
New South Wales Auditor-General's Report

Performance Audit

Managing unsolicited proposals in New South Wales

Department of Premier and Cabinet



The role of the Auditor-General

The roles and responsibilities of the Auditor-General, and hence the Audit Office, are set out in the *Public Finance and Audit Act 1983*.

Our major responsibility is to conduct financial or 'attest' audits of State public sector agencies' financial statements. We also audit the Total State Sector Accounts, a consolidation of all agencies' accounts.

Financial audits are designed to add credibility to financial statements, enhancing their value to end-users. Also, the existence of such audits provides a constant stimulus to agencies to ensure sound financial management.

Following a financial audit the Audit Office issues a variety of reports to agencies and reports periodically to parliament. In combination these reports give opinions on the truth and fairness of financial statements, and comment on agency compliance with certain laws, regulations and government directives. They may comment on financial prudence, probity and waste, and recommend operational improvements.

We also conduct performance audits. These examine whether an agency is carrying out its activities effectively and doing so economically and efficiently and in compliance with relevant laws. Audits may cover all or parts of an agency's operations, or consider particular issues across a number of agencies.

Performance audits are reported separately, with all other audits included in one of the regular volumes of the Auditor-General's Reports to Parliament – Financial Audits.

audit.nsw.gov.au



© Copyright reserved by the Audit Office of New South Wales. All rights reserved. No part of this publication may be reproduced without prior consent of the Audit Office of New South Wales.

The Audit Office does not accept responsibility for loss or damage suffered by any person acting on or refraining from action as a result of any of this material.



GPO Box 12
Sydney NSW 2001

The Legislative Assembly
Parliament House
Sydney NSW 2000

The Legislative Council
Parliament House
Sydney NSW 2000

In accordance with section 38E of the *Public Finance and Audit Act 1983*, I present a report titled **Managing unsolicited proposals in New South Wales: Department of Premier and Cabinet**.

A handwritten signature in black ink, reading 'A. T. Whitfield'.

A T Whitfield PSM
Acting Auditor-General
10 March 2016

Contents

Contents	1
Executive summary	2
Conclusion	2
Recommendations	4
Introduction	5
1. Unsolicited proposals in New South Wales	5
1.1 Government procurement in New South Wales	5
1.2 What is an unsolicited proposal	5
1.3 The unsolicited proposal assessment process	5
1.4 Criteria for assessing unsolicited proposals	7
1.5 Governance arrangements for the assessment of unsolicited proposals	7
1.6 Statistics on unsolicited proposals in New South Wales	8
1.7 Comparison with other jurisdictions	10
1.8 About the audit	11
Key findings	12
2. Does the Department of Premier and Cabinet appropriately coordinate and oversee the unsolicited proposals process?	12
2.1 The Guide is clear, accessible, and understandable	13
2.2 Agencies most likely to receive unsolicited proposals understand the process	15
2.3 Agencies understand their role in assessing an unsolicited proposal	16
2.4 DPC does not actively oversight compliance with the Guide	17
2.5 Transparency would be aided by more public reporting	17
3. Do the governance arrangements ensure separation between the assessment and approval functions?	19
3.1 The Guide and governance plans describe the roles and functions of assessment panels and steering committees	19
3.2 Clear separation between the people who assess and approve proposals	20
3.3 Effective management of potential conflicts of interest	20
3.4 Clarifying the role of probity advisers	21
3.5 Alternative routes for good ideas that are not suitable for direct dealing under the unsolicited proposals process	22
4. Is there clarity and consistency in how government has regard to related procurement documents?	23
4.1 Agency staff are expected to share subject area knowledge in deliberations and assessment processes	24
4.2 The assurance requirements of the Guide differ from other procurement processes	24
4.3 Uncertainty about considering other government procurement policies	24
4.4 No process to document consideration of other procurement policies	24
Appendices	26
Appendix 1: Response from Agency	26
Appendix 2: About the Audit	27
Performance auditing	30

Executive summary

This audit examines the adequacy of governance arrangements for unsolicited proposals with reference to the NSW Government's 'Unsolicited Proposals: Guide for Submission and Assessment' (the Guide). The Guide was released in January 2012 to promote engagement with the private sector in developing and delivering new infrastructure and services.

The Guide sets out the governance arrangements to support the assessment of unsolicited proposals from the private sector. It addresses matters such as the:

- lead role of the Department of Premier and Cabinet (DPC) in coordinating unsolicited proposals
- separation of assessment from decision-making roles in considering unsolicited proposals
- relationship of the unsolicited proposals mechanism to other government procurement policies.

The Guide sets out a four-stage process, as illustrated in Exhibit 1.

Unsolicited proposals can lead to the government dealing directly with just one vendor when procuring goods or services. Direct dealing is inconsistent with usual government procurement practices, which are based on competition and transparency to ensure the best value for the community. One purpose of the Guide is to set out a process that can help mitigate the risks associated with direct dealing.

Conclusion

Overall, the governance arrangements for unsolicited proposals are adequate. However, there needs to be greater transparency and public reporting on unsolicited proposals received by government.

The Department of Premier and Cabinet (DPC) effectively coordinates unsolicited proposals through its Guide and the support and advice it provides to agencies and proponents. The Guide is clear and comprehensive. Agencies most commonly approached about unsolicited proposals have a good understanding of the process, but this could be improved across the NSW Government as a whole. There is ambiguity regarding the nature of DPC's oversight role. The unsolicited proposals process would be more transparent and engender greater community confidence by more public reporting about the proposals.

Governance arrangements support the separation of the assessment and approval of unsolicited proposals. This includes the broad arrangements set out in the Guide itself, as well as those arrangements that are established through governance plans that are mandated by the Guide for proposals that reach Stage 2 (the detailed proposal stage) of the assessment process.

There is a lack of clarity about what regard government will give other relevant procurement processes and approval requirements when forming governance arrangements for unsolicited proposals.

The Department of Premier and Cabinet effectively coordinates the unsolicited proposals process, though its oversight role is less clear

DPC provides coordination through its unsolicited proposals guide

DPC primarily promotes coordination for the unsolicited proposals process through the Guide. The Guide is clear and comprehensive. It is made publicly available on DPC's website, and is linked to other relevant government procurement documents.

While there are matters of detail that would benefit from clarification (which are listed in Recommendation 1), overall the Guide provides a sound framework for the governance of unsolicited proposals.

Whole-of-government understanding of unsolicited proposals is good, but could be improved

Agencies most commonly involved in unsolicited proposals, such as those with transport and infrastructure responsibilities, displayed a good understanding of the process. Perhaps as expected, agencies less frequently involved in unsolicited proposals showed less awareness. A Premier's Memorandum should be issued in order to better promote the Guide across all NSW Government agencies.

DPC is effective in providing advice and coordinating proposals

DPC provides advice to agencies when unsolicited proposals are received and facilitates the establishment of steering committees to initiate assessment of proposals. Agencies involved in unsolicited proposals consistently gave positive feedback about the advice and coordination provided by DPC once an unsolicited proposal had been received. This was consistent among all agencies, regardless of their experience with the unsolicited proposals process.

It is uncertain what 'oversight' is provided by – or required of – DPC

The Guide specifies that DPC is responsible for whole-of-government oversight of unsolicited proposals, as well as its coordination. While DPC's coordination role is relatively clear, it is less clear how DPC provides oversight of unsolicited proposals. The nature of this oversight role, and whether it is intended to be quasi-regulatory, requires clarification. We have recommended that this be clarified in the Guide.

There is limited public reporting about unsolicited proposals

Unsolicited proposals are of public interest and pose a greater risk to value for money than procurements done through open, competitive and transparent processes. While the Guide sets out a sound framework for the governance of unsolicited proposals, public confidence in the process would be enhanced through more extensive public reporting about the assessment of proposals. This could include aggregate information about why proposals are declined, as well as more extensive information about proposals that have progressed beyond Stage 1 (preliminary and strategic assessments). The aim of enhanced public reporting would be to provide greater transparency and confidence to the public that government processes that lead to direct negotiation are robust and only applied in appropriate circumstances.

There is clear separation between the assessment and approval functions

The Guide describes mechanisms that create separation between the people who assess a proposal and those who make recommendations to Cabinet regarding its progress in the assessment process. This separation is a key mechanism to protect impartiality in decision-making. There are also effective processes in place to ensure that potential conflicts of interest are managed appropriately and transparently.

