportion of revenue and the agencies operate within a broadly commercial orientation. A State-owned corporation is one of the forms that a PNFC may take.
Reference Project	The basis for calculating the PSC, reflecting Government delivery of the project by traditional means.
Request for Proposals (RFP)	The tender phase involving the release of the RFP to Short-listed Bidders for detailed, fully costed RFP responses, followed by evaluation and selection of the Preferred Bidder.
Responsible Agency	The Government Agency that is responsible for procuring and/or delivering and managing the project during construction and operations. The procuring Responsible Agency may differ to the delivery and operations Responsible Agency.
Risk Allocation	The allocation of responsibility for dealing with the consequences for each risk to one of the parties to the contract; or alternatively, agreeing to deal with a particular risk through a specified mechanism which may involve sharing that risk.

Term	Meaning
Shadow Bid Model (SBM)	A PPP Shadow Bid Model is the Responsible Agency's best estimate of a private party bid price (in net present value/cost terms) to deliver the output specification under a PPP project structure. The SBM should reflect a private party's costs and debt and equity structure, and the project deed terms (including the payment mechanism). The SBM is dynamic and should be updated as new information is received but should be finalised prior to or soon after the RFP release.
Short-listed Bidder	Bidders selected as part of the EOI evaluation to be invited to submit a proposal in response to an RFP issued by Government for a project.
Social Infrastructure PPP	A PPP where the government pays the private party a service fee for the availability of a facility/social infrastructure. Examples of social infrastructure include hospitals, schools, police stations, prisons, and transport and road projects involving availability payments.
State Owned Corporation (SOC)	Government entities (mostly PNFCs) which have been established with a governance structure mirroring, as far as possible, that of a publicly listed company. NSW State Owned Corporations are scheduled under the *State Owned Corporations Act 1989* (Schedule 5).
State Significant Developments or Infrastructure	Infrastructure that is important to the State for economic, environmental or social reasons. State Significant Infrastructure is assessed under Division 5.2 of the EP&A Act and require the approval of the Minister for Planning before they may proceed.
Strategic Business Case	The primary document for a Gate 1 review under the NSW Gateway Policy that provides a preliminary justification for the program or project, based on an initial assessment of business needs, strategic alignment and overall project benefit(s) and complies with the NSW Government Business Case Guidelines.
Template Project Documents	Refers to the NSW PPP toolbox templates, which is available to Agencies from NSW Treasury (ISFU).
Tender Process	The process of inviting the market to submit bids against a particular project and includes the EOI, RFP and negotiation phases.
Unsolicited Proposal	Please refer to the NSW Government's Unsolicited Proposals Guide for Submission and Assessment.
Weighted Average Cost of Capital	The returns or interest rates payable on the different components of a project's or company's deemed capital structure.

Appendix 1: Public Interest Evaluation

The Public Interest Evaluation (PIE) should be assessed as part of the Procurement Strategy phase (see Figure 4.1) to ensure that PPP procurement is in the public interest. The PIE should be updated throughout the procurement process to ensure that the PPP delivery method continues to be in the public interest.

The PIE will assess the PPP project for the following public interest attributes:

1. Effective in Meeting the NSW Government's Objectives	The PPP project should be consistent with: • The Responsible Agency's budget, service objectives and delivery strategy • The NSW Government's short- and long-term policy objectives • Employment and environmental legislation and NSW Government policies • Concurrent government initiatives/projects (potential for extra benefits/synergies or detriment/conflicts, and • Economic and regional development in the area concerned, including investment and employment growth.
2. Achieves Better Value for Money	• Does PPP procurement offer better value for money than the best practicable public sector delivery model? • Is the level of the user charge paid by the public appropriate and related to the benefits to be received by the user under the project (if applicable)? • Is the level of contribution by taxpayers reasonable (if applicable)?

