

Managing Public Private Partnership (PPP) Contracts

Agencies and Public Trading Enterprises (PTEs) are to consult with the Infrastructure and Structured Finance Unit (ISFU) in Treasury prior to negotiating or agreeing material contractual or commercial changes to existing PPP Projects, consistent with the NSW PPP Guidelines. This includes early consultation on likely material performance issues before they trigger formal notification and/or time limited arrangements under the PPP contract.

Application

Consistent with the NSW Public Private Partnership (PPP) Guidelines, this Circular applies to all general government agencies and Public Trading Enterprises (PTEs) that are managing an existing PPP contract (that is, from Contract Close).

Summary

This Circular clarifies when and under what circumstances Treasury's Infrastructure and Structured Finance Unit (ISFU) should be consulted regarding likely or proposed commercial or contractual changes to PPP projects. This Circular is consistent with the requirements of the NSW PPP Guidelines and the Treasurer's approvals to enter into joint financing arrangements (that is, public private partnerships) under the *Public Authorities (Financial Arrangements) Act 1987* (PAFA Act).

In considering commercial or contractual changes, government entities and the ISFU should take into account value for money, the benefits and costs of the changes to Government and the private party, impact on the State Budget, the impact on the allocation and management of risks, avoiding creating undesirable precedents, project viability and external market forces. 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 Treasurer's or Cabinet approval.

Why Consult the Treasury's ISFU

The NSW PPP Guidelines state that:

- The agency is required to obtain Cabinet approval prior to renegotiating any significant areas of a PPP contract; and
- "where the agency wishes to renegotiate or amend any element of a previously signed PPP, the agency is required to consult with NSW Treasury prior to commencing negotiations. Treasury will determine whether it would be appropriate to seek the approval of the Treasurer or Cabinet".

The ISFU 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, are value for money and are consistent, as much as possible, with the ISFU standard Project Deed for social infrastructure (where relevant)
- The Treasurer is informed of any material changes to the approved joint financing arrangement and any Government PAFA Act Guarantee of the government entity obligations under the arrangement

- Any State Budget and Accounting impacts of PPP contracts are accurate and up to date
- Consistent application of current PPP policies across projects
- Compliance with the NSW PPP Guidelines.

In evaluating proposed material contractual or commercial changes, the ISFU 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
- advise on approval process and the application of NSW PPP policies.

The ISFU 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, the ISFU may be able to refer the government entity to a suitable external adviser.

When should the ISFU be consulted?

The ISFU is to be consulted as the agency becomes aware of a 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 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 ISFU. 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. The ISFU should be consulted prior to engaging external advisers. Consultation with the ISFU may be informal (a phone call or email) or formal depending on the circumstance.

Early and timely consultation is to occur to avoid and manage 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 ISFU through existing project communication, reporting and governance arrangements.

Where the ISFU considers the issue to be minor, no further consultation may be required after the agency has informed the ISFU of the issue. If the ISFU and the agency consider that the issue or change is significant then Ministerial or Cabinet approval may be required.

What proposed material changes require consultation with the ISFU?

Table 1 on the following page lists some events that would require consultation with the ISFU. 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 Treasury and the government entity.

Table 1: Events requiring consultation with the ISFU

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
Planning Approval conditions	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 model
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
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 evaluating likely or proposed material commercial and/or changes to a PPP contract, government entities and the ISFU 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 and avoiding creating an undesirable precedent
- continuing viability of the project
- external market forces

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