Probity advisers play a critical role in overseeing these elements of good governance. Probity advisers should be engaged for all proposals that progress to Stage 2.

The application of other government procurement policies is unclear

The Guide requires that in preparing the governance arrangements for each unsolicited proposal, government will have regard to relevant processes and approval requirements in related procurement policy documents. It is not clear whether this requirement is intended to ensure consistent governance measures across different types of procurement processes. The policy intent of this requirement needs to be clarified, as it is a threshold issue for the subsequent design of governance arrangements for unsolicited proposals.

We also found little guidance on who does this consideration, and at what stage it should occur in the process of considering an unsolicited proposal. There should be guidance on

how, and by whom, this consideration is given as well as guidance on how these deliberations are documented.

Recommendations

By March 2017 the Department of Premier and Cabinet should:

1. Revise the 'Unsolicited Proposals: Guide for Submission and Assessment' to address matters of detail discussed in this report, including to:
 - 1.1 clarify the intended scope and meaning of the 'oversight' provided by DPC over the unsolicited proposal assessment process
 - 1.2 clarify the application of the term 'government'
 - 1.3 better explain how 'value for money' is addressed as one of five probity fundamentals, including the role of probity advisers in reviewing this probity fundamental
 - 1.4 require probity advisers be appointed for unsolicited proposals that progress beyond Stage 1, except where a proposal satisfies prescribed criteria
 - 1.5 clarify options for unsolicited proposals that are found not to meet the criteria for direct dealing.
2. Facilitate whole-of-government understanding of the unsolicited proposals process and related matters by releasing a Premier's Memorandum on this topic.
3. Expand the existing scheme of public reporting for unsolicited proposals received by government by:
 - 3.1 publishing aggregate data about all proposals that are received, including reasons for being declined
 - 3.2 publishing more detailed information for proposals that proceed beyond Stage 1 to reassure the public that governance and probity processes have been followed
 - 3.3 publishing an audited contract summary for successful unsolicited proposals greater than \$100 million.
4. Clarify the requirement that government 'have regard to relevant processes and approval requirements in related policy documents' (as set out in section 3.7 of in 'Unsolicited Proposals: Guide for Submission and Assessment') including clarifying:
 - 4.1 the policy intent of the expression 'have regard to'
 - 4.2 who is responsible for giving regard to other relevant processes and approval requirements
 - 4.3 at what stage in the unsolicited proposal process regard should be given to other relevant processes and approval requirements
 - 4.4 how consideration of these matters is documented.

Introduction

1. Unsolicited proposals in New South Wales

1.1 Government procurement in New South Wales

The predominant form of procurement in New South Wales is based on competition through tendering, which is viewed as the best way to achieve value for money in a fair and transparent manner. This form of procurement is initiated by government and informed by identified strategic and operational planning requirements.

In January 2012, the NSW Government launched its Guide for Submission and Assessment of Unsolicited Proposals (the Guide) to further engage with the private sector in developing and delivering new infrastructure and services.

The Guide represents New South Wales' key whole-of-government mechanism for dealing with unsolicited proposals. It is intended to provide a transparent and streamlined approach to facilitate the government and private sector working together to develop and deliver innovative ideas.

Since the launch of the Guide, 117 proposals have been received by government, three of which have successfully completed the unsolicited proposal assessment process (worth a total value of over \$5 billion). Of the three successful proposals, two are in the process of being delivered.

The Department of Premier and Cabinet (DPC) has the lead role in receiving and coordinating consideration of unsolicited proposals.

1.2 What is an unsolicited proposal

The Guide defines an unsolicited proposal as an approach to government from a proponent with a proposal to:

- build and/or finance infrastructure, or
- provide goods and/or services
- where Government has not requested the proposal.

These approaches are, by definition, outside of the normal planning and procurement processes of government and are administered under the Guide. The Guide itself is not intended as a substitute for routine competitive purchasing by government. A proponent of an unsolicited proposal generally seeks to enter into exclusive dealings with the government. A successful unsolicited proposal will result in direct negotiation.

The risks associated in directly dealing and negotiating with unsolicited proposal proponents are inherently higher than applying a more transparent and open competitive process, such as tendering or calling for expressions of interest. Therefore, the Guide should ensure governance measures over decision making for unsolicited proposals are adequate substitutes for the transparency inherent in competitive purchasing processes.

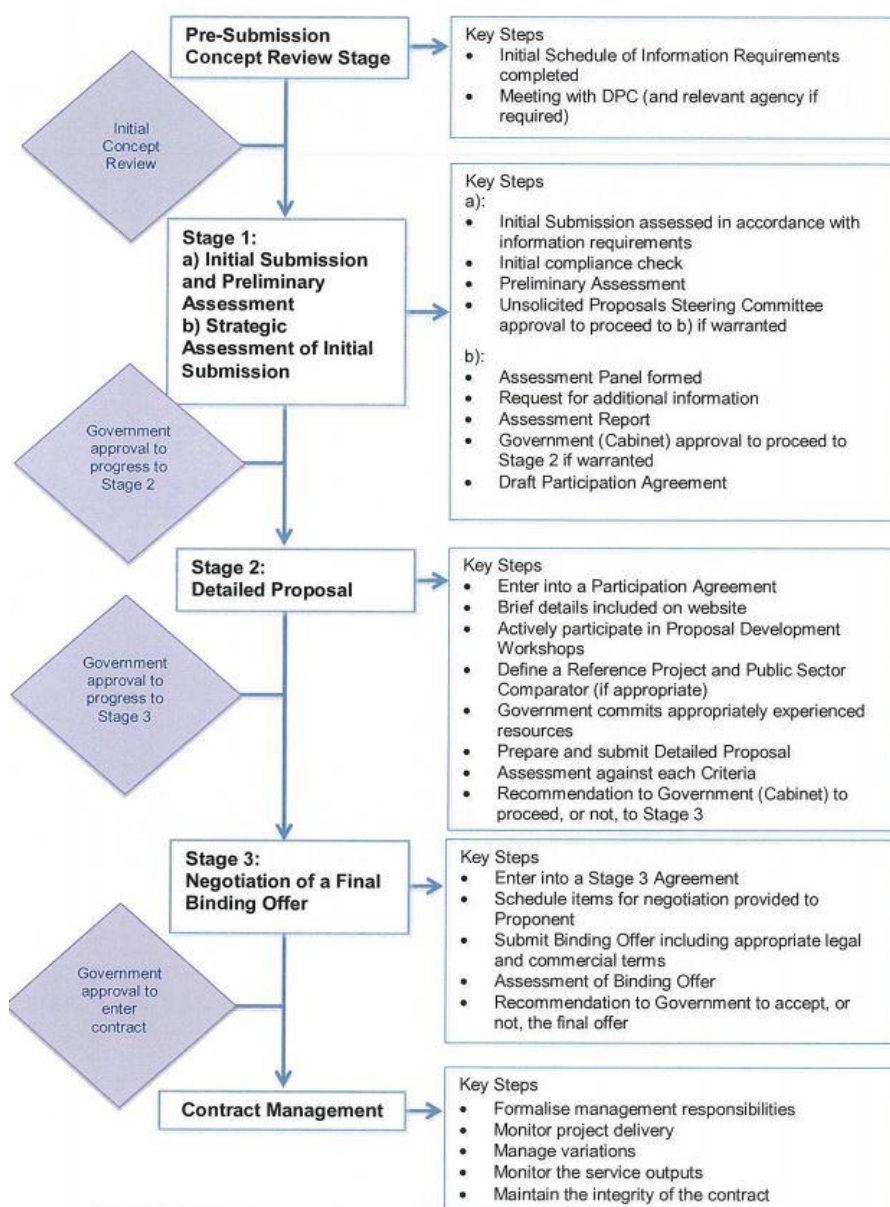
Under the arrangements described in the Guide, the government will generally only consider proposals where both the proposal and the proponent have unique attributes such that others could not deliver a similar proposal.