3. Community Consultation	• Identify individuals/groups (for example, employees, unions, community groups, and local councils) likely to be affected by the project • Assess the likely impact of the project on those individuals likely to be affected by the project, including the likely social, economic, employment and environmental issues which may arise • Develop a community consultation process which: — Ensures participation by the affected individuals/groups during the EOI and short-listing process — In the case of large, complex or controversial projects, ensures the participation of the affected individuals/groups after contract — Signing, during construction, and during the commissioning of the project, and — Complies with the legal requirements and broader NSW Government policy standards. • How have issues raised by the community as part of any community consultation processes been addressed or how will they be addressed?
4. Consumer Rights	• Ensure compliance with relevant consumer rights legislation and NSW Government policies • Ensure the PPP project provides sufficient safeguards for service recipients, particularly those for whom NSW Government has a high level of duty of care, and/or the most vulnerable, including special needs and rights • Assess whether identified special needs and rights are met by the project and if not, what provisions and mechanisms can be introduced to address those deficiencies.
5. Accountability and Transparency	• Are the project processes transparent and do they allow the community to be appropriately informed about the key elements of the project? • Does the project management structure demonstrate clear responsibility and accountability for project reporting? • Is there, or will there be, a comprehensive probity plan and are there measures to ensure transparency of process?

6. Public Access	• Are there adequate arrangements to ensure that the public, including disadvantaged groups, can access and use NSW Government service(s) and related infrastructure? This should include: — Clearly identifying the nature and extent of public access needed — Developing project plans to meet these needs, and — Protecting third-party access to essential infrastructure and services. • To the extent that the project cannot protect the identified public access needs, what provisions or mechanisms can be used to address these deficiencies? • Do the proposed infrastructure and service specifications comply with relevant public use and access legislation and NSW Government policies?
7. Health and Safety	• Clearly identify all public health and safety standards as per legislation, NSW Government policies, or from other Government's accountability • Does the project contain sufficient mechanisms to ensure that the project achieves the identified public health and safety standards? • To the extent that the project does not achieve some of the identified public health and safety standards, what provisions or mechanisms does the Responsible Agency propose to address this deficiency?
8. Privacy	• Clearly identify user rights to privacy as per legislation and NSW Government policies • Does the project contain sufficient mechanisms to ensure that the identified rights to privacy are protected? • To the extent that the project does not protect all of the identified rights to privacy, what provisions or mechanisms does the Responsible Agency propose to address this deficiency?

Appendix 2: Financial Impact Statement Table and Negotiation Parameters

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

Table 1: FIS Table for approval to procure via PPP

	Business Case	
	Nominal ($m)	NPC[25] ($m)
Use of Funds		
Capital — Estimated Total Cost P90		
— Contingency		
Recurrent — Operating Costs P90		
Total Cost		
Additional Revenue		
Net Cost		
Source of Funds		
State Contributions Separately identify all source types, e.g. Restart, Consolidated Fund, Federal, Agency own source contributions		
Private Contributions		
State budget Impacts		
Net Cost of Services		
Capital Expenditure Authorisation Limit		
State budget Result		
Net Lending		
Gross Debt		
Proposed PPP Component		
Indicative PPP Procurement Cost (Shadow Bid)		
Public Sector Comparator P50		
Expected Value for Money		

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

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

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

	Updated Business Case		Change from Business Case[26]	
	Nominal ($m)	NPC[27] ($m)	Nominal ($m)	NPC[28] ($m)
Use of Funds				
Capital — Estimated Total Cost P90				
— Contingency				
Recurrent — Operating Costs P90				
Total Cost				
Additional Revenue				
Net Cost				
Source of Funds				
State Contributions Separately identify all source types, e.g. Restart, Consolidated Fund, Federal, Agency own source contributions				
Private Contributions				
State budget Impacts				
Net Cost of Services				
Capital Expenditure Authorisation Limit				
State budget Result				
Net Lending				
Gross Debt				
Proposed PPP Component				
Indicative PPP Cost (Shadow Bid)				
Indicative PSC				

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

26 This should show the change from Table 1: FIS Table for approval to procure via PPP to Table 2: FIS Table for approval to invite EOIs (if required).

