



1. Introduction
2. The first PPP project
3. Past NSW guidelines
4. National PPP guidelines
5. Current NSW guidelines
6. Number of recent proposals
7. Crown and Echo proposals
8. Debate about the process
9. Guidelines in other States
10. International comparisons
11. Conclusion

Unsolicited proposals

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1. Introduction

The NSW Government's process for dealing with unsolicited proposals from the private sector has recently been the subject of much debate. The debate has centred on Crown Limited's unsolicited proposal to build and operate a six-star hotel and VIP casino at Barangaroo. That proposal has now moved to the third and final stage of the unsolicited proposal assessment process. A key issue in the debate is the circumstances in which it is appropriate for the Government to deal with a private party exclusively and without an open tender process.

This e-brief begins with a brief history of NSW Government policy on unsolicited proposals. Next, it outlines the current Government guidelines, released in August 2012. The paper then briefly examines the Government's consideration of the Crown proposal, and refers to debate about the process. Guidelines for dealing with unsolicited proposals in other States are then outlined. This paper ends with a consideration of relevant policies adopted in a number of other countries.

2. The first PPP project

The first public-private partnership (PPP) undertaken in NSW – the Sydney Harbour Tunnel – resulted from an unsolicited proposal.¹ A 1981 tender for a second harbour crossing did not result in a successful proposal. In 1986, the Transfield-Kumagai joint venture approached the Labor Government with a proposal to build the Harbour Tunnel.² The Government then exclusively dealt with this joint venture without a tender process, and it was awarded the contract for the project.³ This process was heavily criticised by the NSW Opposition and others.⁴

A 1994 report on the project by the Auditor-General noted that there was no formal policy to deal with unsolicited proposals at the time when the proposal was submitted.⁵ It also noted that the Government did not call for tenders in relation to this proposal. It observed that while the particular tunnel design proposed by the joint venture may have incorporated "a significant component of intellectual property, the concept of a tunnel as a second harbour crossing does not appear to be new". It then suggested that under guidelines that had now been published (see below),

the tunnel proposal would have been put to public tender and, if the joint venture were unsuccessful, the government could offer to buy any claimed intellectual property in the bid. The report then commented:

Although engineering consultants...were appointed to assess the reasonableness of the contract price offered by Transfield-Kumagai, only public tendering or calling for expressions of interest would have provided the proper and necessary level of assurance as to whether the proposal was the most appropriate and cost-effective one available.⁶

The Roads and Traffic Authority's response to the report rejected any criticisms about the process followed.⁷ It stated that even under the new guidelines the tunnel proposal may not have been put to public tender. It commented that "the intellectual property may be said to attach to the concept of the whole project as proposed by the proponent; in this case the location of the Tunnel through no privately owned land and the innovative inflation indexed bonds". It also noted that any intellectual property would have been required to be purchased before the proposal was put out to tender, and not after. In addition, the RTA asserted that the approach it adopted "was sufficient to protect [its] interests in relation to the project".

3. Past NSW guidelines

As noted in the Auditor-General's report, in 1988 the Department of State Development published *Guidelines to Private Sector Participation in Infrastructure Provision*.⁸ A copy of these guidelines could not be located.

In October 1989, the Greiner Government established an Industry Task Force to conduct a review of the 1988 guidelines.⁹ It looked at "issues related to the encouragement of greater participation of the private sector in infrastructure and to recommend changes to the existing guidelines".¹⁰ The December 1989 report made two recommendations relating to unsolicited proposals. One was that the guidelines should:

...permit the Responsible Authority to enter into negotiations with the proponent on an exclusive basis, where the Authority believes it appropriate. This is seen as the only means of realistically protecting intellectual property rights.¹¹

The other recommendation was for Government to establish:

...an Independent Panel to assist the Responsible Authority in determining the appropriateness of direct negotiations and exclusivity and to assist in determining the performance criteria upon which the negotiations would proceed.¹²

In 1990, the Greiner Government published a revised version of the guidelines, which did not adopt these two recommendations.¹³ In relation to unsolicited proposals, the guidelines stated:

