

GOVERNMENT PROCUREMENT WEBINAR SERIES 2021

Innovative Forms of Procurement – ECI / Market Led Proposals

Presented by Scott Alden, Partner

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The 2021 Procurement Seminar Series

- Planning a perfect procurement – 17 July 2021
- Probity in Procurement – 17 August 2021
- Current Issues and Updates in Procurement - 7 September 2021
- Legal Issues and Risks in Procurement – 28 September 2021
- Tender Assessment – 19 October 2021
- **Innovations in procurement – 9 November 2021**
- Managing the Procurement – 30 November 2021
- Top Ten Issues for 2021/2022 – 21 December 2021

If you have any questions in relation to our Government Procurement Webinar Series, or to register to attend a session, please email Katarina Szivek, BD Specialist on kszivek@hwle.com.au.

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Introductory Comments

What is ECI?

- A form of Procurement
- Not a Delivery Model
- Not a Contract
- Sometimes called:
 - Competitive Dialogue
 - Early Tenderer Involvement
 - Alliancing for the Faint Hearted

Comparing Different Contract Models – Relationship and Performance Based Model (ECI)

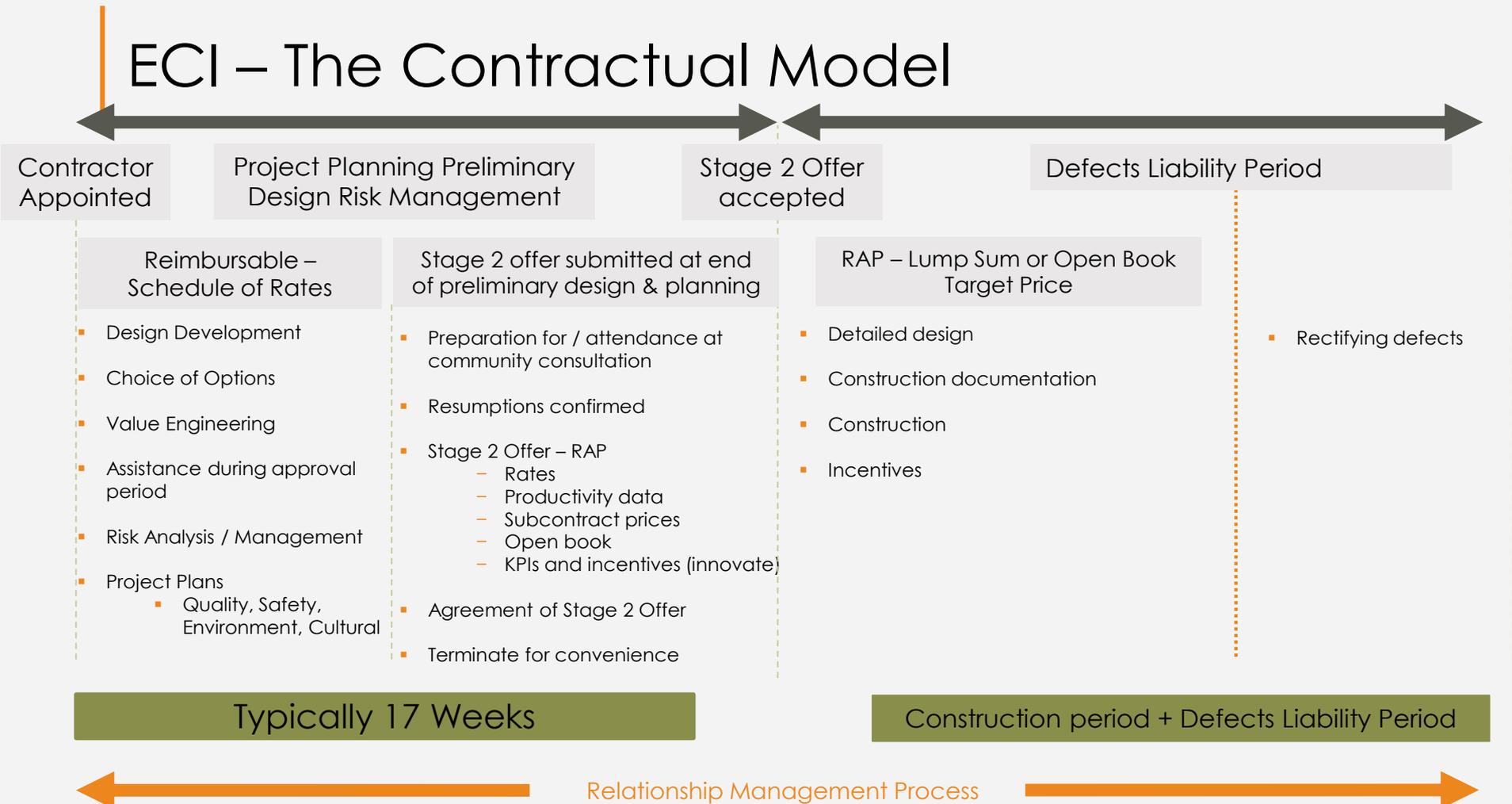
Early Contractor Involvement (ECI)