1.3 The unsolicited proposal assessment process

The Guide contains a four stage assessment process that has been developed to guide the evaluation of proposals (and in later stages, the development of detailed business cases and final binding offers). Where the government assesses a proposal as not meeting the criteria, the government reserves its usual right to use traditional, market-based procurement. The process is summarised in Exhibit 1. and involves the following stages:

- **Pre-submission concept review stage (optional)** – proponents are strongly advised to arrange a meeting with DPC to discuss the key attributes, benefits, requirements and assumptions underlying the potential proposal. A focus of this meeting is the demonstration of the unique attributes of both the proposal and the proponent in order to progress successfully through the unsolicited proposal assessment process.
- **Stage 1a – Initial submission and preliminary assessment** – DPC staff undertake a preliminary assessment of the proposal (in conjunction with relevant agencies) to determine if the proposal contains sufficient potential to justify direct dealing and undertake the Stage 1b assessment.
- **Stage 1b – Strategic assessment of the initial submission** – a comprehensive initial assessment to identify any potential benefit to government of further consideration and development with the proponent.
- **Stage 2 – Detailed proposal** – the government and proponent work collaboratively to develop and assess a detailed proposal (which is similar to a business case).
- **Stage 3 – Negotiation of final binding offer** – outstanding issues are finalised with a view to entering a binding agreement should the government accept the final offer.

Exhibit 1: Key stages in the consideration of unsolicited proposals



Source: Department of Premier and Cabinet 2014.

1.4 Criteria for assessing unsolicited proposals

In order for the proposal to progress through the assessment process, it must satisfy the following criteria:

- the unique benefits of the proposal, providing justification to directly negotiate rather than going to the market
- value to government
- positive whole-of government impact (for example, consistent with government's plans and priorities)
- appropriate (not too high) level of return on investment for the proponent given project risks
- capability and capacity of the proponent to deliver the proposal
- affordability
- appropriate risk allocation between the proponent and government.

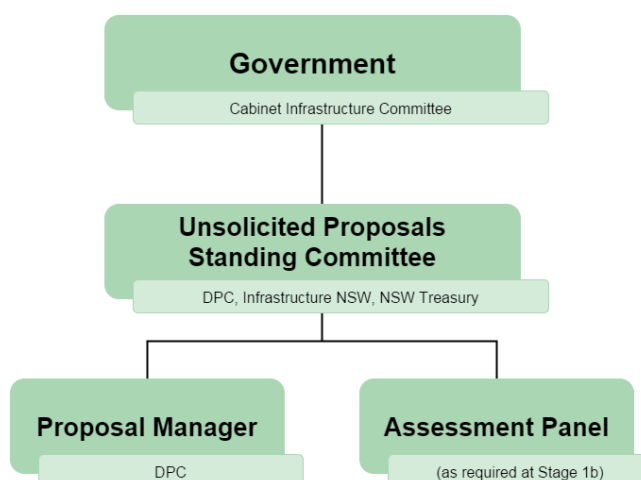
Importantly, it remains general government policy to procure goods and services, or dispose of government assets, through an open tender process to ensure value for money for taxpayers and open opportunity for market participants. A beneficial or innovative solution is generally not sufficient to justify setting aside competition – the proposal must contain qualities that are genuinely unique.

1.5 Governance arrangements for the assessment of unsolicited proposals

The key governance mechanisms are set out in section 3.7 of the Guide. They include:

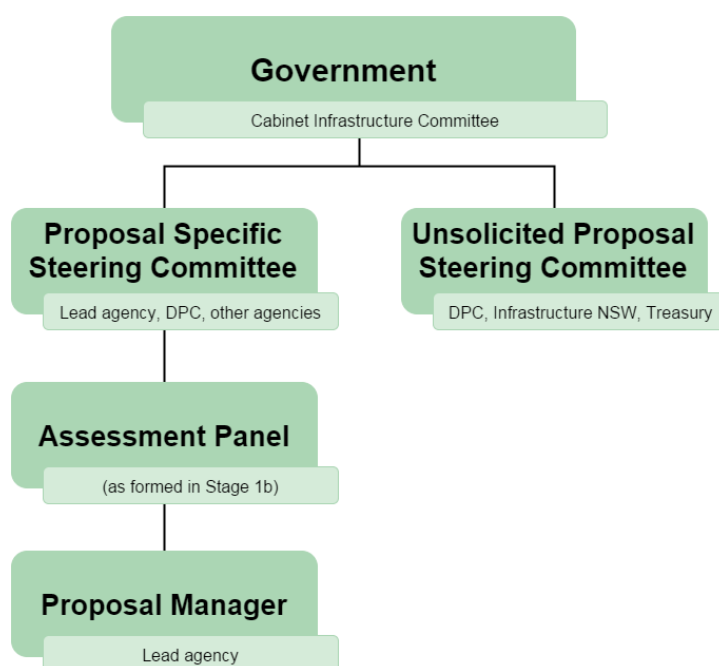
- an **overarching standing steering committee** that includes DPC, Treasury and Infrastructure NSW and reports to the Infrastructure Committee of Cabinet
- **project specific steering committees** that are convened if a project reaches Stage 2
- **assessment panels** that are convened at either Stage 1 (which provide advice to the standing unsolicited proposal steering committee) or Stage 2 (which provide advice to the proposal specific steering committee)
- a **probity adviser** may be used for proposals that reach Stage 2 (a key task for which would be to prepare a governance plan)
- **technical advisers** may be used to provide expert advice to the assessment panel and steering committee.

Exhibit 2: Governance chart for proposals at Stage 1



Source: Audit Office Research 2015.

Exhibit 3: Governance chart for Stage 2 onward



Source: Audit Office Research 2015.

1.6 Statistics on unsolicited proposals in New South Wales

Since the Guide was published in 2012, 117 proposals have been assessed. As shown in Exhibit 6 below, the overwhelming majority of unsolicited proposals have not progressed beyond Stage 1. DPC has explained that a great many of the unsuccessful proposals received are 'considered not sufficiently unique to warrant a direct dealing.'¹

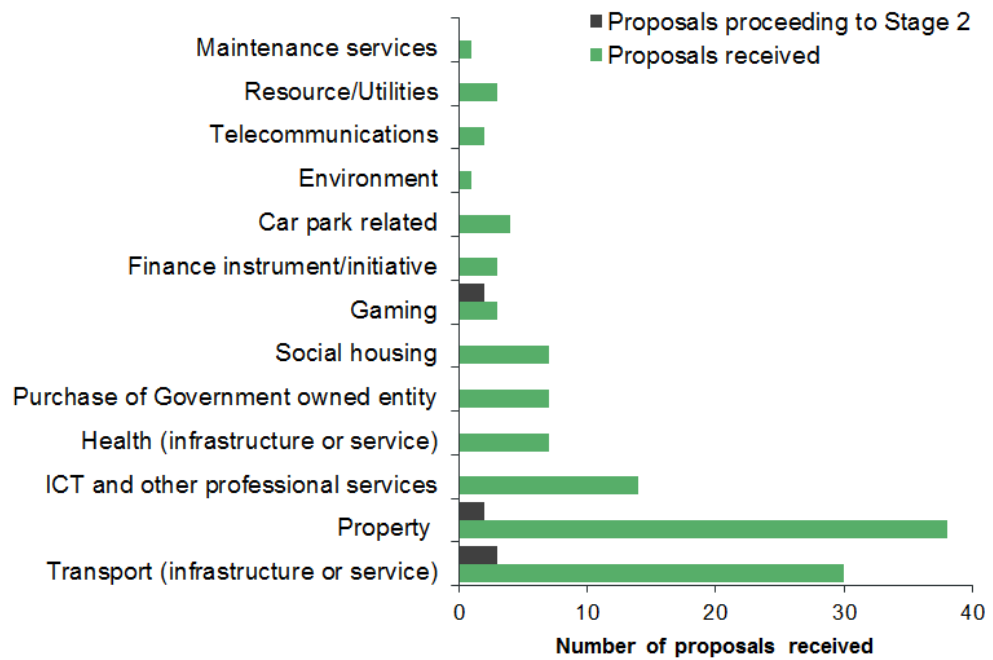
The majority of proposals received relate to transport or other infrastructure, and to the acquisition of government-owned property. Seven proposals have progressed to Stage 2 of the assessment process and five have progressed to Stage 3.

Three proposals have completed the assessment process and are in various stages of delivery:

- the \$2 billion Crown Sydney Resort
- the \$3 billion NorthConnex project
- the sale of the Queen Mary Building to the University of Sydney for \$27 million.