The Government will call for Expressions of Interest for all projects where the private sector approaches Government with a proposal. Expressions of Interest will be called based on the community need/objective identified. This will allow a range of creative solutions to be submitted. The intellectual property and package put forward by the private sector proponent will be treated in confidence.¹⁴

Unsolicited proposals

The intellectual property of proponents would be protected by calling for expressions of interests on a 'broad needs' basis, and using confidentiality or non-disclosure agreements where relevant.¹⁵

A 1993 Public Accounts Committee report supported the approach adopted in the 1990 guidelines.¹⁶ In a section on projects proposed by the private sector, the Committee recommended:

Where a proposal is put up by the private sector, the Committee would prefer that the government go to the market to ensure it is getting the best deal possible rather than enter into an exclusive deal.

However, to provide some protection to the private proponent's intellectual property rights, the Committee proposes that the government goes to market on a broad needs basis.¹⁷

In early 1995, the Fahey Government published revised guidelines.¹⁸ In an introductory section, the guidelines referred to unsolicited proposals:

Where the private sector has submitted an unsolicited proposal to an agency, which is subsequently accepted and endorsed, the agency will ensure that any public call will be done on a broad needs basis and that the proponent's proposal will be covered by commercial-in-confidence provisions.¹⁹

The guidelines also stated that "a competitive bidding process will apply in all instances of privately financed infrastructure, unless otherwise agreed by the Capital Works Committee".²⁰ In a later section, the guidelines contained the following conditions about direct negotiations:

Where an exclusive or one-on-one negotiation, without a competitive bidding process is being proposed to the Capital Works Committee, the agency must fully demonstrate the rationale and net benefits of such an approach. The private sector proponent must first demonstrate to the agency the intellectual property held and the benefits of pursuing direct negotiations with government.

The proposal must be consistent with the Asset Strategic Plan of the agency and all necessary work, as outlined in Section 3.2 would need to have been performed. In addition, the agency will need to have thoroughly researched the proposal and have independent evaluations confirming the following:

- the proposal contains genuine intellectual property that is of considerable benefit to the agency, Government and the community and hence, direct negotiations would provide better value for money than if competitive bidding were instituted;
- the proponent has been assessed as having the expertise, experience and financial capacity to successfully deliver the project, that is not available elsewhere in the market; and
- the monetary value of the intellectual property

Commercial arrangements do not constitute intellectual property, unless protection can be afforded at law.

Where the Government, through the Capital Works Committee, approves of direct negotiation, then a public statement will be issued outlining the reasons for adopting such an approach. The proponent will then be asked to go directly to submit a detailed proposal.²¹

In September 1995, the Carr Government issued another revised set of guidelines.²² However, there were no changes to the provisions dealing with unsolicited proposals or direct negotiations (other than replacing references to the Capital Works Committee with the Cabinet Budget).

A further revision was made in October 1997.²³ A new sub-section entitled “Unsolicited Proposals” stated that the Department of State and Regional Development would be the initial contact point and it would advise proponents on the process for the preliminary assessment.²⁴ It also stated that “unsolicited proposals should identify and demonstrate the benefits to the community and government likely to result from the proposal”. The guidelines on direct negotiations were unchanged and still applied.

In November 2000, Premier Carr released a [discussion paper](#) on private sector financing of infrastructure.²⁵ A year later, the Government published revised guidelines.²⁶ The only significant change in relation to unsolicited proposals was for Premier and Cabinet to be the first point of contact rather than Department of State and Regional Development.

In June 2006, the Public Accounts Committee published a [report](#) on public-private partnerships, which referred to guidelines on unsolicited proposals but it did not make any comments or recommendations in this regard.²⁷ The Committee noted by way of a footnote that the [Parramatta Transport Interchange](#) was “one example of a successful unsolicited proposal”.²⁸

In December 2006, the Government issued [revised guidelines](#) “to reflect Government’s experience on projects and to incorporate the findings of recent reviews and inquiries into PFPs”.²⁹ The revised guidelines did not contain any significant changes in relation to unsolicited proposals.

