



**A new framework to  
assess unsolicited  
infrastructure  
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# A new framework to assess unsolicited infrastructure proposals in Victoria

The Victorian Government has recently published guidelines that frame how it will assess unsolicited proposals for infrastructure projects pitched to it by the private sector. At a time in the economic cycle where investment in infrastructure is becoming more critical to Australia's economic story, this is a very positive step towards encouraging private sector development of innovative and more efficient ways to deliver critical infrastructure projects for the benefit of Government and ultimately the public.

There should be no confusion – Federal and State Governments in Australia are open for business when it comes to economic and social infrastructure projects.

Leading the charge is Australia's Prime Minister, Tony Abbott MP, who is well known for his wish to be known as an 'infrastructure prime minister'. State Governments around Australia are also working hard to tackle the country's current and future infrastructure challenges – and balance their budgets

– by embarking on a fresh wave of privatisation of State-owned assets that will allow for the recycling of precious capital into greenfields infrastructure projects. The New South Wales sales process for the State-owned entity, Macquarie Generation, is an example, with various energy, port, water and other assets also mooted for sale.

In addition, Australia's States continue to reiterate their desire for greater private sector investment and participation in projects by, among other things, publishing guidelines for unsolicited private sector proposals for projects. While not intended to displace Government initiated 'competitive tender' processes as the predominant procurement method, State Governments seem keener than ever to encourage the private sector to be proactive in proposing innovative ideas for the development and delivery of new infrastructure.

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## Victorian guidelines for assessing unsolicited proposals for infrastructure development

For its part, the Victorian Government has recently delivered on its 2013 commitment to develop a transparent framework for dealing with unsolicited proposals in Victoria by releasing a set of guidelines. The guidelines establish a five-stage process for the management of unsolicited proposals across all parts of the Victorian Government. This is undoubtedly a positive development for the projects industry in Victoria, providing a more transparent, consistent and structured approach for such proposals between Government and the private sector for the development and assessment of innovative ideas.

Victoria's approach has been warmly received by many in the industry, following the NSW Government's approach laid down in 2012 in its unsolicited proposal guidelines which received a positive response from the private sector. The NSW process has already enabled a joint proposal by Transurban Limited, Intoll Group and QIC to construct a 8km, multi-billion dollar tunnel to connect Sydney's M2 motorway to the F3 freeway (a national priority project according to Infrastructure Australia) to progress to an advanced stage.

However, some controversy has surrounded the NSW Government's approval of an unsolicited proposal from Crown Limited for the development of six-star hotel and VIP casino at Barangaroo in Sydney. This may have played a part in informing the Victorian guidelines' emphasis on the need to assess whether proposals (or aspects of

them) can be opened to the market, and the decision to require a project summary to be released publicly within 90 days of contractual or financial close about the value for money equation and why an exclusive negotiation was pursued.

### Five stage process

The guidelines set out five stages, but potential proponents will be most interested in navigating the first three stages to put their best foot forward to secure an exclusive negotiating position with Government, thus avoiding the commercial risks, costs and other uncertainties inherent in a competitive bid process.

#### Stage 1: receipt of an unsolicited proposal

- All proposals are to be submitted to the Deputy Secretary, Commercial, Department of Treasury and Finance.
  - The minimum information requirements include: an outline of the proposal and how it meets a service need; the unique aspects of the proposal; the required Government support and cost (direct and indirect) and the expected capital cost; the proponent's financial capacity; the commercial aspects of the proposal; the proposed benefits to the State, including how the proposal is in the public interest; the desired delivery method; and areas considered to be unique intellectual property.
  - The Government will confirm within 30 days how the proposal will be evaluated, how it proposes to protect any confidential information and if it has any additional information requirements.
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## Stage 2: preliminary assessment

- Government will establish an internal working group to evaluate whether the proposal should proceed for further development in an exclusive negotiation. The Treasurer, Minister for State Development and relevant portfolio Minister(s) will provide early guidance to the working group on whether the proposal fits with Government priorities and policy directions.
- Key considerations include: the service need and the proposal's consistency with policy objectives; the financial, technical and economic merits of the proposal; the 'uniqueness' of the proposal that justifies exclusive negotiation; the potential for a value for money solution to be achieved; whether other solutions can be considered and if there is a competitive market for such solutions; and the proponent's capacity to deliver the solution.
- The outcome may be a recommendation that the proposal should not proceed at all, that it should be further developed in exclusive negotiations with the proponent or that the Government develop it further and award it through a competitive process.
- Stage 3: exclusive negotiations to develop the proposal further
- Government and the proponent will enter into a formal negotiation period to develop a full proposal for Government consideration. This will involve further consideration of the feasibility of the project, how it will be delivered and whether it represents value for money for Government.
- Key considerations include: the value for money equation; the whole of

government impacts; funding, financing and delivery options; whether the proposal or parts of it can be put to the market; risk allocation; and the appropriate return to the private sector given the project risks.

- At the end of this process, the Government may choose to negotiate a final offer with the proponent, not to proceed with the proposal or to take another approach, which could include a competitive process. In the latter case, the Government will consider appropriate compensation for genuine intellectual property and partial reimbursement of the proponent's costs in further developing the proposal.

## Stage 4: negotiating and finalising a binding offer

- Government and the proponent will finalise any outstanding issues and the proponent will present a final binding offer to Government for approval.
- The expected outcome is that the proposal is finalised and a contract awarded or, if a final outcome cannot be negotiated, that the proposal does not proceed.