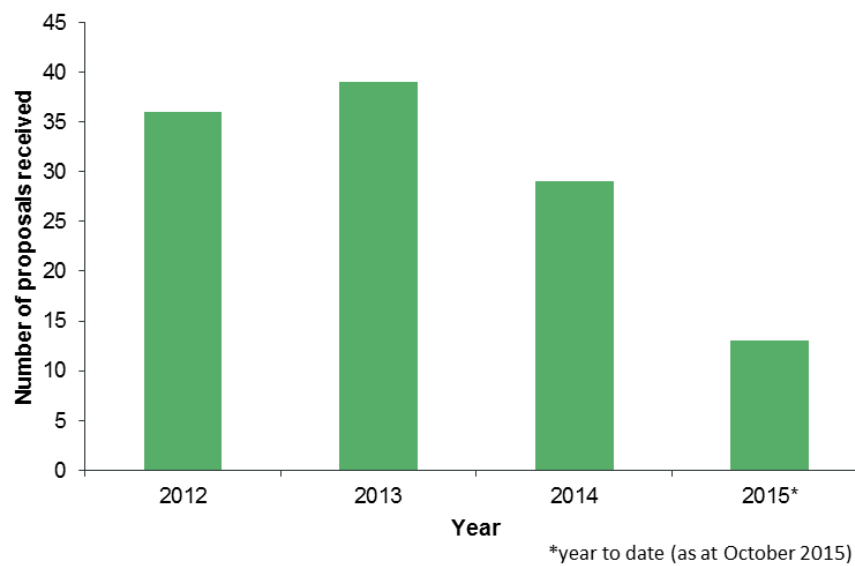
¹ DPC, *Unsolicited Proposals - Supplementary information for proponents*, DPC, viewed December 2015, 2014, <https://www.nsw.gov.au/sites/default/files/miscellaneous/supplementary_information_feb_2014.pdf>.

Exhibit 4: USPs by category (January 2012 – December 2015)



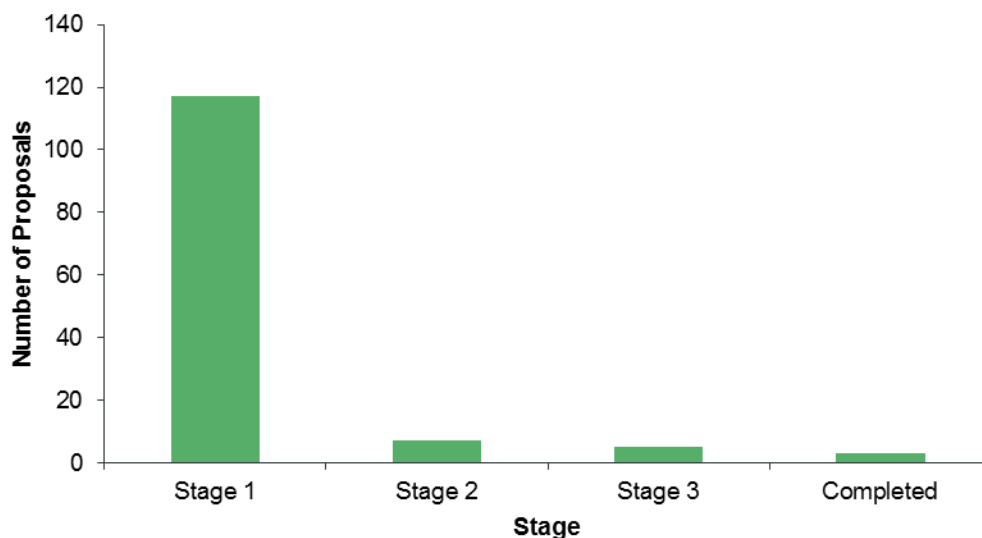
Source: Department of Premier and Cabinet 2016.

Exhibit 5: Number of proposals received by calendar year



Source: Department of Premier and Cabinet 2015.

Exhibit 6: Number of proposals that have reached each stage of the USP assessment process



Source: Department of Premier and Cabinet 2016.

In a review conducted in 2013, DPC analysed 69 proposals. Exhibit 7 below lists the criteria (and other reasons) and the number of proposals that did not meet the criteria (note: each proposal may not have met multiple criteria).

Exhibit 7: Number of proposals not meeting criteria

Criteria	Number of proposals not meeting criteria
Uniqueness	44
Not aligned with government policy/objectives	37
Value to government	11
Not affordable	6
Not appropriate to be dealt with as an unsolicited proposal	4
Capability and capacity	2
No commercial proposition offered	2
High risk to government	2
Further information not provided	1

Source: Department of Premier and Cabinet 2014.

1.7 Comparison with other jurisdictions

As part of the audit, we reviewed how other Australian jurisdictions manage unsolicited proposals (also referred to as 'market-led proposals') to government. The NSW Guide has been used by several other jurisdictions to inform the development of their own guidelines.

All of the guidelines reviewed relied on a central government agency managing the receipt and coordination of assessment of unsolicited proposals. The following is a list of the major variations observed.

- Tasmania, South Australia, and the ACT have a dollar threshold for when an unsolicited proposal will be assessed under a centralised framework. For example, the Tasmanian guidelines apply to unsolicited proposals that have a minimum private investment contribution of \$10 million or the creation of a minimum of 100 direct jobs in Tasmania.
- Both the Victorian and ACT guidelines actively consider other methods of procurement beside direct negotiation as part of the assessment approach.
- The Victorian guidelines refer to other governance and assurance processes that should be applied due to other government policy. For example, there is explicit reference that 'proposals will also be assessed under the High Value High Risk framework where appropriate' and includes reference to gateway reviews and other mechanisms.

1.8 About the audit

The audit focuses on the adequacy of the governance arrangements for unsolicited proposals with reference to the NSW Government's Unsolicited Proposals: Guide for Submission and Assessment. To help us do this, the audit answered the following questions:

- How effectively does the Department of Premier and Cabinet provide 'whole-of-government oversight and coordination of unsolicited proposals'?
- How do the governance arrangements ensure a 'clearly defined separation of duties and personnel between the assessment and approval functions'?
- In establishing governance arrangements, is there clarity and consistency in how government 'gives regard to' other relevant processes and approval requirements in related procurement policy documents?

During our audit, we reviewed the governance arrangements for three specific unsolicited proposals:

- AMP Capital and Macquarie University's proposal for a new transport interchange and town centre at Macquarie Park (Macquarie Square). This proposal is currently at Stage 2.
- The University of Sydney Proposal to acquire the Queen Mary Building in Camperdown from the Sydney Local Health District and use it to provide affordable student accommodation.
- A proposal that was rejected at Stage 1b (details relating to this proposal remain confidential).

The department's response to the audit report is at Appendix 1. Further information on the audit scope and criteria is at Appendix 2.

Key findings

2. Does the Department of Premier and Cabinet appropriately coordinate and oversee the unsolicited proposals process?

The Department of Premier and Cabinet (DPC) effectively coordinates the unsolicited proposals process, primarily through its 'Unsolicited Proposals: Guide for Submission' (the Guide) and advice provided during assessments. Agencies most commonly approached about unsolicited proposals have a good understanding of the process, but this could be improved across government as a whole. There is ambiguity regarding the nature of DPC's oversight role. The unsolicited proposals process would be more transparent and engender greater community confidence by more public reporting about the proposals.

DPC promotes coordination of unsolicited proposals through the Guide, which we found, overall, to be clear and comprehensive. However, there are some detailed matters that should be reviewed, as set out in Recommendation 1.

All agencies we spoke to reflected positively on the advice and coordination provided by DPC during individual unsolicited proposals assessment processes. However, there appeared to be significant differences in levels of awareness and understanding of unsolicited proposals across government. A Premier's Memorandum may be an appropriate way to promote more consistent whole-of-government understanding of unsolicited proposals.

Recommendations

1. Revise 'Unsolicited Proposals: Guide for Submission and Assessment' to address matters of detail discussed in this report, including to:
 - 1.1 clarify the intended scope and meaning of the 'oversight' provided by DPC over the unsolicited proposal assessment process
 - 1.2 promote better clarity in the application of the term 'government'
 - 1.3 better explain how 'value for money' is addressed as one of five probity fundamentals, including the role of probity advisers in reviewing this probity fundamental
 - 1.4 require probity advisers be appointed for unsolicited proposals that progress beyond Stage 1, except where a proposal satisfies prescribed criteria
 - 1.5 clarify options unsolicited proposals that are found not to meet the criteria for direct dealing.
2. Facilitate whole-of-government understanding of the unsolicited proposals process and related matters by releasing a Premier's Memorandum on this topic.
3. Expand the existing scheme of public reporting for unsolicited proposals received by government by:
 - 3.1 publishing aggregate data about all proposals that are received, including reasons for being declined
 - 3.2 publishing more detailed information for proposals that proceed beyond Stage 1 to reassure the public that governance and probity process have been followed
 - 3.3 publishing an audited contract summary for successful unsolicited proposals greater than \$100 million.