4. National PPP guidelines

In November 2008, all Australian Governments endorsed the [National Public Private Partnership Policy and Guidelines](#).³⁰ The guidelines apply in all Australian jurisdictions but “jurisdictional requirements” can change or supplement the guidelines (see Volume 6 of the guidelines). The guidelines contain the following statement on unsolicited proposals:

Unsolicited proposals and exclusive mandates can provide a source of innovative ideas about how to improve the delivery of government services. Given their unsolicited/exclusive basis, as a general principle such proposals need to demonstrate unique value for money benefits that allow the government to demonstrate with confidence the reasons for entering into an exclusive arrangement rather than a competitive tender process. Further, as with all projects, unsolicited proposals must demonstrate an overall community benefit and be consistent with the government’s plans and priorities.

Commercial viability alone will not be sufficient to gain the government’s support.

This is an area where government departments and agencies should seek further advice from the relevant PPP Authority. Each jurisdiction will have its own policies and procedures for dealing with unsolicited proposals/exclusive mandates.³¹

5. Current NSW guidelines

In January 2012, the NSW Government released an unsolicited proposals guide. In August 2012, an updated version of this guide was published alongside the new [NSW Public Private Partnerships Guidelines](#) (PPP Guidelines). The PPP Guidelines, which replaced the 2006 guidelines, state that “unsolicited proposals and direct negotiations for PPPs must comply with the principles in these Guidelines as well as” the Unsolicited Proposals Guide.³² A brief summary of the current [Unsolicited Proposals: Guide for Submission and Assessment](#) is presented below.

Direct negotiations on proposals: The introduction to the guide states:

Government is seeking to capture innovative ideas from industry that provide real and tangible benefit to the people of New South Wales. Government will consider directly negotiating with an individual or organisation that presents an Unsolicited Proposal (see Glossary) where circumstances support this approach and at its absolute discretion.

The introduction explains further:

While direct negotiation of Unsolicited Proposals may be pursued, Government’s default procurement approach is to test the market. This generally results in the demonstrable achievement of value-for-money outcomes and provides fair and equal opportunities for private sector participants to do business with Government. As such, Unsolicited Proposals should include unique elements that provide justification for entering into direct negotiations with the Proponent. The unique elements may include characteristics such as:

- Intellectual property or genuinely innovative ideas
- Ownership of real property
- Ownership of software or technology offering a unique benefit
- Unique financial arrangements
- Unique ability to deliver a strategic outcome
- Other demonstrably unique elements.

Guiding principles: There are seven guiding principles and one is that all unsolicited proposals are to be assessed against these criteria:

- Unique benefits of proposal providing justification to directly negotiate
- Value to Government; encompassing economic benefit, service delivery, whole-of-life costs, risk transfer, timely achievement of objectives and qualitative outcomes
- Whole-of-Government impact, including opportunity cost
- Appropriateness of return on investment obtained by the Proponent given project risks
- Capability and capacity of Proponent to deliver the proposal
- Affordability
- Appropriate risk allocation.

Roles and responsibilities: In summary, the roles and responsibilities are:

- The *Department of Premier and Cabinet* has the lead role in receipt and coordination of unsolicited proposals.

- *Infrastructure NSW* may coordinate the assessment of a proposal that relates to the provision of major infrastructure.
- The *Steering Committee*, which comprises senior representatives of the Department of Premier and Cabinet (Chair), NSW Treasury, Infrastructure NSW, and the relevant agency (as required), is responsible for making recommendations to Government.
- An *Assessment Panel*, comprised of “appropriately qualified representatives” appointed by the Steering Committee, assesses the proposal during Stage 1 (if required) and the detailed proposal during Stage 2, and makes recommendations to the Committee.
- A *Probity Adviser* may be appointed for large scale projects or where probity risk warrants appointment. The role of the adviser is to monitor and report on the application of the probity principles (in section 3.3) during the assessment process.
- *Cabinet* is required to approve proposals prior to progression to Stage 2 and prior to signing of any agreement.