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

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

Table 3: Financial Impact Statement Table for approval to appoint Preferred Bidder

	Latest Estimates		Change from EOI[29]	
	Nominal ($m)	NPC[30] ($m)	Nominal ($m)	NPC[31] ($m)
Use of Funds				
Capital — Estimated Total Cost P90 Land & Property Acquisitions Construction Delivery Contingency (incl. forex) Escalation				
Contingency				
Recurrent — Operating Costs P90				
Total Cost				
Additional Revenue				
Net Cost				
Source of Funds				
State Contributions Separately identify all source types, for example, Restart, Consolidated Fund, Agency own source contributions Cluster Resources Additional State Funding Capital Funding Recurrent Funding				
Private Contributions				
State budget Impacts				
Net Cost of Services				
Capital Expenditure Authorisation Limit				
State budget Result				
Net Lending				
Gross Debt				

29 This should show the change from Table 2: FIS Table for approval to invite EOIs (if required) to Table 3: FIS Table for approval to appoint Preferred Bidder.

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

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

	Latest Estimates		Change from EOI[29]	
	Nominal ($m)	NPC[30] ($m)	Nominal ($m)	NPC[31] ($m)
Proposed PPP Component				
RFP Submission Price Financial Liability Capitalised Financing Costs Service Payments — Capital Service Payments — Recurrent Interest Payments				
State Provisions up to Financial Close[32]				
Expected PPP Contract Award Price				
Shadow Bid/PSC				
Expected Value for Money				

Table 4: PPP Negotiation Parameters

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

32 This should separately identify and include Foreign Exchange Risk, Interest Rate Risk, and other contract finalisation items such as costs related to finalising insurance arrangements or planning approvals.

Table 5: FIS Table for approval to award contract

	PPP Contract Award Price		Change since appointing preferred bidder[33]	
	Nominal ($m)	NPC ($m)[34]	Nominal ($m)	NPC ($m)[35]
Use of funds				
Capital Service Payments				
Recurrent Service Payments				
Proponent Submission Price				
State Provisions up to Financial Close				
Expected Award Price				
Modifications Expected post Financial Close				
Contract Contingency				
Total PPP Contract budget				
SBM/PSC				
Expected Value for Money				
Private Sector Financing (for Construction)				
Source of Funds (post Construction)				
State Contributions Separately identify all source types, for example, Restart, Consolidated Fund, Agency own source contributions				
Private Contributions				
Adjustment to financial impact if PPP reaches Financial Close				
Net Cost of Services				
Capital Expenditure Authorisation Limit				
State budget Result				
Net Lending				
Gross Debt				

33 This should show the change from Table 3: FIS Table for approval to appoint Preferred Bidder to Table 5: FIS Table for approval to award contract.

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

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

Appendix 3: NSW Guidelines, Circulars and Policies

These Guidelines also recognise other, NSW guidelines, circulars and policies. These include, without limitation, the following, as updated from time to time:

- TC17-03: NSW Gateway Policy
- TC16-09: Infrastructure Investor Assurance Framework
- TC14-29: Management of Contingency Provisions for Major Projects
- TC12-19 Submission of Business Cases
- TPP17-01: NSW Gateway Policy
- TPP15-02: Budgeting for Availability based PPPs
- TPP08-05: Guidelines for Capital Business Cases
- C2014-09: Governance Framework for Major Transaction
- M2014-11: Additional Evaluation Criteria for Procurement of Major Projects Valued Above $100 million
- M2007-01: Public Disclosure of Information Arising from NSW Government Tenders and Contracts
- NSW Government Procurement Policy Framework and the associated Strategic Directions and Procurement Board Directions (NSW Government Procurement Directions)
- NSW Government Unsolicited Proposals Guide for Submission and Assessment (Unsolicited Proposals Guide 2017)
- TPP19-07 Asset Management Policy for the NSW Public Sector
- TPP19-06 AASB 1059 Service Concession Arrangements: Grantors Scoping

This list does not include all policies and guidelines owned by Responsible Agencies.

These Guidelines take precedence where there is an inconsistency with policies and guidelines of Responsible Agencies. In the event of inconsistency between Treasury policies and guidelines, guidance should be sought from NSW Treasury.