- Process – EOI – Stage 1 Contract – Stage 2 Contract
- Lots of interaction
- Project owner and contractor develop design and match project objectives together
- Relationship embedded into process and contracts – ‘Collaborative Contracting’
- Stage 2 Contract for D&C or Construct Only

What is ECI?

- The Process
 - Starts with an EOI of some kind
 - Rates / Margins
 - Similar Project Experience
 - Key Personnel
 - Understanding of Issues
 - Understanding of and Commitment to Process
 - Availability
 - Experience in & ability to work in relationship environment
 - Selection

ECI – The Contractual Model



Stage 1 Contract – Elements

- Short Term Contract for Stage 1
- Do & Charge / Time & Materials (cap) / Fixed Fee
- Usually design work only – can include early work
- Intellectual Property Ownership and Moral Rights
- Good faith negotiation of Works Contract (Stage 2 and beyond)
- Termination for convenience
- Ownership of Stage 1 Material and Stage 2 bid to then shop to market –
(but ... illusory benefit only)
- Sunset clause

Form of Stage 2 Contract

- Stage 2 Contract can be any form
 - An Australian Standard (with amendments for relationship issues)
 - Construct Only
 - D&C (with novated architect or not)
 - GC 21
 - NEC 4 (now with Australian special 'Z' clauses)
 - Bespoke
 - Lump Sum / Guaranteed Maximum Price / Target Cost (TOC)
 - Alliance
 - PPP Concession Deed

When to use ECI

Need to
Fast Track

Design is
Complex

Many
Unknowns

Significant
Risks

Hard Dollar
is Needed

Government
Funded

Benefits of ECI

Reduced overall pre-tender costs

Shortened delivery times

Team approach and true collaboration

Innovation – deals with complex projects well

Integration of construction methods

Sustainability

Early procurement

Fewer variations

Bankable

Problems with ECI

- Resource Intensive (During Procurement and Contract - Project Management Team and Project Leadership Team)
- Relationship management is essential
- Less tender price competition and related certainty demonstrating value for money – 'gilding the lily'
- Principal can end up negotiating with a single contractor
- Probity
- Requires the principal to be flexible in design and open to ideas that may challenge the premise of the project
- Requires a change in mindset to procurement
- May not get a bid – Fidelity / Commitment Deed
- May not proceed
- Can be pressure to proceed
- Potential to leave relationship behind in Stage 2

ECI Probity Requirements

- The application of probity principles may vary depending on the nature and subject of the particular tender but generally require that:
 - Impartiality / Integrity / Honesty: all tenderers are treated fairly and equitably, consistent with the rules of natural justice and procedural fairness;
 - Openness / Accountability / Value for Money / Transparency: an appropriate while flexible and transparent tender process is established, including a defined evaluation methodology;
 - Confidentiality and Accountability: all confidential information is protected in accordance with any contractual arrangements; and
 - Impartiality / Honesty / Integrity: potential and/or actual conflicts of interest are identified, declared and avoided.