Assessment process: There is a three stage assessment process for unsolicited proposals, which is summarised as follows:

- *Stage 1 – Initial Submission and Strategic Assessment* includes a comprehensive initial assessment of the proposal to identify the potential benefit to Government of further consideration and development with the Proponent. The outcome is advice to the Proponent of progression to Stage 2, or that the Government does not wish to proceed.
- *Stage 2 – Detailed Proposal* requires the Proponent and Government to work cooperatively in the development and assessment of a Detailed Proposal. The outcome is advice to the Proponent of progression to Stage 3, or that the Government does not wish to proceed.
- *Stage 3 – Negotiation of Final Binding Offer* involves the finalisation of all outstanding issues with a view to entering into a binding agreement, should the Government accept the final offer.

The guide has further details for each of these stages. For example, in relation to Stage 1, the guide states that if the proposal is not sufficiently unique to justify direct negotiations with the Proponent...the Steering Committee will agree a recommended course of action”.

6. Number of recent proposals

The NSW Government received 36 unsolicited proposals between January 2012 and January 2013.³³ It stated that “approximately 85% of proposals have not proceeded beyond Stage 1”, noting “a great many of these were considered not sufficiently unique to warrant a direct dealing”. As outlined on the NSW Government’s unsolicited proposals [webpage](#), and shown in the table below, one proposal is currently being assessed at Stage 2, and three proposals have progressed to Stage 3.

Unsolicited proposals

Table 1: Proposals currently being assessed at Stages 2 and 3

Stage	Proposal	Details
2	University of Western Sydney	Proposal to acquire surplus Government lands at Rydalmere for higher education purposes.
3	University of Sydney	Proposal for the University of Sydney to purchase Queen Mary Building, Camperdown, for affordable student accommodation.
3	Transurban F3 to M2 Link	Proposal to construct a tunnel link between the F3 and M2 Motorways.
3	Crown Sydney Resort Project	Proposal for development of Sydney's first six star hotel resort at Barangaroo, incorporating a VIP-only gaming facility

7. Crown and Echo proposals

The Crown Sydney Hotel Resort proposal, which was submitted on 6 September 2012, has been the most controversial. The basis for the proposal is that Crown has entered into an exclusive dealing agreement with Lend Lease that gives it an exclusive right (for a renewable period of two years) to develop a hotel building at Barangaroo South (Lend Lease was awarded the right to develop this precinct).³⁴ The VIP gaming facilities are an integral part of the Crown proposal, with Crown stating that they are “necessary to make this project commercially viable”.³⁵ The proposal seeks certainty from the Government in relation to the provision and cost of a VIP gaming licence, access to land issues, and taxation and other legislation.³⁶

The Stage 1 Assessment Panel comprised two members from the Department of Premier and Cabinet and one from Treasury. The [Stage 1 Assessment Report](#), dated October 2012, recommended the proposal progress to Stage 2. The report stated that Crown had a unique ability to achieve a strategic outcome as a result of the exclusive dealing agreement with Lend Lease, and also because of Crown's strong financial resources, demonstrated ability to attract VIP tourists, and proven track record.

In April 2013, Echo Entertainment, the operator of Sydney's only casino (the Star), submitted a competing unsolicited proposal. This proposal was for an extension of its exclusivity arrangement with the Government (which expires in November 2019) for up to 25 years, and an expansion of the Star and investment in transport infrastructure. The [Stage 1 Assessment Report](#) also recommended that this proposal also proceed to Stage 2. The report considered that Echo had a unique ability to achieve a strategic outcome because it held a 99-year casino licence, meaning that only Echo could enter into an exclusivity agreement with the government.