Appendix 4: PPP Assessment Framework

Information to collect to complete a qualitative assessment on a project's PPP suitability[36]

Project specific information:

Table 6 below should be used to collect project specific information on the project's scope, outputs, whole-of-life opportunities and potential risks.

Table 6: Project specific information

Project Name	[Insert]
Assessment Date	[Insert]
Category	**Commentary**
1. Project overview	
Provide a high-level description of the project, including whether any asset related services that may be required post-construction, e.g. cleaning, catering, facilities management, service delivery, operations, maintenance etc.	
Project objectives and outcomes	
Is there a critical project completion date?	
Project Status (scoping/SBC/FBC, etc.)	
2. Cost and Funding	
Is the project's expected capital value over $200m (including contingency)?	
If not, can scope/services be bundled to exceed the $200m threshold?	
Amount of approved project funding (capped or flexible)?	

36 The information for this guidance note is primarily sourced from the 'National PPP Guidelines', *Volume 1: Procurement Options Analysis* (Dec. 2008). Accessible via www.infrastructure.gov.au.

Category	Commentary
3. Scope and service outputs	
Can the project scope and service outputs be clearly defined and measured?	
Is the scope likely to change significantly prior to project completion and the potential change cannot be satisfactorily provided for in the specification?	
What is the extent of interfaces with other projects/packages?	
4. Whole-of-Life Opportunities	
Can services be bundled together to create a long-term operational/ maintenance opportunity?	
5. Revenue sources	
Is there an opportunity to collect user charges (e.g. tolls)?	
6. Procurement Options	
What other procurement and/or delivery options are being considered (other than a PPP)?	
Describe the high-level pros and cons of alternate procurement/delivery models.	
Feedback from market soundings on options. Was a PPP model raised during market soundings?	
Unique economic benefits to be derived if this project was to be procured as a PPP.	
Are there any public interest issues that should be considered?	
7. Risk	
The extent to which the majority of material risks can be defined, allocated and potentially transferred to a private party for a fixed price.	
What are the unquantifiable risks that could have a material impact on the project's cost and objectives?	
Does the project cover multiple disciplines which the private sector may be better placed to manage?	

Category	Commentary
Is there material risk that the Government is best placed to manage, and is the cost of transferring this risk prohibitive?	
8. State's procurement capability	
Agency's view on: a) agency's internal capacity and capability to deliver — key capabilities b) any capability gaps c) due diligence performed on unquantifiable/material risks d) State-side cost requirements	
NSW Treasury view on #8	

Value-for-money drivers

PPPs have the potential to provide value for money when certain drivers are present. The value-for-money drivers in Table 7 should be considered when assessing a project's PPP suitability.

This table does not consider the financial or accounting considerations of the PPP model. ISFU can work with agencies to explore the quantitative considerations if the project shows the relevant value-for-money drivers for a PPP procurement.

Table 7: Value-for-money drivers for PPP

Value for money drivers	Description	Relevant for project (Y/N)	Project's Relevant Factors
Complex risk profile and opportunity for risk transfer	More rigorous risk evaluation and transfer to the private sector of those risks it is best able to manage, including those associated with providing the specified services, asset ownership and whole-of life asset management.	[select Y/N and colour]	E.g. [no, unless project is expanded to include brownfield assets]
Whole-of-life costing	Full integration, under the responsibility of one party, of up-front design and construction costs with ongoing service delivery, operational, maintenance and refurbishment costs. This delivers improved efficiency through whole-of-life costing as design and construction become fully integrated up-front with operations and asset management.	[select Y/N and colour]	E.g. [Long-term asset risk could be integrated and transferred by combining D&C and O&M under one PPP Contract.]

