

**Submission
No 2**

**EXAMINATION OF AUDITOR-GENERAL'S PERFORMANCE AUDIT
REPORTS AUGUST 2018 - JANUARY 2019**

Organisation: Department of Premier and Cabinet

Date Received: 19 September 2019



Premier & Cabinet

13 February 2020

Ref: A3234840

Mr Greg Piper MP
Chair
NSW Legislative Assembly Public Accounts Committee
By email: pac@parliament.nsw.gov.au

Dear Mr Piper

Thank you for your letter dated 11 November 2019 requesting a submission outlining the Department of Premier and Cabinet's (DPC) response to the Auditor-General's report 'Unsolicited proposal process for the lease of Ausgrid' (the Report).

As noted in response to the Report, DPC and NSW Treasury differed with several of the conclusions made. In particular, it is DPC and NSW Treasury's view that the evidence before the Assessment Panel and Steering Committee provided compelling reasons to conclude that the proponents were uniquely placed to deliver the proposal and achieve value for money for NSW citizens.

DPC has nevertheless worked towards improving USP processes, accepting six of the eight recommendations made in the Report. I have attached DPC's submission to the Public Accounts Committee – 'Implementation of Recommendations.'

DPC will be publishing the status of implementing performance audit recommendations in its 2019 - 2020 Annual Report.

If you have any queries in relation to this response, please contact [REDACTED]

Yours sincerely

Tim Reardon
Secretary

13 February 2020

IMPLEMENTATION OF RECOMMENDATIONS

Department of Premier and Cabinet

Unsolicited proposal process for the lease of Ausgrid

RECOMMENDATION	ACCEPTED OR REJECTED	ACTIONS TO BE TAKEN	DUE DATE	STATUS (completed, on track, delayed) and COMMENT	RESPONSIBILITY (Section of agency responsible for implementation)
The Department of Premier and Cabinet should ensure future Assessment Panels and Steering Committees considering a proposal to acquire a government business or asset:					
1	Accepted	Briefings to Assessment Panels and Steering Committee's emphasise the need for a strong evidence base and the consideration of counter-arguments when considering a proposal to acquire a Government business or asset.	N/A	<p>Completed</p> <p>To ensure that Assessment Panels and Steering Committee's understand the requirements under the USP Guidelines, DPC Commercial Delivery Branch provides briefings to these bodies on the USP process and relevant probity principles.</p> <p>To address this recommendation, these briefings emphasise the need for a strong evidence base and the consideration of counter-arguments when considering a proposal to acquire a Government business or asset.</p>	DPC Commercial Delivery Branch
2	Accepted	Briefings to Assessment Panels and Steering Committee's emphasise the need to rigorously consider all elements of the USP Guidelines when determining	N/A	<p>Completed</p> <p>To ensure that Assessment Panels and Steering Committee's understand the requirements under the USP Guidelines, DPC Commercial Delivery Branch provides</p>	DPC Commercial Delivery Branch

	dealt with as an unsolicited proposal, and document these deliberations and all relevant evidence		whether a proposal should be dealt with as a USP. Briefings also emphasise that the USP Guidelines require that all activities and decision making be documented.		briefings to these bodies on the USP process and relevant probity principles. To address this recommendation, these briefings emphasise the need to rigorously consider all elements of the USP Guidelines when determining whether a proposal should be dealt with as a USP. Briefings also emphasise the USP Guidelines require all activities and decision making be documented.	
3	Do not use speed of transaction compared to a market process as justification for uniqueness	Rejected	N/A	N/A	DPC agrees that speed of transaction compared to a market process should not be used as the sole justification for uniqueness. Nevertheless, as provided for in the USP Guidelines, attributes of a proposal that do not necessarily stand alone as unique may be combined to create a 'unique' proposal. How different attributes may combine to create a unique proposal should be considered on their merits on a case by case basis to encourage the best ideas and solutions from the non-Government sector. In the case of speed of transaction, this can have significant impacts on the value for money proposition of a proposal which may combine with other aspects of a proposal to present a unique opportunity for the State. Speed of transaction may also impact both the transaction outcome and transaction risk.	DPC Commercial Delivery Branch
4	Document a minimum acceptable price, and a negotiating strategy designed to maximise price, before	Accepted	Briefings to Assessment Panels, Steering Committees and the agencies leading the Stage 2 Negotiation process (Lead Agencies), emphasise that where	N/A	Completed The assessment of USPs includes a detailed assessment of price to determine whether a proposal is acceptable to Government and	DPC Commercial Delivery Branch