The Stage 2 assessment for both proposals was undertaken by a Steering Committee comprised of David Murray AO, the independent Chair, the Director General Department of Premier & Cabinet (DPC), Secretary NSW Treasury, and the Director General NSW Trade and Investment. The Committee was assisted by an Assessment Panel including the Deputy Director General DPC (Chair), Deputy Secretary Treasury, and Acting Deputy Director General, NSW Trade and Investment. The Stage 2 assessment was completed in July 2013. The Committee's [report](#) stated:

Both proposals meet the three qualification criteria and perform satisfactorily against the four performance criteria as required under the NSW

Government Unsolicited Proposal Guidelines [i.e. the 7 assessment criteria]. However, as both of Echo's options require exclusivity in a form that is incompatible with Crown's proposal to include domestic VIP gaming, the proposals are mutually exclusive and therefore only one can proceed.³⁷

The Committee concluded that the Crown proposal should progress to Stage 3. It explained:

Comparison of the proposals has focused on achieving the best outcome for NSW. Both proposals and the assessment...confirm that:

- Sydney is falling short of its potential share of a rapidly growing gaming and tourism market
- Sydney has underperformed compared with Melbourne, even though the single casino in Melbourne does not have exclusivity
- To be competitive requires an investment in integrated resort style facilities taking advantage of special locations, and
- The Pyrmont, Darling Harbour and Barangaroo precincts have the potential to become a virtual integrated resort, with a unique location on Sydney Harbour.

The Committee therefore believes that the decisive factor in the choice between Crown's and Echo's proposal is the opportunity to introduce competition.³⁸

The Committee's recommendation for the Crown proposal to proceed to Stage 3 was subject to further conditions relating to licence fees and taxes. It stated that "if [these] conditions are not accepted by Crown, then the Government should consider conducting a tender process for a licence to establish a second gaming and tourism resort in Sydney".³⁹ The NSW Government adopted the Committee's recommendations.⁴⁰ Crown has accepted the conditions and has formally moved to Stage 3.⁴¹

8. Debate about the process

The unsolicited proposal process in relation to the Crown proposal has been controversial. One article in the media questioned why a requirement in the guide for "independent evaluations" of a project to justify not going to tender were removed two weeks before the Crown proposal was lodged.⁴² The article noted that a spokesman for the Premier said that the changes were made by the department and were "minor administrative changes and clarifications to keep the document up to date and relevant".

It has also been argued that without a competitive tender process, the public do not know if the State is getting the best value from the deal.⁴³ A related argument is that the Crown proposal was not sufficiently unique to justify the Government not holding a competitive process,⁴⁴ and further, that the Government did not examine non-gambling options for the Barangaroo development.⁴⁵ The media has also questioned why key documents relating to the Crown proposal were not made public until after the Government announced that the proposal would proceed to Stage 3.⁴⁶

The Government has defended the process on the basis that the Crown proposal was subject to rigorous assessment by an independent steering committee, which was assisted by Deloitte Access Economics; and that it was assessed against a competing proposal by Echo.⁴⁷ The Committee

Unsolicited proposals

was satisfied that the unique elements of the Crown and Echo proposals justified dealing with their proposals without a tender process.

9. Guidelines in other States

Queensland: The current Queensland guidelines on unsolicited proposals are outlined in [Public private partnerships guidance material: value for money framework](#), which was published in 2008. It states:

If an agency receives an unsolicited proposal from a private party addressing a service requirement that has been identified by that party, the proposal will be assessed for priority against the relevant agency's strategic plan and the state's relevant infrastructure plans. If the proposal is considered by the agency to be a priority, it will be progressed either,

- within this framework in the same manner as agency-generated outputs; or
- pursuant to an exclusive mandate (for further detail on exclusive mandates refer to Appendix 1).⁴⁸

The guidance notes that "in progressing unsolicited proposals the government would take all reasonable steps to protect the genuine intellectual property of the Private Sector".⁴⁹ Specifically, "the government would not reveal a Proponent's intellectual property when subjecting the project to a competitive bidding process".

As outlined in Appendix 1 in the guidance, an exclusive mandate is "a right given to a private sector party to fully develop a proposal it has brought to government on an unsolicited basis".⁵⁰ It allows the private sector party to deal exclusively with the government in relation to the proposal, without being subject to the usual competitive processes. The exclusive mandate guidelines in Appendix 1 state that "the government may, at its sole discretion, consider granting an exclusive mandate" if a number of specified criteria are met. In summary, these are:

- The proposal satisfies a community need, which is a government priority
- The proposed pricing regime must provide only for a fair commercial return, be commercially sustainable in the long term, and be reasonably priced relative to comparable ventures
- The proposal involves genuine existing intellectual property rights without which the project could not proceed
- The proponent has undertaken significant preliminary investment in developing the proposal
- The government is not required to accept any project risks and/or costs or to make service payments to the proponent
- The proponent has the financial and technical capability to undertake the project to successful completion
- The proposal is technically, commercially, and practically feasible
- There are no competing proposals (see below).