Value for money drivers	Description	Relevant for project (Y/N)	Project's Relevant Factors
Private Sector Innovation	As the PPP approach focuses on output specifications, this provides a wider opportunity to use competition as an incentive for private parties to develop innovative solutions in meeting these service specifications, and from a whole-of-life perspective.	[select Y/N and colour]	
Measurable outputs	The nature of the services enables output specifications and a performance-based contract.	[select Y/N and colour]	
Asset utilisation	Reducing costs to government through potential third-party utilisation and through more efficient design to meet performance (e.g. service delivery) specifications.	[select Y/N and colour]	
Better upfront integration of design, construction and operational requirements	Ongoing operational, maintenance and refurbishment requirements become a single private party's responsibility for the contract period. Opportunity for single party to manage complex interface risks.	[select Y/N and colour]	
Competitive process	A competitive market exists which helps to encourage the private party to develop innovative means of service delivery while meeting government cost objectives.	[select Y/N and colour]	
Opportunity for superior value for the State	Given the circumstances in which this project is to be developed (e.g. a precinct), are there distinct advantages in progressing this project as a PPP which may yield a better value outcome for the State (note — not necessarily will any increased value be realised by any one agency)?	select Y/N and colour]	

Appendix 5: Managing Public Private Partnership (PPP) Contracts

This Appendix incorporates the requirements of Treasury Circular TC15-16 which will no longer apply from the date of these Guidelines, and clarifies when and under what circumstances NSW Treasury must be consulted regarding likely or proposed commercial or contractual changes to PPP projects.

In accordance with section 7.4 of these Guidelines, Responsible Agencies and Public non-financial corporations (PNFCs) are to consult with NSW Treasury prior to negotiating or agreeing proposed contractual or commercial changes to existing PPP Projects. This includes early consultation on likely material performance issues before they trigger formal notification and/or time-limited arrangements under the PPP contract.

The role of NSW Treasury

NSW Treasury is responsible for ensuring and monitoring that:

- Any changes to risk allocation under existing PPP and other complex infrastructure contracts:
  - Do not create undesirable precedents
  - Deliver value for money, and
  - Are consistent, as much as possible, with the template project documents for social infrastructure (where relevant).
- The Treasurer is informed of any material changes to the approved joint financing arrangement, and any obligations the government entity has under the arrangement in connection to the Government GSF Act Guarantee, if applicable
- Any State budget and accounting impacts of PPP contracts are accurate and up to date
- There is consistent application of PPP policy across projects, and
- Complies with these Guidelines.

In evaluating proposed material contractual or commercial changes, NSW Treasury can draw on its considerable experience and expertise across a wide range of PPP projects and:

- Provide expert commercial and financial advice, whilst avoiding setting undesirable precedents
- Assist in resolving disputes prior to them escalating
- Assist in retaining external experts if appropriate, and
- Advise on approval processes and the application of NSW PPP policy.

NSW Treasury can provide commercial and financial advice, and aid negotiations to assist the government entity with achieving value for money and maintaining an appropriate project risk allocation. If the specific situation warrants it, NSW Treasury may refer the government entity to a suitable external adviser.

When must NSW Treasury be consulted?

NSW Treasury is to be consulted as soon as the Responsible Agency becomes aware of likely or proposed material contractual or commercial (risk allocation) changes to an existing PPP contract. This also applies to any material issues relating to the ability of the private party or the Responsible Agency in meeting its performance obligations under the contract.

A materiality level for proposed changes may be agreed between the government entity's contract manager/director and NSW Treasury. This may form part of a protocol between these parties to ensure communication expectations are clear and appropriate mechanisms are in place.

Consultation is required regardless of whether the likely proposed material change may occur within the bounds of the current contract, e.g. refinancing or change in control, or could lead to a change to the contractual terms. NSW Treasury should be consulted prior to engaging external advisers.

Consultation with the NSW Treasury may be informal (a phone call or email) or formal depending on the circumstance.

Early and timely consultation is to occur to avoid and aid in the management of material commercial and contractual issues before they become significant or contractually time-limited, restricting the potential solutions that could be applied. If timely, government entities should consult with NSW Treasury through existing project communication, reporting and governance arrangements.