Role of the Government and Tenderer

GOVERNMENT

- Clearly communicate the vision of the final project
- Willingness to consider design options and be open to innovations that may test the project design – being flexible
- Invest the right people who are capable of and committed to working to a “best for project” end result including necessary decision makers
- Ability to implement particular aspects which may demand practical experience
- Challenge the solutions of the contractor through open dialogue
- Make and maintain good relationships – create trust
- Commitment to the ECI process to develop the “best for project” end result

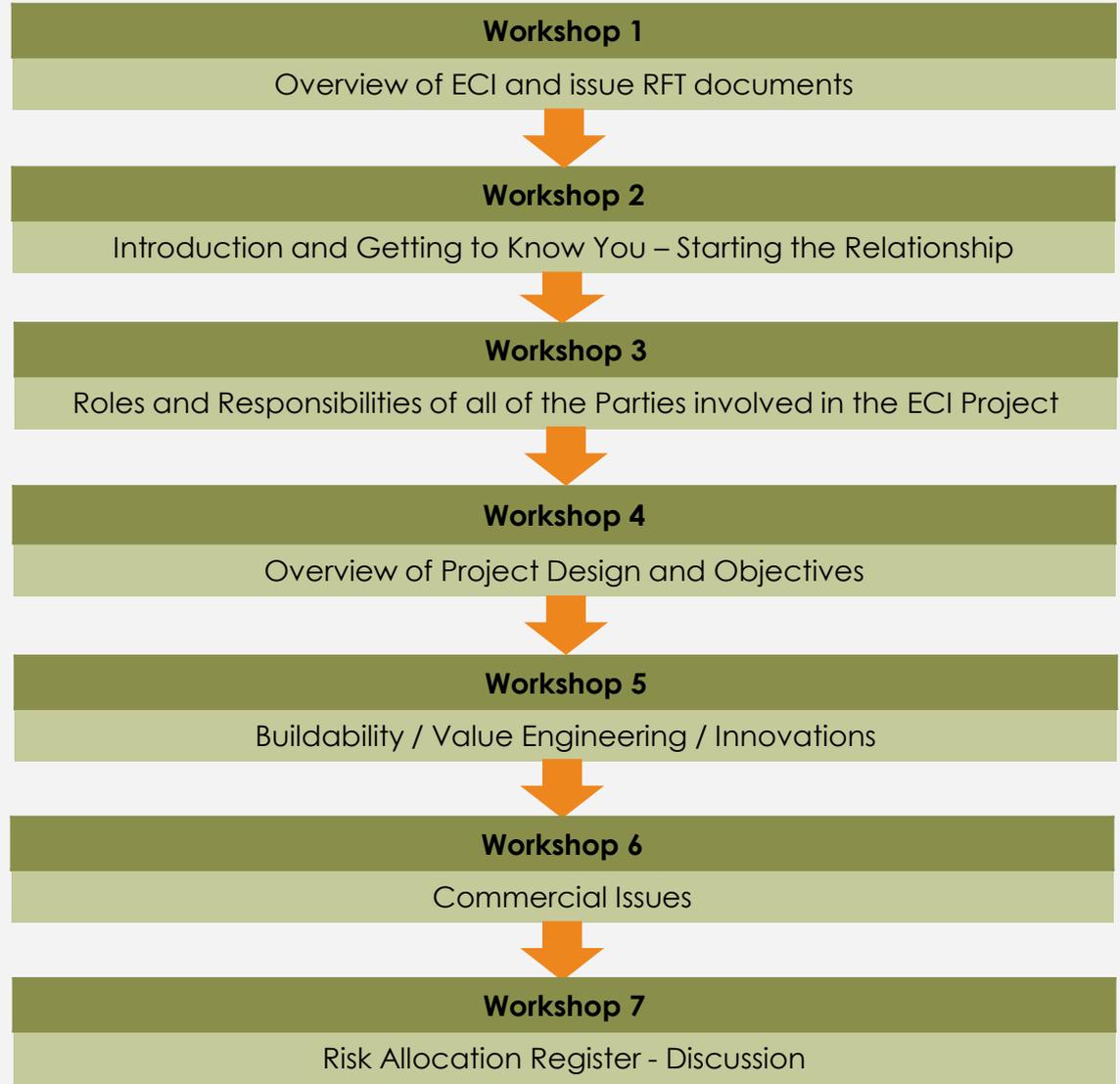
TENDERER

- Be committed to sharing knowledge early in the process
- Being prepared to maximise workshop outcomes
- Willingness to challenge the project design
- Ability to create (and willingness to share) innovations
- Keep an open mind towards the client's problems
- Maintain good relationships – willingness to collaborate
- Offer expertise and practical insights
- Commitment to achieving greater efficiency and good quality
- Willingness to take risk on board

Advantages for the Government

- High quality project at lower cost
- Design input from contractors
- Opportunity for innovation
- Reduction of variations during construction through detailed project design and relationship
- Contractor has better understanding of the project
- Improved communication
- Risk analysis
- “Whole-of-asset life cycle” approach
- Relationship management & lower conflict

Possible Workshops



ECI Selection Matrix

QUESTION	SELECTION SCORE
<ul style="list-style-type: none"> Is the project expected to involve high risks during construction? 	Score 5 for yes, 0 for no
<ul style="list-style-type: none"> Is the project time critical? 	Score 3 for yes, 0 for no
<ul style="list-style-type: none"> Is there scope for innovation in design? 	Score 2 for yes, 0 for no
<ul style="list-style-type: none"> Does the Principal require involvement in design? 	Score 2 for yes, 0 for no
<ul style="list-style-type: none"> Does the Principal have the resources/expertise to support Stage 1 activities? 	Score 2 for yes, 0 for no
<ul style="list-style-type: none"> Does the Principal have the resources/expertise to support Stage 2 activities? 	Score 2 for yes, 0 for no
<ul style="list-style-type: none"> Does the Principal need a fixed cost for the project? 	Score 2 for yes, 0 for no