According to the guidelines, there are no competing proposals if a proposal addressing the same or similar need is not already being considered by government, or by any other private sector party. The guidance states that there will be deemed to be no competing proposals from a private sector

party “if no further private sector proposals are submitted on an unsolicited basis (in the opinion of government) following the receipt of the original unsolicited proposal”. However, even if there are no competing proposals, the government will only grant an exclusive mandate if:

...the private sector party satisfies government that it enjoys such demonstrable commercial advantage over other potential proponents that calling for expressions of interest could not be reasonably expected to generate a better value for money outcome.

The guidelines explain that “the procedure to be followed in progressing an unsolicited proposal through to the development of a detailed binding bid under an exclusive mandate would, to the extent practicable, be consistent with the process outlined in stage 5 of this framework”.⁵¹ Stage 5 (binding bids) involves several steps including finalisation of bid documentation, evaluation of binding bids, and consideration by Cabinet.⁵²

Projects Queensland does not keep a record of the number of unsolicited proposals received or considered; or of those unsolicited proposals that are progressed under exclusive mandates.⁵³ It stated that the most notable examples of projects progressed towards development under exclusive mandates are the [Surat Basin Railway](#) (currently in feasibility stage) and the [Wiggins Island Coal Terminal](#) (currently under construction).⁵⁴

Victoria: The 2001 Partnerships Victoria [Practitioners Guide](#) (which was replaced by the 2008 National Public Private Partnership Policy and Guidelines) set out considerations for handling unsolicited proposals.⁵⁵ The Guide stated that “Departments and agencies likely to receive unsolicited proposals should establish a procedure to apply, at least at the point of receipt”.⁵⁶ It also outlined procedures that may then apply including:

- in normal circumstances, if an unsolicited proposal containing intellectual property is received and the proposal is assessed as meeting a priority service need, the intellectual property may be returned to the owner while the service need is put to the market in a manner that accommodates, but does not divulge, the intellectual property. The owner of the intellectual property is free to put in a bid or to join with other bidders;
- in the rare circumstances where the intellectual property is of such outstanding value that a competitive market for the service need would not exist, it may be appropriate to adopt a course that avoids putting others to the cost of preparing fruitless bids. This course may be to remove the intellectual property from the project solution and to put the remainder of the project out for competitive bidding. Such a course could be adopted if government is first able to obtain rights to the intellectual property. Achieving such rights should be through a negotiation process open to appropriate scrutiny and using sound evaluation techniques.⁵⁷

It is not known whether any major projects in Victoria originated as unsolicited proposals in the period when this guide applied.⁵⁸ In the Government’s economic strategy released in December 2012, it stated that it will implement “a clear framework for consideration of unsolicited private sector proposals for infrastructure investment”.⁵⁹ In May 2013, the Government published a revised public private partnerships policy, which notes that “unsolicited private sector infrastructure proposals will be considered under a separate policy framework”.⁶⁰

Unsolicited proposals

South Australia: [Guidelines](#) issued by the State Procurement Board (SPB) contain a section on unsolicited proposals.⁶¹ The guidelines state:

An unsolicited proposal is defined as a unique or innovative method, concept, approach or idea received by a public authority, not in response to a formal request and not readily available in the marketplace. An unsolicited proposal should also advance the objectives of government by providing improved value, benefit and opportunity.

Public authorities may consider an unsolicited proposal only where it meets the above definition and where a robust business case clearly demonstrates its capacity to meet a public authority's business need.

