

## WANT TO SELL YOUR IDEA TO GOVERNMENT? AN UNSOLICITED PROPOSAL COULD BE YOUR ANSWER.

Andrew Chew and Robert Clarke, Partners and Georgina Crouch, Associate



Unsolicited proposals are a means by which the private sector can propose new ideas to the State to deliver capital requirements outside normal procurement processes.

Governments generally procure projects, goods and services of any size by direct tendering through a competitive process.

However, another approach is through an unsolicited proposal, initiated by the private sector.

Allowing private sector firms to propose new projects, even if a proposal has not been requested can drive innovation and can improve service delivery.

With the exception of Western Australia and Tasmania, each State and Territory now has its own guidelines on how proposals can be put to Government – **see Figure 1**. Several governments also have websites that provide template documents to assist organisations prepare an unsolicited proposal.

A key feature of the guidelines is that, if certain criteria are met, the Government (at its discretion)

Figure 1

STATE/TERRITORY	GUIDELINES
NSW	Guide for Submission and Assessment of Unsolicited Proposals (January 2012, updated in August 2012) <a href="http://www.nsw.gov.au/your-government/unsolicited-proposals">http://www.nsw.gov.au/your-government/unsolicited-proposals</a>
QLD	National Public Private Partnership Guidelines Annexure 1 – Queensland departures (2011) and Public private partnerships guidance material, Supporting document – Value for money framework (2008)
SA	State Procurement Board Market Approaches Guideline Version 3.0 (August 2012, to be reviewed in August 2014)
NT	Unsolicited Proposals Policy (October 2013) <a href="http://www.dob.nt.gov.au/business/tenders-contracts/procurement-support/Pages/unsolicited-proposals.aspx">http://www.dob.nt.gov.au/business/tenders-contracts/procurement-support/Pages/unsolicited-proposals.aspx</a>
ACT	Guidelines for Unsolicited Proposals (January 2014) <a href="http://apps.treasury.act.gov.au/partnerships-framework/unsolicited-proposals">http://apps.treasury.act.gov.au/partnerships-framework/unsolicited-proposals</a>
VIC	Unsolicited Proposal Guideline (February 2014) <a href="http://www.dtf.vic.gov.au/Infrastructure-Delivery/Unsolicited-proposals">http://www.dtf.vic.gov.au/Infrastructure-Delivery/Unsolicited-proposals</a>

may enter into direct negotiations with an individual or organisation and conduct an assessment of the proposal without a tender process.

Western Australia and Tasmania have not yet adopted specific guidelines.<sup>1</sup> For these states, private sector proponents should use the National Public Private Partnership Policy and Guidelines, which provide general guidance on unsolicited proposals.

### How are unsolicited proposals assessed?

The assessment process for evaluating proposals is set out in each jurisdiction's guidelines.

A common feature is that an unsolicited proposal must be "unique" and "innovative".

In New South Wales, proposals must include "unique elements that provide justification for entering into direct negotiations with the Proponent".<sup>2</sup> In the Northern Territory, the proposal must contain qualities that are "new, unique or innovative"<sup>3</sup>, and in Victoria, an unsolicited proposal will only be pursued where it has "a degree of uniqueness that means it could not reasonably be delivered by another private party or achieve the same value for money through a competitive process within acceptable timeframes"<sup>4</sup>.

The extent of the requirements in each jurisdiction varies. In New South Wales, there is a three stage assessment process, as compared to a five stage assessment process in Victoria. The processes generally cover similar assessment by the Government, at different points in time. A summary of the assessment processes in each jurisdiction is set out in **Table 1**. The New South Wales three stage assessment process is set out in **Figure 2**.

A feature of the Victorian guideline is that it allows for the Government to contemplate a competitive process at the conclusion of stages two and three. In the absence of competition, a "value for money" evaluation is required, whereby the Victorian Government is required to consider appropriate costing mechanisms, such as building a cost comparator, seeking independent assessment of a proposal, using an open book approach or using benchmarking data.<sup>5</sup>

The Australian Capital Territory guidelines contain a "six ways" framework, in which the assessing committee and proponent determine a procurement structure for the proposal from six procurement models outlined within the guidelines.<sup>6</sup>

### Will IP rights be protected?

There are obviously sensitivities in bringing new ideas to market. The

guidelines suggest that intellectual property rights will be protected through agreement with proponents throughout the process.

The New South Wales guidelines provide that the approach to protecting intellectual property rights will be agreed with the proponent during stage one.<sup>7</sup>

In South Australia the Government can test an unsolicited proposal through a competitive market, "subject to the protection of any intellectual property rights or confidential information, as agreed with the proponent"<sup>8</sup>.