<ul style="list-style-type: none"> Is a high performing team available to carry out the project? 	Score 3 for yes, 0 for no
<ul style="list-style-type: none"> Is there a need to reduce cost and duration of tendering? 	Score 2 for yes, 0 for no
TOTAL SCORE	
SCORE EVALUATION	
Score 0-9. Project not suitable for ECI.	Score 10-16. Project suitable for ECI. Score 17-23. Project highly suitable for ECI.

ECI, Project Alliancing, Traditional

ECI	ALLIANCE	TRADITIONAL
High potential for innovation during stage 1	High potential for innovation	Little potential for innovation
Risks identified and negotiated in stage 1 – allocated for stage 2	Risks shared and jointly managed	Risks allocated from outset (not necessarily optimally)
Benchmarked (can be competitive if DECI)	Benchmarked	Competitive
Final \$ certainty	Final \$ varies	Final \$ certainty
Client resource – High in stage 1, Low in stage 2	High client resource	Low client resource
Client design input	Client design input	Low client design input
Low tender costs and resources	Low tender costs and resources	High tender costs and resources
Relationship management is essential	Relationship management is essential	Relationship and collaboration not a feature
Probity an issue (unless double or multiple ECI)	Probity an issue	Probity compliant

ECI Summary

ECI solves many issues with traditional tendering and brings significant benefits

- Reduces Cost and Reduces Time
- Builds Collaboration
- Drives Innovation
- Reduces risk of variation and uncertainty

...**BUT**

- Probity remains a major issue in the public sector unless DECI or Multiple ECI

Unsolicited Proposals

- The Philosophy
- The Policies – History in Australia and Current Position
- International Experience
- Projects
- Issues

Unsolicited Proposals

- The Philosophy
 - Tension
 - Government should market test all 'substantial' projects / expenditure / opportunities
- versus*
- Market testing unique ideas of private sector is not appropriate and may lead to such ideas not coming forward

Unsolicited Proposals

- The Policies – History in Australia and Current Position
 - NSW First Project – Harbour Tunnel – 1986
 - NSW – First Modern Policy 2012 – last revised 2017
 - Vic – Policy 2015 – last revised August 2021
 - Qld – Policy 2015 – Revised July 2017
 - WA – Market-led Proposals Policy – March 2020
 - Tasmania – July 2019
 - NT – July 2021
 - ACT – March 2018
 - South Australia – September 2018