.....
A public authority shall retain the right to test an unsolicited proposal through a competitive market approach, subject to the protection of any intellectual property rights or confidential information, as agreed with the proponent...⁶²

The guidelines set out a process which involves undertaking a preliminary review in relation to the above criteria, developing an acquisition plan, and then establishing an evaluation panel comprising relevant stakeholders to undertake a detailed consideration of the proposal.⁶³ The SPB does not collect data on the number of unsolicited proposals that are received or on the number of such proposals that proceed via direct negotiations.⁶⁴

10. International comparisons

United States: In the US, federal procurement regulations contain [provisions](#) on unsolicited proposals.⁶⁵ The regulations provide for federal agencies to establish procedures relating to unsolicited proposals that are consistent with the regulations. The regulations require evaluators of unsolicited proposals to consider a number of factors⁶⁶ (which are similar to those in the NSW guidelines) and they then state (in part):

(a) A favorable comprehensive evaluation of an unsolicited proposal does not, in itself, justify awarding a contract without providing for full and open competition. The agency point of contact shall return an unsolicited proposal to the offeror, citing reasons, when its substance—

- (1) Is available to the Government without restriction from another source;
- (2) Closely resembles a pending competitive acquisition requirement;
- (3) Does not relate to the activity's mission; or
- (4) Does not demonstrate an innovative and unique method, approach, or concept, or is otherwise not deemed a meritorious proposal.⁶⁷

According to a 2009 report, 18 US States also had legislation which specifically authorised unsolicited proposals for public private partnership projects.⁶⁸ A 2006 report stated that the 12 States which authorised unsolicited proposals differed greatly in their approach and level of detail".⁶⁹ It noted that some States (e.g. Delaware, Florida, Georgia) required the relevant agency to publish a notice of an unsolicited proposal, and allow for the submission of competing proposals (e.g. within 60 days).⁷⁰

New Zealand: The New Zealand Government recently published a [guide](#) on managing unsolicited proposals.⁷¹ The guide relates to procurement generally rather than being part of a policy on public-private partnerships. It states that "serious consideration will generally be given only to exceptional proposals" and that "these should demonstrate unique concepts or benefits

that cannot otherwise be obtained in the marketplace or that are only able to be provided by a single supplier, eg, as a result of IP or capability issues". It also outlines other criteria for considering unsolicited proposals (e.g. provide value or significant benefit to the taxpayer). The guide allows discretion to agencies to decide what process to take but it expects the process to contain a number of broad steps that are outlined. If the agency is satisfied that the proposal is truly unique, the guide permits the agency to deal with the proponent on an exclusive basis.

Canada: In Canada, it appears that the federal government and most provincial governments have no policy relating to unsolicited proposals.⁷² Nova Scotia has issued a [guide](#) on unsolicited proposals, which sets out a three-stage assessment process.⁷³ A departmental review examines the proposal to satisfy itself of a number of criteria (e.g. it is unique). Second, there is a review by an evaluation team consisting of at least two members of procurement services. If it recommends acceptance, the Department seeks approval from the Deputy Minister to proceed without a public tender process. British Columbia also has guidelines on unsolicited proposals but only in relation to information management and information technology.⁷⁴

Some local governments in Canada also have policies on unsolicited proposals.⁷⁵ For example, the City of Toronto has a policy, which requires an evaluation team to evaluate the unsolicited proposal against a number of criteria.⁷⁶ If the proposal is considered acceptable to Council, the selection process involves a "challenge approach", where the Council invites others to submit competing proposals but allows the party that submitted the original proposal to match or improve upon these competing proposals (in which case it will be awarded the contract). As outlined below, this "Swiss Challenge" approach is used in some other countries.

United Kingdom: The UK Government is bound by EU procurement rules. The Government's procurement and public-private partnership policies do not contain any guidelines on unsolicited proposals.⁷⁷ Presumably, this means that any projects that the Government is considering must be subject to the usual competitive selection processes.⁷⁸

Countries with novel processes: In 2007, the World Bank published a [paper](#) on unsolicited proposals, which reported on policies in some countries that "encourage the private sector to come forward with potentially beneficial project concepts, while at the same time introducing competitive forces to secure the benefits associated with a public tender".⁷⁹ The different types of competitive processes included:

- *Bonus system* – there is an open tender but the original proponent's offer is selected if it is within a certain percentage of the best offer (usually 5-10 per cent). This system is used in Chile and Korea:
- *Swiss Challenge* – there is an open tender but the original proponent has the right to counter-match the best offer. This system is used in Italy, the Philippines, Taiwan, and in two Indian States.
- *Best and final offer* – there is an open tender but the original proponent automatically qualifies to participate in the final tendering round. This system is used in Argentina and South Africa.