Note: Recommendation 1 is a compendium recommendation of matters that should be revised in the Guide. Recommendations 1.4 and 1.5 are substantively discussed in Section 3 of this report.

2.1 'Unsolicited Proposals: Guide for Submission and Assessment' is clear, accessible, and understandable

In January 2012, the DPC released 'Unsolicited Proposals: Guide for Submission and Assessment' (the Guide). The stated purpose of this document was to provide guidance across all NSW Government agencies to ensure that unsolicited proposals were managed centrally and consistently. These guidelines were principally directed at major infrastructure projects and the divestment of assets.

The Guide outlines a transparent and streamlined approach for the consideration of unsolicited proposals. It also sets out processes to be followed by both NSW Government and proponents in developing unsolicited proposals. Its key objective is to provide consistency and certainty to private sector participants as to how unsolicited proposals are evaluated and managed.

The current 2014 Guide describes a four stage process, with an optional pre-assessment meeting for potential proponents to meet with DPC staff to discuss whether a proposal is likely to meet the criteria for unsolicited proposals.

The Guide is publicly available and is referenced in other relevant government procurement policies

The NSW Government website includes a section specific to unsolicited proposals which includes the Guide, supplementary information for proponents and limited information on current and completed projects.² This information is publicly available.

Additionally, further information specific to the Crown Sydney Resort proposal at Barangaroo (which includes various assessment reports and a final report from the steering committee) has been made publicly available. This reflects the heightened interest in that proposal at the time it was considered.

The Guide is also on ProcurePoint, the NSW Government's information portal for procurement policy. ProcurePoint has an intended audience of both suppliers and NSW Government agencies. While reference to the Guide can be found on ProcurePoint, it is not prominent. There is no reference to unsolicited proposals on the ProcurePoint homepage or primary drop down menus. However, this is probably appropriate given the small number of proposals that are made each year, particularly relative to the NSW Government's overall total procurement.

The Guide is also referenced in other relevant NSW Government procurement policies and documents, for example, the Department of Finance, Services and Innovation's Market Approaches Guide and on Treasury's website for Public Private Partnerships.

The Guide has been subject to review and revision

Section 3.9 of the Guide requires DPC to conduct a periodic review of the effectiveness of its approach to dealing with unsolicited proposals.

In August 2012, an updated version of this guide was published alongside the new NSW Public Private Partnerships Guidelines. The changes made in the August 2012 revision are minor, reflecting changes in the policy environment (for example, removing reference to the NSW Government Working With Government Privately Financed Projects Guideline and replacing it with reference to the 2012 NSW Public Private Partnerships Guidelines).

In November 2013, DPC conducted an internal review of the unsolicited proposals framework. The Review included:

- analysis of proposals and how they had been assessed
- consultation with successful and unsuccessful proponents
- consultation with agencies involved in unsolicited proposals

² <https://www.nsw.gov.au/your-government/unsolicited-proposals>

- consultation with other relevant stakeholders, both within government (such as the Independent Commission Against Corruption) and relevant industry groups.

The Review informed the February 2014 revision of the Guide. The review found that there was no need for fundamental changes to the Guide, recommending instead a number of enhancements to improve the clarity and utility of the guide.

As part of its internal audit plan for 2013–14, DPC engaged an external consultant to conduct an internal audit of the management of unsolicited proposals. The objectives of this audit were to evaluate the design and operating effectiveness of the internal controls established to mitigate specific risks associated with the management of proposals, and to make recommendations for improvements.

This audit did not identify any risks of high or moderately high significance. The three main findings, which were rated low risk, related to:

- incomplete sign off of the Stage 1 proposal assessment report
- formal appropriate endorsement/approval of governance plan
- non-compliance with the assessment requirements described in the Guide (for example, completion of schedule of information requirements).

We observed that the management actions described in the internal audit report were implemented in the unsolicited proposals reviewed.

These reviews appeared thorough and resulted in improvements to the Guide. In speaking to stakeholders involved in some of the review processes, there was no evidence that concerns or suggestions raised during as part of any review had not been appropriately addressed by DPC.

The Guide could offer greater clarity on some details

Our view, as well as many of the people with whom we spoke, is that the Guide is, overall, clear and comprehensive. However, there are four areas where greater clarity could be considered.

- What it means for the government, when preparing governance arrangements for unsolicited proposals, to 'have regard to relevant processes and approval requirements in related procurement policy documents' (section 3.7 of the Guide). This is discussed further in Section 4 later in this report.
- What the intent of DPC's 'oversight' role is for unsolicited proposals, including whether this is intended to be a proactive, quasi-regulatory function. This is discussed further in Section 2.4 below.
- The meaning of 'government' varies throughout the Guide. We understand from discussions with DPC that 'government' may, depending on where it is used, be a reference to:
 - the Cabinet of the NSW State Government
 - the Infrastructure Committee of Cabinet
 - DPC itself
 - either of the overarching or proposal specific steering committees.

DPC has explained that the generic word 'government' is used for all these levels of administration as a way to avoid confusing proponents unfamiliar with government processes and who may view 'government' as a single entity. We note that the variable use of the term makes it more difficult to determine who is making decisions through the unsolicited proposals process.

- Section 3.5 sets out five probity fundamentals,³ and it is relatively clear how four of these are given effect, particularly through the role of probity advisers. It is less clear how the probity fundamental 'obtaining value for money' is maintained. It would be helpful for this section to offer greater explanation of how this probity fundamental is promoted, in turn supporting the achievement of value for money.
For example, we understand from discussions with probity advisers that they included in their probity assessments commentary on whether appropriate value for money processes were followed (without directly assessing themselves the rigour of the assessment and whether the project reflects value for money). One probity adviser described that the role was to assess that an appropriate value for money process had been in place and that it was followed.

2.2 Agencies most likely to receive unsolicited proposals understand the process

As noted earlier, most of the proposals received by DPC concern infrastructure development (particularly transport infrastructure) and the acquisition of government property. Because most proposals concern a handful of agencies, these agencies have a body of experience and expertise in the unsolicited proposals process.

The Department of Finance, Services and Innovation maintains a Procurement Leadership Group consisting of Chief Procurement Officers from large NSW Government agencies – members of this group were able to demonstrate their understanding and knowledge of what constitutes an unsolicited proposal and when it ought to be referred to DPC.

DPC has formed a network of relationships across key government agencies to support the implementation of the Guide

A network of key agency procurement contacts has been proactively established by DPC staff. These agencies are generally those more likely to receive unsolicited proposals (or who have had contact with such proposals in the recent past). These agencies include Transport for NSW, Government Property NSW and Infrastructure NSW. We saw evidence of the effectiveness of this network, particularly as it relates to DPC's role in providing guidance and coordination for unsolicited proposals.

As part of the audit, the audit team also sought to identify if there were any key person risks (which exist where critical knowledge and information rests with a small number of staff) associated with maintaining and operating this network. DPC provided evidence of appropriate risk management strategies (including a register of unsolicited proposal related enquiries).

The awareness of the unsolicited proposal process is not as strong in agencies that are less likely to be approached with unsolicited proposals

Given the large number of NSW Government agencies, the audit team did not seek to determine if every agency had knowledge of the unsolicited proposals process. However, the audit team found several instances where staff in government agencies (which had only participated in a very small number of unsolicited proposals) had limited understanding of the Guide. This included staff in procurement related positions.

The unsolicited proposal process and Guide have not been actively promoted across government

As noted above, some agencies may have only occasional dealings with unsolicited proposals, and are therefore less familiar with the key requirements of the unsolicited proposals process and how it is administered. This creates risk in proponents being provided inaccurate information and raises probity concerns, especially in situations where proponents may attempt to lobby decision makers for a proposal after submitting their application.

³ The five probity fundamentals are described as: maintaining impartiality; maintaining accountability and transparency; managing conflicts of interest; maintaining confidentiality; and obtaining value for money.

DPC staff involved in managing and coordinating unsolicited proposals consulted the Office of General Council in DPC regarding this issue, and it was recommended a Premier's Memorandum might be the appropriate mechanism to communicate the key requirements to ministers and agencies. A Premier's Memorandum addresses whole-of-government matters of strategic importance and communicates guidance to the ministries and their portfolio agencies. They are publicly available online.