Unsolicited Proposals

Current Position and Common Themes – Cth

Current Cth position

- CPRs
 - CPR 9.10 - a limited tender can be conducted instead of an open tender in the circumstances specified under CPR 10.3, or when a procurement is exempt under Appendix A of the CPRs
 - CPR 10.3(c) - a limited tender may be conducted (i.e. a direct negotiation with a single supplier) for a procurement made under exceptionally advantageous conditions such as an 'unsolicited innovative proposal', which is not a 'routine procurement from regular suppliers'

Unsolicited Proposals

Current Position and Common Themes – Cth

Current Cth position

■ CPRs (cont)

- A procurement conducted by limited tender is not required to meet the rules in CPR 10.6 - 10.8 (Request documentation), 10.20 - 10.31 (Minimum time limits), or 10.35 (Awarding contracts).
- However, under CPR 10.5, a written report must be prepared that includes:
 - the value and type of goods and services procured
 - a statement indicating the circumstances and conditions that justified the use of limited tender
 - a record demonstrating how the procurement represented value for money in the circumstances

Unsolicited Proposals

Current Position and Common Themes – Cth

Current Cth position

- CPRs (cont)
 - The CPRs do not define, or provide any guidance on, 'exceptionally advantage conditions' or 'unsolicited innovative proposals'
- Policy
 - No prescribed guidelines or policy governing unsolicited proposals for Commonwealth Government entities
 - All States and Territories in Australia, as well as some Commonwealth Departments, have published unsolicited proposal or market-led proposal policies
 - can be referred to for guidance for Commonwealth entities

Unsolicited Proposals

Current Position and Common Themes – NSW

Current NSW position

- EPPs
 - Mirrors the CPRs
 - Under EPP 15(1)(c), a limited tender can be conducted (i.e. a direct negotiation with a single supplier) instead of an open tender in the circumstances specified under EPP 15(1)(c), including for:
 - procurements made under **exceptionally advantageous conditions** that arise only in the very short term (such as from unusual disposals, **unsolicited innovative proposals**, liquidation, bankruptcy, or receivership), and which are not routine procurements from regular suppliers [emphasis added].

Unsolicited Proposals

Current Position and Common Themes – NSW

Current NSW position

- EPPs (cont)

- A procurement conducted by limited tender is not required to meet the rules in:
 - EPP 16 -18 (Conditions for participation, Specifications & Procurement documentation)
 - EPP21 (Negotiations)
 - EPP 22 (Awarding contracts)
 - EPP 23 (Timing for submissions)

Unsolicited Proposals

Current Position and Common Themes – NSW

Current NSW position

- EPPs (cont)
 - Under EPP 15(3), for each contract awarded through limited tender, a written report must be prepared that includes:
 - the value and type of goods and services procured;
 - statement indicating the circumstances and conditions that justified the use of limited tender.

Unsolicited Proposals

Current Position and Common Themes – NSW

Current NSW position

- Policy

- NSW Government Unsolicited Proposals Guide for Submission and Assessment August 2017 (NSW Guidelines)
 - comprehensive guidance on how to assess unsolicited proposals
- Under the NSW Guidelines, an unsolicited proposal must meet the following criteria to be deemed a genuine unsolicited proposal:
 - Uniqueness
 - Value for money
 - Whole of government impact
 - Return on investment
 - Capability and capacity
 - Affordability
 - Risk allocation

Unsolicited Proposals

Current Position and Common Themes

What are they suitable for:

- NSW
 - Build and / or finance infrastructure
 - Provide Goods or Services
 - Undertake a major commercial transaction

Unsolicited Proposals

Current Position and Common Themes

What are they suitable for:

- QLD
 - Commercial Activity, for which some government facilitation is sought
 - The acquisition of, or access to, government land, assets, information, or networks
 - Development of public or open access infrastructure in Qld
 - Delivery of services to, or on behalf of, government