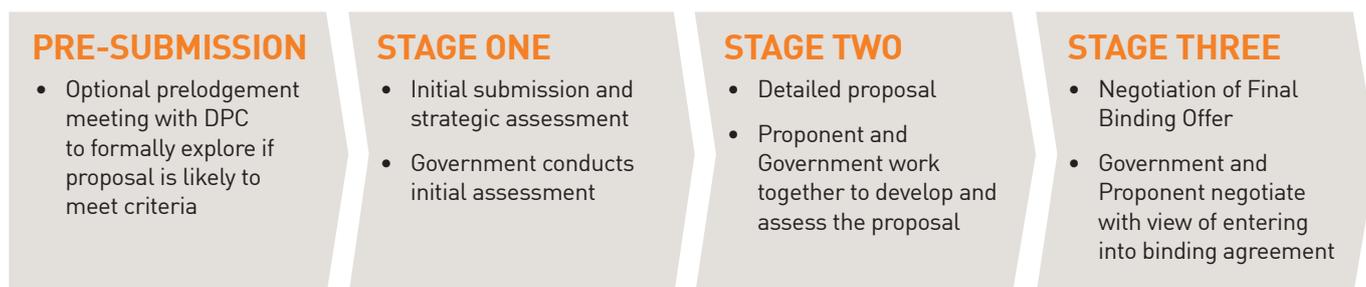
### What is the current status of unsolicited proposals in Australia?

The NSW Government has received over 80 unsolicited proposals since January 2012.<sup>9</sup> Approximately 90% of those proposals have not proceeded beyond stage one, and the Government has stated that "a great many of these were considered not sufficiently unique to warrant a direct dealing"<sup>10</sup>.

Unsolicited proposals in New South Wales over the last couple of years that have progressed beyond stage one include:

- Brookfield Office Properties Australia Pty Ltd's proposal to combine a commercial and retail development on Carrington Street with improvements to the

Figure 2



public access areas for Wynyard Station, which is currently in stage two of the New South Wales Government's unsolicited proposals assessment process;

- the proposal from private motorway operator Transurban and the Westlink M7 shareholders to construct a tunnel link between the F3 and M2 Motorways, which is currently in stage three of the New South Wales assessment process;
- the Crown Sydney Resort Project for the development and operation of an iconic six star hotel and subsequent commencement of VIP gaming in Barangaroo South, Sydney, which has been approved by the Government.

The interests of the New South Wales Government were enhanced by the inclusion of detailed securities and guarantees, and a licence fee payment of \$100 million to be paid by Crown Group to the New South Wales Government upon the issue of the licence. The project is subject to a number of conditions and approvals, including the passing of amending legislation, planning approval under the *Environmental Planning and Assessment Act 1979* (NSW) and licence approval by the Independent Liquor and

Gaming Authority; and

- the sale of the Queen Mary Building, Camperdown, which will be used for affordable student accommodation, to the University of Sydney.

In Victoria, a private sector proposal from MTR, John Holland Construction and UGL Rail Services for an approximately \$2.5 billion upgrade of the Cranbourne-Pakenham suburban rail line (including the delivery of 25 high capacity trains) is the first project approved under the new Victorian government guidelines.

In Victoria, a private sector proposal to build an 18km road from the Eastern Freeway to the Western Ring Road (which would be longer than the Government's proposed 6km East West link) for less than \$12 billion was rejected by the Victorian Government. Victorian Treasurer Michael O'Brien said the Government was committed to a competitive tender process and that an unsolicited proposal to finance and operate the East West Link was not good value for money.<sup>11</sup>

Unsolicited proposals are not without controversy, and the application of the New South Wales guidelines to the Crown Sydney Resort proposal caused debate around the circumstances

in which it is appropriate for the Government to deal with a private party exclusively and without an open tender process.<sup>12</sup>

However, Government issued unsolicited proposals guidelines provide a framework for the Government to recognise innovative contributions by the private sector that potentially benefit the economy. As stated by Victorian treasurer Mr Michael O'Brien "*the public sector doesn't have a monopoly on good ideas*"<sup>13</sup>.

1 The Western Australian Government previously provided guidance on unsolicited proposals from the private sector for a PPP, in its publication *Partnerships for Growth: Policies and Guidelines for Public Private Partnerships in Western Australia* in December 2002. However, there is no longer any specific Western Australian guidance as these guidelines were superseded by the National PPP guidelines in 2008.

2 NSW Guide for Submission and Assessment of Unsolicited Proposals (August 2012), p 4.

3 NT Unsolicited Proposals Policy (October 2013), p1.

4 VIC Unsolicited Proposal Guideline (February 2014), p2.

5 VIC Unsolicited Proposal Guideline (February 2014), p7.

6 ACT Guidelines for Unsolicited Proposals (January 2014), pp 9-10.

7 NSW Guide for Submission and Assessment of Unsolicited Proposals (August 2012), p 4.

8 SA State Procurement Board Market Approaches Guideline Version 3.0 (August 2012 p 10).

9 NSW Government, Supplementary Information for proponents, February 2014, p1.

10 NSW Government, Supplementary Information for proponents, February 2014, p1.

11 [www.abc.net.au/news](http://www.abc.net.au/news): 'Treasurer says East West Link proposal 'not good value for money'', 15 August 2013.