DPC staff have previously submitted a proposal for the release of a Premier's Memorandum on the unsolicited proposal guidelines. This proposal was unsuccessful, and no additional guidance was released.

Given the relatively small number of unsolicited proposals (compared with the vast proportion of government procurement), the majority of which are received by a handful of agencies, we recognise that not all agencies need to have an expert understanding of the unsolicited proposals process. However, given the probity risks of unsolicited proposals, it is important that all agencies have awareness that there is an unsolicited proposals process and that DPC is the central agency coordinating the receipt and assessment of unsolicited proposals.

A Premier's Memorandum is an effective method of communicating whole-of-government policy. Accordingly, a Premier's Memorandum may be an appropriate and proportional way to foster whole-of-government understanding of unsolicited proposals.

2.3 Agencies understand their role in assessing an unsolicited proposal

DPC assists agencies to participate meaningfully in the assessment process

As part of the process outlined in the Guide, DPC takes a central role in coordinating the assessment of proposals. This role involves consulting with the relevant agencies early in the process.

DPC staff proactively seek to engage other government agencies as soon as possible, often before a proposal is formally received. This early engagement of appropriate expertise supports meaningful participation by other government agencies that have a role in assessing unsolicited proposals.

DPC staff also provide clear guidance on specific roles and responsibilities for line agency staff involved in unsolicited proposals. Agency staff involved in the assessment of unsolicited proposals offered positive feedback on how DPC provides guidance and support. This was especially evident in discussions with agency staff who previously had little or no exposure to the unsolicited proposals process.

Generally, agencies understand that their role is to provide relevant expert advice as well as knowledge on relevant government policies and initiatives

The agency staff interviewed for this audit all demonstrated an understanding of their role in providing relevant subject matter advice (to assessment panels and steering committees) as part of the assessment process. For larger unsolicited proposals that were being assessed at Stage 2 (or later in the proposal), we found evidence to support 'representative function' of assessment panel and steering committee members where members of these groups represent their respective agency's views on issues related to the proposal.

For example, for the Macquarie Square proposal currently being assessed at Stage 2 of the unsolicited proposals assessment process, Transport for NSW staff provided documentation that described how information related to the proposal was communicated across the agency (where appropriate) with appropriate reporting lines.

There is less clarity regarding how this advice and knowledge is provided to steering committees (as opposed to proposal specific assessment panels). However, this does not appear to be an issue for the three unsolicited proposals that were reviewed as part of this audit.

2.4 DPC does not actively oversight compliance with the Guide

Section 3.7 of the Guide describes the governance arrangements under which unsolicited proposals are managed and assessed. The section specifies that DPC is responsible for 'whole-of-government oversight and coordination'. While DPC's role in coordinating the submission and assessment process is clear, DPC's role in whole-of-government 'oversight' is less clear.

DPC's interpretation of oversight

When asked about its interpretation of 'oversight' and how it undertakes the role, DPC staff expressed the view that the word should be taken in the context of the Guide, where DPC's role is largely described in coordinating the receipt and assessment of unsolicited proposals.

DPC described itself as 'the custodian of the Guide' – it ensures compliance with the Guide once a proposal is received, provides confidence in the process, and ensures that the adequacy of reporting/accountability to Cabinet.

However, an alternative interpretation of 'oversight' involves a more active role in reviewing, monitoring, and supervising how NSW Government agencies comply with the Guide. This could include such measures as auditing compliance with the Guide and maintaining a registry of unsolicited proposals received across all NSW Government agencies. This would represent a substantial expansion of DPC's role, requiring additional resources, and for potentially little or no benefit. Further, New South Wales already has a number of established statutory 'oversight agencies'.

DPC's existing functions in providing coordination seem well done, though greater clarity is required around the policy intent of DPC's purported 'oversight' function.

2.5 Transparency would be aided by more public reporting

DPC publish little information publicly on unsolicited proposals that have been received. The unsolicited proposals website contains very brief summary information on proposals currently under assessment at Stage 2 or later, and proposals which have completed the process. Additional information on the Crown proposal has also been made available.

There is other information available in the public domain (for example, media releases relating to the select tender process for the Queen Mary Building), but these are not linked on the unsolicited proposals website.

Public reporting and disclosure of unsolicited proposals received by government may pose some challenges. There is a tension between respecting the commercial-in-confidence information provided by proponents (which fosters an environment of innovation) and providing transparency and accountability to the public that discussions that might lead to direct negotiation are conducted with the best interests of the people of New South Wales.

The Guide provides assurance to potential proponents that all proposals received will be kept confidential at Stage 1 of the assessment process. At Stage 2, the Guide states that 'relevant information regarding proposals under consideration at Stage 2 should be publicly available' (but notes that in some cases government may agree to not disclose a proposal if requested by the proponent). There is no specific guidance on what constitutes relevant information (although a later section of the Guide states that 'brief details of all unsolicited proposals that progress to Stage 2 will be included on the Government Website').

There are no further requirements for public reporting contained in the Guide. Further guidance on procurement reporting obligations is contained in Premier's Memorandum M2007-01. However, this guidance appears to relate to information disclosure after a contract becomes effective.

Given the relatively high risk, and increased public interest, associated with unsolicited proposals, consideration should be given to increased public reporting of unsolicited proposals received by government. The aims of this enhanced public reporting would be to

provide transparency and confidence to the public that government processes which lead to direct negotiation are robust and applied appropriately.

We recommend that DPC increase its public reporting on unsolicited proposals through three measures:

- Reporting aggregate level data on the numbers of proposals received each year, possibly with high level descriptor information regarding the category (or type) of proposal. For proposals that do not proceed to Stage 2, further consideration should be given to providing information on which assessment criteria were not met. This level of aggregate reporting would protect the confidentiality of proponents, while also providing confidence to the public that the assessment process was rigorous. It is likely that potential proponents might find the statistical information on assessment criteria useful in terms of developing their initial proposals.
- Investigating reporting options that would provide the public with confidence that the assessment process used for proposals is consistent with the Guide. This reporting should be updated as proposals move through the assessment process. There are a variety of models that might be adopted. For example, the Victorian Department of Treasury and Finance's 'Market-Led Proposals Guideline' (November 2015) increases the amount of public disclosure for proposals as they proceed through the stages of assessment. At the conclusion of the equivalent of Stage 2, the Victorian Guideline requires the disclosure of a detailed description, including the proposed scope and benefits, and the reasons why a competitive or an exclusive negotiation process was pursued. The probity plan is also made publicly available at this stage.
- Publishing audited contract summaries for successful unsolicited proposals with a value of over \$100 million. Contract summaries are a plain English summary of a project's contracts but do not have any independent legal status, and their use is already NSW Government policy for Public Private Partnerships for projects over \$100 million. The contract summary should have three distinct parts:
 - background to the project, including a summary of the rationale for the project, its value and the parties involved
 - detailed description of the assessment process which outline how the proposal met criteria to justify direct negotiation
 - elements of the contract, which summarises the key commercial features of the project.

3. Do the governance arrangements ensure separation between the assessment and approval functions?

We found that governance arrangements support the separation of the assessment and approval of unsolicited proposals. This includes the broad arrangements set out in the Guide itself, as well as those arrangements that are established through governance plans that are mandated by the Guide for proposals that reach Stage 2 (the detailed proposal stage) of the assessment process.

The broad governance arrangements in the Guide are appropriate for assessment at Stage 1.

For proposals that progress beyond Stage 1, more detailed and proposal-specific governance arrangements are established in governance plans. We found that governance plans were clear and comprehensive in describing the roles and responsibilities of those involved in assessing unsolicited proposals.

Further, the probity environment established by the Guide mandates the use of appropriate controls to ensure that conflicts of interest do not adversely affect outcomes.

Given the key role played by probity advisers, there is merit in considering that the Guide requires their appointment for any proposal that reaches Stage 2 of an assessment process. This appointment would be expected to continue for proposals that reached Stage 3. Any amendment along these lines would be consistent with what has occurred in practice, and could, if deemed necessary, be accompanied by specified exceptions.

Recommendations

Recommendations 1.4 and 1.5 are substantively discussed in this Section, though included earlier in a compendium recommendation in Section 2 of this report.

3.1 The Guide and governance plans describe the roles and functions of assessment panels and steering committees

The Guide contains the overarching governance arrangements applied at each stage of the unsolicited proposals assessment process. These arrangements include the creation of specific governance plans for proposals that reach Stage 2 of the assessment process and continue to apply for proposals that reach Stage 3.