	commencing negotiations		<p>appropriate the Negotiation Plan should document a minimum acceptable price and a bargaining strategy for maximising price and other strategic benefits.</p> <p>DPC will also consider including more detail on negotiation strategy in any future update of the USP Guidelines.</p>		<p>represents value for money. In any given USP this evaluation may include the use of independent experts or valuers, sensitivity testing, or the use of comparative financial models like Public Sector Comparators or Shadow Bid Models. Price is not necessarily the sole determinant of value for money, with proposals intended to be considered in light of the benefits and outcomes delivered by the proposal.</p> <p>The approach to negotiation to maximise price and other strategic benefits is generally documented in a Negotiation Plan prepared by the lead agency at the appropriate time in the USP process. Negotiation Plans, as with other key governance documents, are approved by the Proposal Specific Steering Committee.</p> <p>While it is not always possible to identify a minimum acceptable price until wider benefits and strategic outcomes of a proposal are finalised and evaluated, to address the Audit Office's recommendation, DPC now ensures that briefings to Assessment Panels, Steering Committees and the agencies leading the Stage 2 Negotiation process (Lead Agencies), emphasise that where appropriate the Negotiation Plan should document a minimum acceptable price and a bargaining strategy for maximising price and other strategic benefits.</p>	
5	Do not communicate an acceptable price to the proponent, before the negotiation stage	Accepted	DPC emphasises in briefings to Lead Agencies the importance of the Negotiation Plan documenting a strategy regarding	N/A	Completed As above, Negotiation Plans are generally prepared by the Lead Agency at the	DPC Commercial Delivery Branch

	of the process, and then only as part of a documented bargaining strategy		the timing of communications to a proponent on price. Where it is considered appropriate to provide an early indication of price to a proponent, as is provided for in the USP Guide, DPC emphasises that the justification for doing so should be documented in the Negotiation Plan.		<p>appropriate time in the USP process. The plans include parameters on what information should be communicated to a proponent, and the timing for that communication. The negotiation strategy for each plan is formulated on a case by case basis having regard to the nature of the proposal. As per the USP Guide, the strategy may include providing an early indication of acceptable return on investment and other requirements to be achieved by the proponent. This is intended to encourage the submission of quality proposals that may be capable of acceptance, whilst still ensuring Government maintains the scope to negotiate a price in Stage 2 that delivers a value for money outcome.</p> <p>To address this recommendation, DPC emphasises in briefings to Lead Agencies the importance of the Negotiation Plan documenting a strategy regarding the timing of communications to a proponent on price. Where it is considered appropriate to provide an early indication of price to a proponent, DPC Commercial Delivery Branch emphasises that the justification for doing so should be documented in the Negotiation Plan.</p> <p>DPC will also consider including more detail around potential negotiation strategies in any future update to the USP Guidelines.</p>	
6	Maintain separation between negotiation, assessment and review in line with the	Accepted	DPC seeks to ensure separation is maintained by advising Lead Agencies at the commencement of Stage 2 of the appropriate	N/A	<p>Completed</p> <p>Separation of negotiation, assessment and review is maintained in the USP process</p>	DPC Commercial Delivery Branch

	Unsolicited Proposals Guide		governance arrangements required under the USP Guidelines. DPC also reviews key governance documents and provides oversight of the governance arrangements through its representation on the Assessment Panel and Steering Committee for each proposal.		<p>through the governance arrangements put into place by the Lead Agency at Stage 2 of the USP process. This include a Proposal Specific Steering Committee to provide oversight and review of the process, a Negotiation Team and Proposal Manager to manage negotiations, and a separate Evaluation Panel to evaluate the detailed proposal and contract documentation at the end of Stage 2 and 3 respectively. As per the USP Guide, a probity advisor is appointed at Stages 2 & 3 of the assessment process.</p> <p>DPC seeks to ensure separation is maintained by advising Lead Agencies at the commencement of Stage 2 of the appropriate governance arrangements required under the USP Guidelines. DPC Commercial Delivery Branch also reviews key governance documents and provides oversight of the governance arrangements through its representation on the Assessment Panel and Steering Committee for each proposal.</p>	
7	Keep an auditable trail of documentation relating to the negotiation process	Accepted	<p>To ensure that an auditable trail of documentation is kept, DPC emphasises in briefings to Lead Agencies at the commencement of Stage 2 that the USP Guidelines require all activities and decision making to be documented.</p> <p>DPC will also consider in any future update of the USP Guidelines whether any updates may be beneficial for clarifying</p>	N/A	<p>Completed</p> <p>To ensure that an auditable trail of documentation is kept, DPC emphasises in briefings to Lead Agencies at the commencement of Stage 2 that the USP Guidelines require all activities and decision making to be documented.</p> <p>DPC will also consider in any future update of the USP Guidelines whether any updates may be beneficial for clarifying the requirements around documentation.</p>	DPC Commercial Delivery Branch

			the requirements around documentation.			
8	Maintain separation between any probity audit services engaged and the probity advisory and reporting services recommended in the current Guide.	Noted	N/A	N/A	<p>To ensure that Assessment Panels and Steering Committees understand the probity requirements relating to a USP, it is standard practice for DPC Commercial Delivery branch to arrange briefings for these bodies on relevant probity principles. Probity advisors are also appointed at Stages 2 and 3 of the assessment process to advise on the application of probity fundamentals, which may include advice on the engagement of probity audit services.</p> <p>It is not standard practice in NSW on major transactions, whether through the USP process or more generally, to mandate a separation between probity 'advice' and 'audit' services. Further, while probity advice is routinely sought, probity audits are not always required. However, in circumstances where a probity audit was warranted, consideration would be given to whether a separate probity expert should be engaged to conduct the audit. This will depend on the circumstances of the individual case.</p>	DPC Commercial Delivery Branch