Where NSW Treasury considers the issue to be minor, no further consultation may be required after the Responsible Agency has informed NSW Treasury of the issue. If NSW Treasury and the Responsible Agency consider that the issue or change is significant, Ministerial or Cabinet approval may be required. Responsible Agencies must consult NSW Treasury prior to the commencement of any negotiations in connection with such changes to the PPP contract where Cabinet approval is required, prior to renegotiating any significant areas of the PPP contract.

Material commercial changes may or may not lead to a change in the contract but may lead to a change in risk allocation, such as waivers of abatements and waiving conditions precedent. In some cases these likely or proposed changes may also require the approval of the Treasurer or Cabinet.

What proposed material changes require consultation with NSW Treasury?

Table 8 "*Events requiring consultation with NSW Treasury*" lists some events that would require consultation with NSW Treasury.

Consultation should occur irrespective of whether the private party or the government entity is initiating the event. Category A Events are those that are automatically considered material, whereas Category B Events only require consultation if they are material events. For some projects, objective materiality thresholds may be defined in the project's protocol as agreed between NSW Treasury and the government entity.

Table 8: Events requiring consultation with NSW Treasury

Category A Event	Primary Reason for consultation
Waiver or change to a Condition Precedent (CP) or the timing of a CP affects timing and pre-conditions of financial close.	Affects timing and pre-conditions of financial close.
Planning Approval Conditions, project timing (possibly including financial close), scope, affordability and risk allocation.	Project timing (possibly including financial close), scope, affordability and risk allocation.
Change of ownership, control or financier, or major subcontractor.	Government consent, reputation risk, base case financial model implications, consistent treatment with any other affected PPP contracts.
Refinance (non-vanilla where contractually specified) or new hedging arrangements.	Government consent, base case financial model implications, administration of refinancing gain share mechanisms.
Default or termination.	Government reputation, risk to continuity of service delivery, Impact to State Finances.
Step-in.	Government reputation, risk to continuity of service delivery, Impact to State Finances.
Force Majeure.	Service continuity, Impact to State Finances.
Benchmarking or market testing process.	Market knowledge and reputation, impact to Service Payments and Service Specification, possible flow-on effects to other contractual terms, Impact to State Finances.
Satisfying the conditions of a Conditional Debt Pay Down, or other State contributions.	Impact to State finances, verification of Base Case Financial mode.
Changes to the Base Case Financial Model.	Impact to State finances, possible impact on the calculation of termination payments.
End-of-term arrangements, e.g. handover or extension.	Government consent, asset condition to ensure service continuity, Impact on State Finances.
Delay in construction completion or operation commencement dates.	Impact to State finances, Government reputation in delivering infrastructure and services.

Category B Event	Primary Reason for consultation
Infrastructure/Service, Modifications, variations or augmentations.	Project Scope, Project Affordability, State finances, timing, risk allocation.
Dispute or claim, including defects impact to State finances.	Impact to State finances.
Relief (Extension or Intervening) events.	May impact on asset readiness and availability of full service delivery.
Compensable (Extension or Intervening) events or material Adverse Effect events.	Impact to State finances, availability/quality of service delivery.
Performance issue (e.g. high/repeated abatements).	Project viability, service continuity/quality, government reputation and avoiding undesirable precedents (in case of abatement relief/waiver).
Changes to the payment mechanism or price.	Impact to State finances, risk allocation and key performance indicators.

Minimum Criteria for Evaluating Commercial or Contractual Change

In considering likely or proposed material commercial and/or contractual changes to a PPP project deed, government entities and NSW Treasury should, at a minimum, take into account:

- Value for money
- The benefits and costs of the changes to government and the private party
- Impact on the state budget and project affordability
- The impact on the allocation and management of risks
- Avoiding the creation of undesirable precedents
- Continuing viability of the project, and
- External market forces.

Further Information and Contacts

NSW Treasury

Infrastructure and Structured Finance Unit (ISFU)
52 Martin Place Sydney NSW 2000
GPO Box 5469 Sydney NSW 2001

Telephone: (02) 9228 4422
Facsimile: (02) 9228 5748

Email: ppp@treasury.nsw.gov.au
Website: https://www.treasury.nsw.gov.au/projects-initiatives/public-private-partnerships

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