The key governance mechanisms are:

- the Unsolicited Proposals Steering Committee: this is an overarching standing steering committee that includes DPC, Treasury and Infrastructure NSW and reports to the Infrastructure Committee of Cabinet
- project specific steering committees that are convened if a project reaches Stage 2
- assessment panels that are convened at either Stage 1 or Stage 2 and which provide advice to either, respectively, the standing steering committee or a project specific steering committee (if a matter has progressed to Stage 2)
- a probity adviser is required for proposals that reach Stage 2, as are governance plans.

Broad governance arrangements are appropriate for Stage 1

The broad governance arrangements described in the Guide are appropriate for the preliminary assessment at Stage 1.

The relationships between the Proposal Manager (who is a staff member of DPC), the assessment panel and Unsolicited Proposal Steering Committee is clearly described and functions effectively.

We found consistent application of these arrangements in the unsolicited proposals reviewed during this audit.

Governance plans provide effective guidance on the roles and responsibilities of those involved in assessing unsolicited proposals

When a proposal is assessed as being suitable to progress to Stage 2, a proposal specific governance plan is drafted by the proposal specific proposal manager. The proposal manager is also responsible for coordinating the implementation of the requirements of the governance plan. The purpose of the governance plan is to define the government's commitment and approach to participating in Stage 2 and the project approval process. The proposal specific governance plan is endorsed by the project steering committee prior to the commencement of Stage 2. The governance plan continues to apply for proposals that reach Stage 3 (though it may be modified to reflect any additional governance requirements necessary for Stage 3).

The governance plans used for the unsolicited proposals reviewed as part of this audit were effective in describing the roles and responsibilities of those involved.

The arrangements described in the Guide are generally well articulated although there is some overlap between steering committees

The governance arrangements described in the Guide are generally well articulated and comprehensive, though we found that there is overlap between the stated role of the standing Unsolicited Proposals Steering Committee and the role of proposal specific steering committees.

The Guide states that a proposal specific steering committee will report on progress to the standing steering committee, though it seems relatively clear that the proposal specific committee becomes responsible for leading the process. However, it was apparent that this understanding was not shared, and there was some uncertainty about which committee had overall leadership of deliberations for an unsolicited proposal.

3.2 Clear separation between the people who assess and approve proposals

Maintaining impartiality is one of the probity fundamentals upon which the Guide is based. The Guide seeks to promote impartiality in decision making through the clearly defined separation of duties and personnel between the assessment and approval functions. This separation seeks to create a clear division between the people who assess a proposal, and those who recommend to cabinet regarding its progress.

There is clear documentary evidence of separation between approval and assessment

In the proposals we reviewed, there was clear evidence of the separation of approval and assessment. This view was supported by interviews with assessment panel and steering committee members, as well as probity advisers engaged to work on several unsolicited proposals.

Members of assessment panels and steering committees were also able to demonstrate their understanding of the importance of the separation of assessment and approval.

Probity advisers play an important role in ensuring that the assessment and approval functions are kept separate

The requirement of probity advisers to be present at all meetings of the assessment panels and steering committees provides an additional degree of certainty that the groups fulfilled their duties appropriately.

3.3 Effective management of potential conflicts of interest

Conflict of interest management is an important aspect of the process articulated in the Guide. It is a requirement of the process that all participants in the assessment process must have no conflicts of interest, which would, or may appear to, adversely affect the impartiality of the process.

Governance plans for proposals that reach Stage 2 and Stage 3 include the incorporation of appropriate controls to identify and manage conflicts of interest. These controls include:

- signed conflict of interest declarations
- regular reminders to disclose possible conflicts
- all potential conflicts reported, with any management action requiring approval.

The probity environment established under the Guide relies on participants in the assessment process taking responsibility for their compliance with the probity arrangements described in the Guide and governance plan. Additionally, if a probity adviser is engaged, one of their primary duties is to assist in ensuring that any potential or actual conflicts of interest could be declared and managed appropriately.

We found extensive evidence to indicate that these processes are clearly described and are followed.

3.4 Clarifying the role of probity advisers

The Guide allows for, but does not mandate, the appointment of a probity adviser for proposals that reach Stage 2 of the assessment process. The Guide goes on to state that the role of the probity adviser is to monitor and report on the application of the probity fundamentals during the assessment process. When appointed, probity advisers report to the Chair of the Steering Committee.

The Guide does not clarify when a probity adviser should be engaged

The Guide states that probity advisers may be appointed for large-scale projects or where the probity risk is considered sufficient to warrant appointment. To date, all of the unsolicited proposals that reached Stage 2 of the process have had a probity adviser appointed. The routine appointment of a probity adviser is consistent with the high risks associated with processes that lead to direct negotiation.

The unsolicited proposals process might be strengthened by an explicit presumption in favour of appointing a probity adviser for all proposals that reach Stage 2. This appointment would be expected to continue for proposals that reached Stage 3. Exceptions to this presumption, perhaps such as small value proposals, could also be included in the Guide. This is reflected in Recommendation 1.4 of this report.

Probity reports are provided at key milestones in the USP assessment process

At the end of each stage, the Steering Committee (and therefore the Cabinet Infrastructure Committee) are provided with a probity report prepared by the probity adviser for the proposal. The report sets out the probity oversight, observations and conclusions relating to the development and assessment of the proposal. It effectively provides a level of independent assurance that processes set out in the Guide and related governance plans were carried out appropriately.

For large or complex unsolicited proposals, the time taken for a project to move through Stage 2 or Stage 3 can be protracted. One of the proposals we reviewed had spent over twelve months at Stage 2. More regular reporting, particularly for proposals which require more time to assess, might be useful.

Additionally, consideration to 'public' probity reporting requirements would improve transparency. This has been discussed earlier in Section 2.5.

Reporting lines for probity advisers could be strengthened

As mentioned above, probity advisers currently report directly to the Chair of the Proposal Specific Steering Committee. This may be problematic if a probity concern relates to the Chair, or where a concern is so material that it is best raised outside of the Steering Committee (we note that we saw no evidence during the audit that either scenario has occurred).

In the unsolicited proposals we reviewed, there was evidence that demonstrates that probity advisers can, should the need arise, communicate directly with the Secretary of DPC. It is our view that the Guide should be amended so that this becomes standard for all unsolicited proposals where probity advisers are appointed. This is reflected in Recommendation 1.4 in this report.

3.5 Alternative routes for good ideas that are not suitable for direct dealing under the unsolicited proposals process

In general, the Guide provides that an unsolicited proposal can either be approved to progress to the next stage, or not approved: the decision options are binary. Only at Stage 1b is there an alternative option available, where a potentially meritorious proposal can be referred to an agency for consideration. This includes where a proposal is small value, low risk, and not a whole-of-government concern.

In a number of cases, we found that proposals that did not meet the direct dealing criteria had been referred to alternative routes beyond those set out in the Guide. This included advice provided by DPC and decisions made by Steering Committees.

It is not inappropriate for the unsolicited proposals process to assist in fostering good outcomes for good ideas, even if they are progressed under other processes. However, as a matter of ensuring sound administrative decision-making, the Guide should be clear on who can make decisions and the scope of the decisions that can be made (including the decision to make a recommendation to Cabinet).

If it is deemed good public policy for unsolicited proposals to be referred to other processes, especially when they do not satisfy the criteria for direct dealing, then it should be clear in the Guide that such options are available to decision-makers. This is reflected in Recommendation 1.5 in this report.

4. Is there clarity and consistency in how government has regard to related procurement documents?

There is little evidence about how and to what extent Government gives regard to relevant processes and approval requirements in related procurement policy documents when forming governance arrangements for unsolicited proposals.

There is a need to clarify the policy intent of the government 'having regard' to other procurement-related policies when establishing governance arrangements. This includes to what extent it is expected that governance arrangements for unsolicited proposals will be consistent with proposals progressed under other processes.

We found some understanding that agency staff who are nominated for steering committees or assessment panels should have relevant expertise in related procurement processes – such as Gateway Reviews – but this is not formalised. Further, there was a lack of common understanding among members of steering committees and assessment panels regarding how, and when in the unsolicited proposal assessment process, other government policies would be considered or applied.

The Guide does not provide an effective mechanism to record how (and when) other governance arrangements and government policies are considered. This meant that we were unable to assess the effectiveness of this element of the governance measures in the Guide.