## Stage 5: award contract

- The Government and the proponent will enter into a binding contractual arrangement to deliver the agreed proposal.
  - The Government will release a Project Summary within 90 days of contractual or financial close which summarises aspects of the proposal, including reasons why an exclusive negotiation was pursued, how the proposal was evaluated and what value for money was achieved for Government.
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## Key issues for the private sector

Plainly, timing the delivery of the unsolicited proposal within State Government electoral cycles will be a key commercial objective for proponents. Government will first be assessing whether the proposal is consistent with its policy objectives and priorities. This is one area where both Federal and State Governments have been subject to some recent criticism based on perceptions that certain projects may have been incorrectly prioritised and that good ideas from the private sector may not be progressed by Government as efficiently as they could be due to concern from individual departments not to set potentially unwanted precedent or different views between departments of a Government as to what is an area of priority.

As to matters within the private sector's control, it is clear that the critical task in Victoria will be to convince the Government of the precise reasons why an exclusive negotiation should be pursued and the value for money aspects of the proposal. This is because the Government will itself need to be able to justify to the public the benefit to Government and why departure from a competitive tender process was appropriate in the circumstances.

### Uniqueness

Demonstrating the uniqueness of the proposal, or the unique ability of the proponent to deliver the proposal, will be fundamental.

The experience in NSW is telling in this regard: between January 2012 and January 2013, the NSW Government received 36 unsolicited proposals, approximately 85% of which were assessed not to be sufficiently unique to warrant exclusive negotiations. The proposal having merit will not itself be sufficient.

Proponents should be striving to answer positively one or more of the following questions in making an unsolicited proposal.

- Is the proposal unable to be readily delivered by the proponent's competitors?
- Does the proponent, individually or together with its commercial partners or consortium members, own a strategic asset integral to delivering the proposal or that would otherwise constrain the Government from contracting with other parties if the proposal was put out to the market in a competitive tender?
- Does the proposal include features or attributes that are not of themselves unique but together contribute to a unique proposal?

Technological and engineering advantages or the ability to deliver the least environmental impact, particularly if they are proprietary to the proponent, are at the more obvious end of the spectrum of potential features that will assist proponents to convince Government of the uniqueness of a proposal.

However, it will be interesting to see how proponents might structure their proposals around ownership of assets or the participation of key commercial partners to justify the uniqueness of their proposal.

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A positive development for the industry would be if innovative financial structures or solutions were to be regarded as a sufficiently unique feature – in that way challenging and encouraging the private sector to develop innovative and value for money financing solutions. Reflective of a global trend, as the debt capital markets gain a level of resurgence in Australia and more superannuation funds, sovereign wealth funds and alternative capital providers participate in direct infrastructure investment and debt financing transactions, equity and debt financing structures that deliver new solutions to prevailing Government concerns regarding risk allocation around traditional financing concerns (for example, refinancing risk inherent in debt structures reliant on short term bank debt) would hopefully be well received in this process.

### Value for money

The value for money considerations for Government are well known.

In the context of unsolicited proposals, a relevant factor for proponents to demonstrate will be the savings to Government that will result from pursuing an exclusive negotiation process compared to the relatively high costs of a competitive tender process. Depending on the features of the project, a proponent may also be able to identify additional value creation or ‘value capture’ opportunities for Government or the affected community or communities generally arising out of the proposal.

### Protection of intellectual property and confidentiality

From a legal perspective, proponents will need to consider taking appropriate steps to protect the confidentiality of their ideas and rights in respect of any genuine intellectual property.

In this regard, the Victorian Government has clearly flagged that it will be open to considering purchasing a proponent’s intellectual property if exclusive negotiations with the proponent are not approved. Although the detailed provisions will be critical with respect to any confidentiality agreement or agreement regarding intellectual property, the Victorian guidelines should be of some comfort to proponents as they clearly exhibit the Government’s concern to take into account a proponent’s legal rights, as well as the cost to it of generating its proposal for the Government’s consideration. It should be noted that the guidelines indicate that it is only at Stage 3 (exclusive negotiations) that a formal agreement regarding intellectual property, confidentiality and compensation arrangements would be entered into by Government.

It will be interesting to see how proponents approach Government in connection with proposals that contain unique ideas or methods that could be relevant to other projects. Proponents will presumably want to avoid a situation where their unsolicited proposal is rejected but for Government to ‘cherry pick’ innovative ideas they suggested. Although, given the commitment to confidentiality and compensation in the

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Victorian guidelines, this does not seem to be the intention of Government. No doubt the sophisticated proponents participating in these proposals will time their approach to Government so as to align their proposal with Government priorities. Of course, there could be a tension between this timing and 'sitting on an idea' and the uniqueness of a proposal.

## Conclusion

The Victorian Government has recently published guidelines that frame how it will assess unsolicited proposals for infrastructure projects pitched to it by the private sector. At a time in the economic cycle where investment in infrastructure is becoming more critical to the national economic story, this is a very positive step towards encouraging private sector development of innovative and more efficient ways to deliver critical infrastructure projects for the benefit of the Victorian Government and ultimately the public.

For the private sector, the key challenges in making an unsolicited proposal will be to establish that the proposal is sufficiently unique to justify the Government not putting the project to competitive tender and to time its approach as best as it can having regard to the prevailing policy objectives and priorities of Government.

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