12 Lenny Roth, NSW Parliamentary Research Service August 2013 e-brief, p1 and pp 7-9.

13 Victorian Government Media Release, 'Private sector's big ideas welcome in Victoria', 13 February 2014.

Table 1

UNSOLICITED PROPOSAL ASSESSMENT PROCESSES IN AUSTRALIAN STATES AND TERRITORIES

Stage	NSW	ACT	NT	VIC	QLD	SA
<b>Pre-submission concept review</b>	Optional pre-lodgement meeting to formally explore whether proposal is likely to meet Stage 1 assessment criteria					
<b>Submission</b>	<b>1 Initial Submission and Strategic Assessment</b> <ul style="list-style-type: none"> <li>Government conducts initial assessment</li> <li>Government submits preferred commercial model</li> </ul>	<b>Concept Presentation</b> <ul style="list-style-type: none"> <li>Government assesses concept's merit</li> <li>Proponent submits preferred commercial model</li> </ul>	<b>Initial Review</b> <ul style="list-style-type: none"> <li>Assessment Panel undertakes initial review to determine whether the proposal is an unsolicited proposal</li> </ul>	<b>1 Receipt of Unsolicited Proposal</b> <ul style="list-style-type: none"> <li>Government notifies Proponent about how proposal will be evaluated</li> </ul>	<b>1 Notification of the Outcome of the EOJ Process</b> <ul style="list-style-type: none"> <li>Proponent notified of outcome in relation to Expression of Interest</li> </ul>	<b>1 Government to ensure required information provided by Proponent</b>
<b>Proposal</b>	<b>2 Detailed Proposal</b> <ul style="list-style-type: none"> <li>Proponent and Government work together to develop and assess the proposal</li> </ul>	<b>Submission Evaluation</b> <ul style="list-style-type: none"> <li>Steering Committee assesses the detailed submission</li> <li>Financial appraisal is conducted</li> <li>Government assesses delivery appropriateness</li> </ul>	<b>Strategic Assessment</b> <ul style="list-style-type: none"> <li>Assessment Panel determines alignment with government policies and priorities</li> </ul>	<b>3 Communications with Proponents</b> <ul style="list-style-type: none"> <li>Proponent presents bid to Government</li> </ul>	<b>2 Finalisation and issue of Binding Bid Documentation</b> <ul style="list-style-type: none"> <li>Binding bid documentation provided</li> <li>Proposal prepared</li> <li>Commitment to delivering project</li> </ul>	<b>2 Conduct preliminary review</b> <ul style="list-style-type: none"> <li>Government conducts initial review</li> </ul>
<b>Final Offer</b>	<b>3 Negotiation of Final Binding Offer</b> <ul style="list-style-type: none"> <li>Government and Proponent negotiate with a view of entering into a binding agreement</li> </ul>	<b>Tender Approach</b> <ul style="list-style-type: none"> <li>Tender Evaluation team determine the final tender approach to be taken and make recommendation to Cabinet</li> </ul>	<b>Developing the Proposal in Exclusive Negotiations</b> <ul style="list-style-type: none"> <li>Government and Proponent develop full proposal</li> <li>Headline details published on Department of Treasury and Finance website</li> </ul>	<b>5 Consideration by Cabinet</b> <ul style="list-style-type: none"> <li>Cabinet provided with project summary</li> </ul>	<b>3 Where appropriate, Government will develop an acquisition plan</b>	<b>3 Seek approval of the acquisition plan</b>
			<b>4 Award Contract</b> <ul style="list-style-type: none"> <li>Contract awarded</li> <li>Government releases project summary</li> </ul>	<b>6 Negotiating and Finalising Binding Offer</b> <ul style="list-style-type: none"> <li>Government and Proponent negotiate with a view of entering a binding agreement</li> <li>Report submitted to Government to assess whether other industry participants should be given opportunity to submit proposals</li> </ul>	<b>4 Evaluation of Binding Bid</b> <ul style="list-style-type: none"> <li>Committee evaluates bid and reports to Ministers</li> <li>Ministers present submission to Cabinet</li> </ul>	<b>5 Conduct detailed evaluation in accordance with acquisition plan</b> <ul style="list-style-type: none"> <li>Evaluation panel undertake detailed consideration of proposal</li> </ul>
				<b>7 Project agreements summary</b> <ul style="list-style-type: none"> <li>Government releases project summary</li> </ul>	<b>5 Consideration by Cabinet</b> <ul style="list-style-type: none"> <li>Cabinet provided with project summary</li> </ul>	<b>6 Seek approval of the purchase recommendation</b> <ul style="list-style-type: none"> <li>Recommendation is made to the principal officer</li> </ul>
					<b>6 Financial close</b> <ul style="list-style-type: none"> <li>Project agreements finalised and executed</li> <li>Public announcement made on financial close</li> </ul>	<b>7 Implement the proposal</b> <ul style="list-style-type: none"> <li>Proponent notified of the outcome</li> <li>Contract and contract management plan finalised</li> </ul>