Unsolicited Proposals

Current Position and Common Themes

What are they suitable for:

- VIC
 - Build infrastructure and / or provide services
 - Not to circumvent existing pathways and arrangements

Unsolicited Proposals

- International Experience
 - US – permits federal agencies to develop procedures consistent with regulations (overall similar to NSW)
 - NZ – has a guide on managing unsolicited proposals (Unsolicited Unique Proposals: How to deal with uninvited bids – a guide for government agencies – October 2019)
 - Canada – piecemeal approach – a few have policy like NSW and US - some local councils allow a 'Swiss Challenge'
 - UK – not any existing policies – bound by EU procurement rules... at present

Unsolicited Proposals

- Novel approaches
 - Bonus systems – open tender – but original selected if within (say) 10/15% (Chile and Korea)
 - Swiss Challenge – open tender but original proponent can counter match the winner (Italy, the Philippines, Taiwan, two Indian States)
 - Best and final offer – open tender but original proponent automatically qualifies to participate in the final tendering round (Argentina and South Africa)

Unsolicited Proposals - NSW

- Projects Under Assessment – Stage 2
 - Aqualand – 15 Blue Street, North Sydney
 - Built Development Group Pty Ltd – Unsolicited proposal for the leasehold purchase of 50 Phillip Street, Sydney
 - Carsingha Investments Pty Ltd – Renewal of the Entertainment Quarter (EQ)
 - Dexus Funds Management Limited – Norwest High School
 - Nichigo Health – Westmead Hybrid Particle Therapy and Research Centre
 - TOGA Pty Ltd – Western Gateway Development
 - WSO Co. Pty Limited – M7-M12 Integration and Delivery

Unsolicited Proposals - NSW

- Projects Under Assessment – Stage 3 (Negotiation of final binding offer)
 - [Dexus and Frasers Property Australia – Central Place Sydney](#)
 - [Mirvac Group – Harbourside Shopping Centre](#)

Unsolicited Proposals

- Completed Projects (NSW)
 - University of Sydney – Sale of Queen Mary Building
– to be used for student accommodation
 - Crown Sydney Resort Project
 - Northconnex – construction of tunnel link between M1 and M2
 - Wynyard Place – Brookfield
 - Partial long term lease of Ausgrid - IFM Investors Pty Ltd and AustralianSuper Pty Ltd
 - Sydney Metro City and Southwest, Martin Place Station

Unsolicited Proposals

- Some Statistics – FY19

CATEGORY	NO. RECEIVED
Property & Infrastructure	5
Service	1
Transport	1
Health	1
TOTAL	8

Unsolicited Proposals

- Some Statistics
 - Of these eight proposals, one is current (as at 30 June 2019), four did not proceed past the initial assessment stage and three were referred to another agency for consideration (outside the unsolicited proposals framework).
 - Reasons for failing:
 - Uniqueness – 3
 - Inconsistent with Government Policy - 3
- In FY2018-19, one proposal was:
 - Accepted by the government: Macquarie Group – Sydney Metro Martin Place Integrated Station Development.
 - Approved to proceed to Stage 2: Dexus and Frasers Property Australia – Henry Deane Plaza Redevelopment.

Unsolicited Proposals – Assessment Criteria

VIC	NSW	QLD
Characteristics justifying exclusive negotiation	Uniqueness	Is exclusive dealing in interests of the public
Meets a service need aligned with Govt policy objectives	Whole of Government impact	Investment alignment with Govt Policy
Value for money	Value for money	Value for money
Affordable and a relative priority for budget funding	Affordability	Investment ready (affordable)
Deliverable	Capability and Capacity	Investment ready (deliverable) Technical / legal and commercial feasibility
	Return on Investment	
	Risk Allocation	VFM (cost/ risk)

Unsolicited Proposals - IP

- QLD
 - Silent
- NSW
 - Where MLP fails and the proposal is offered to the market, the government will 'respect' the IP of the proponent
- VIC
 - If proposal does not proceed and Govt wants to use IP 'appropriate compensation' will 'be considered'

Contact



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