Unsolicited proposals

UN guidelines: The United Nation Commission on International Trade Law (UNCITRAL) [Legislative Guide on Privately Financed Infrastructure Projects](#) recommends that, if the output of an unsolicited proposal is not truly unique, the contracting authority should initiate the normal competitive selection procedures.⁸⁰ If an unsolicited proposal does involve genuine intellectual property without which the project could not proceed, the guide recommends that the contracting authority should publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit a competing proposal.⁸¹ If no further proposals are received, the authority may negotiate with the proponent.⁸² If there are competing proposals, the authority should invite all proponents to negotiations, and offers should be evaluated against established criteria.

11. Conclusion

Unsolicited proposals can generate innovative ideas for the State from the private sector. Unsolicited proposals are not new in NSW and, since 1988, successive governments have had guidelines for dealing with such proposals, as part of its policy on public-private partnerships. The guidelines have been revised a number of times, most recently in August 2012. A key feature of the guidelines (since 1995) is that, if certain criteria are met, the government may conduct an assessment of the proposal without a tender process. Previously, the criteria referred to “genuine intellectual property”, whereas the current criteria refer to “unique elements” (including intellectual property). The guidelines and their application in the case of the Crown Sydney Resort proposal have been controversial.

The Queensland and South Australian guidelines are similar to those in NSW. The Queensland guidelines have a requirement that the proposal involves “genuine existing intellectual property rights without which the project could not proceed”; while in South Australia, the proposal must involve “a unique or innovative method, concept, approach or idea”. Similar policies on unsolicited proposals can be found in some parts of the United States, Canada, and in New Zealand. The regulations in some US States require the relevant agency to invite competing proposals. A number of other countries (e.g. Chile, Korea, Italy, and South Africa) have adopted modified competitive processes for unsolicited proposals which give some form of advantage to the original proponent.

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- ¹ NSW Treasury, [NSW public private partnerships policy – an evolution](#), March 2009, p3
 - ² NSW Auditor-General’s Office, *Private Participation in the Provision of Public Infrastructure: The Roads and Traffic Authority*, October 1994, Vol 1, p249
 - ³ NSW Auditor-General’s Office, note 2, p258
 - ⁴ See NSW Parliamentary Debates, [30 April 1987](#), p10,922ff
 - ⁵ NSW Auditor-General’s Office, note 2, p258. The other information in this paragraph of the e-brief is taken from this report at p258-259.
 - ⁶ NSW Auditor-General’s Office, note 2, p258-259
 - ⁷ NSW Auditor-General’s Office, *Private Participation in the Provision of Public Infrastructure: The Roads and Traffic Authority*, Vol 2, p59. The other information in this paragraph of the e-brief is also taken from this report at p59.
 - ⁸ NSW Auditor-General’s Office, note 2, p78
 - ⁹ Industry Task Force, *Private Sector Participation in the Provision of Infrastructure: Industry Task Force Report*, NSW Government, December 1989
 - ¹⁰ Industry Task Force, note 9, p5
 - ¹¹ Industry Task Force, note 9, p13 (rec 8)

- ¹² Industry Task Force, note 9, p13 (rec 9)
- ¹³ Department of State Development, *Guidelines for Private Sector Participation in Infrastructure Provision in the 'State of Business'*, July 1990
- ¹⁴ Department of State Development, note 13, p5
- ¹⁵ Department of State Development, note 13, p5
- ¹⁶ Legislative Assembly Public Accounts Committee, *Infrastructure Management and Financing in New South Wales*, Report No. 73, July 1993
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Unsolicited proposals

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