Recommendations

4. Clarify the requirement that government 'have regard to relevant processes and approval requirements in related policy documents' (as set out in section 3.7 of in 'Unsolicited Proposals: Guide for Submission and Assessment') including:
 - the policy intent of the expression 'have regard to'
 - 4.1 who is responsible for giving regard to other relevant processes and approval requirements
 - 4.2 at what stage in the unsolicited proposal process should regard be given to other relevant processes and approval requirements
 - 4.3 how consideration of these matters is documented.

In section 3.7 of the Guide, under 'Governance Arrangements', reference is made to other government policy:

In preparing the governance arrangements, government will have regard to relevant processes and approval requirements in related procurement policy documents. This may include:

- NSW Public Private Partnerships Guidelines (August 2012)
- National PPP Guidelines
- NSW Code of Conduct for Procurement
- ICAC Guidelines for Managing Risks in Direct Negotiations
- NSW Code of Tendering

The Guide also states that 'unsolicited proposals that seek to enter in to a Public Private Partnership (PPP) should comply with the NSW PPP Guidelines, where applicable.'

As part of the audit, we sought to determine how such consideration was given effect, by whom, and how it was documented. The audit did not seek to determine if consideration ought to be given to specific government processes that might apply (such as NSW Treasury's Gateway review process or the Major Project Assurance Framework). We looked for evidence that there was clear documentation of decision making which resulted in other policies or processes not being applied.

However, given the relatively high risk present in a process that results in direct negotiation, we did seek to compare the assurance controls in the Guide with comparable government processes.

4.1 Agency staff are expected to share subject area knowledge in deliberations and assessment processes

The inclusion of appropriate expertise from amongst government staff who participate in the assessment process is critical to good outcomes. A core component of the process outlined in the Guide is the engagement of relevant government agencies in the assessment process. The commitment of appropriately experienced and qualified resources by NSW Government agencies for assessment processes is a clearly identified responsibility in the Guide.

The Guide ascribes responsibility for providing policy and inter-agency input to deliberations to members of the steering committee and requires the creation of an assessment panel which comprises of appropriately qualified representatives.

These responsibilities were well understood by all representatives of steering committees and assessment panels we interviewed.

4.2 The assurance requirements of the Guide differ from other procurement processes

Assurance mechanisms are an important component of government decision-making. Generally, government employs more stringent quality assurance practices as the potential risk involved in a decision increases. The assessment of unsolicited proposals is a high risk procurement practice, particularly compared with procurement methods which go to open tender.

We found that the process described in the Guide does not, by itself, include independent assurance processes which apply to other large or high risk government procurements (such as the NSW Treasury Gateway Review or the Infrastructure NSW's Investor Assurance Framework).

This does not mean that unsolicited proposals which were assessed under the process described in the Guide did not undergo independent assurance. We found evidence to support that some unsolicited proposals were referred to other NSW Government assurance processes, such as those described above.

4.3 Uncertainty about considering other government procurement policies

As mentioned above, the Guide assigns responsibility for providing policy and inter-agency input for deliberations to the steering committee. Additionally, there is provision for an assessment panel to provide guidance to the steering committee during Stage 1b regarding risks and other limitations that might affect a proposal.

However, there is no further guidance on how this input occurs, or at what point(s) in the unsolicited proposals assessment process it should occur.

During interviews with steering committee and assessment panel members, there was a lack of uniform understanding regarding how and when in the unsolicited proposal assessment process other government policies would be considered or applied.

This presents a risk that government policies that ought to be applied, might not be or that the complete application of certain government policies and processes would be limited. For example, the NSW Treasury Gateway process includes seven 'gateway reviews' that involve independent assurance at various stages in a project life cycle. Under the current arrangements, there is a risk that several of the early gateways might be missed.

4.4 No process to document consideration of other procurement policies

We were able to find some evidence that demonstrated that other relevant procurement policies and processes were considered. However, we were unable to determine whether all relevant assurance processes which ought to be applied to unsolicited proposals were wholly and consistently applied.

Governance plans do not refer to other potentially relevant NSW Government policies or assurance processes

There is a governance plan template, which is used to create proposal specific governance plans for unsolicited proposals which reach Stage 2 of the assessment process. The template includes sections for roles and responsibilities, resource commitments, statutory approvals and probity arrangements.

The probity arrangements section of the governance plan does include a subsection on 'Record Keeping', though in the unsolicited proposals reviewed there was no evidence of the requirement to clearly document how governance bodies considered and/or complied with other government policy.

As such, the documentation of how such consideration was given effect depends on how meeting proceedings are minuted. Additionally, the lack of a formal requirement to map out how (and where) other governance arrangements and government policies were considered meant that we were unable to determine if all appropriate considerations took place.

Appendices

Appendix 1: Response from Agency



Reference: A1495208

Mr Tony Whitfield PSM
Acting Auditor-General
Audit Office of New South Wales
Level 15, 1 Margaret Street
SYDNEY NSW 2000

Dear Mr Whitfield

Thank you for your letter dated 3 February 2016 and for the opportunity to respond to the Performance Audit Report, "Managing Unsolicited Proposals in NSW".

I am pleased the audit found that the NSW Department of Premier and Cabinet (DPC) effectively coordinates the unsolicited proposals (USP) process, and that the USP Guide for Submission and Assessment is clear, comprehensive, and provides a sound framework for the governance of USPs.

The Audit Report has made a number of recommendations to provide greater clarity and transparency in the USP framework. DPC will continue to work towards the implementation of the majority of the recommendations contained in the audit report.

I would like to thank the Audit Office for its efforts in examining the USP process and governance arrangements.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Blair Comley".

Blair Comley PSM
Secretary

4 March 2016

Appendix 2: About the audit

Audit objective

The audit objective is to examine the adequacy of the governance arrangements for unsolicited proposals with reference to the NSW Government's 'Unsolicited Proposals: Guide for Submission and Assessment'.

Audit scope and focus

Section 3.7 of the Guide sets out the governance arrangements that are to apply to unsolicited proposals. These arrangements are itemised below.

1. The Department of Premier and Cabinet (DPC) takes responsibility for the whole-of-government oversight and coordination of unsolicited proposals.
2. An overarching standing Unsolicited Proposals Steering Committee has been established, which comprises senior representatives from DPC (chair), NSW Treasury and Infrastructure NSW.
3. Proposal specific assessment panels may be convened comprising appropriately qualified members.
4. Cabinet approval is required to progress a proposal to the next stage of assessment.
5. Once proposals reach Stage 2, the government establishes appropriate specific governance arrangements that will detail:
 - the make-up and responsibilities of the steering committee and assessment/technical panels
 - management of confidentiality and conflict of interest
 - the appointed proposal manager and probity adviser.
6. In preparing the governance arrangements, the government will 'have regard to' other relevant processes and approval requirements including PPP guides, NSW codes for procurement and tendering and so on.

Audit Exclusions

The audit did not seek to conduct a review of the merits of any unsolicited proposals and did not comment on whether a specific proposal met assessment criteria contained in the Guide.

The audit did not focus on how unsolicited proposals are being assessed directly by line agencies. The focus was on unsolicited proposals being assessed in accordance with the Guide.

Lines of enquiry and audit criteria

Line of enquiry 1

How effectively does the Department of Premier and Cabinet provide 'whole-of-government oversight and coordination of unsolicited proposals'?

Criteria

- 1.1 The Department of Premier and Cabinet provides clear and comprehensive guidance and advice across government on how the Guide should be applied.
- 1.2 Agencies understand what an unsolicited proposal is and when it should be referred to the Department of Premier and Cabinet
- 1.3 Agencies understand their role when an unsolicited proposal is being processed in accordance with the Guide.

Line of enquiry 2

How do the governance arrangements ensure a 'clearly defined separation of duties and personnel between the assessment and approval functions'?

Criteria

- 2.1 There are comprehensive and clearly articulated Terms of Reference for steering committees and assessment panels.
- 2.2 Membership of steering committees and assessment panels do not overlap and roles and responsibilities for members of steering committees and assessment panels are clearly defined.
- 2.3 There is a clear process to ensure that any interests are managed in a transparent and open manner to prevent any perceived or actual conflict or capture of interest.

Line of enquiry 3

In establishing governance arrangements, is there clarity and consistency in how government 'gives regard to' to other relevant processes and approval requirements in related procurement policy documents?

Criteria

- 3.1 Governance arrangements that apply under other relevant processes and policies are understood.
- 3.2 There is an established process to record and demonstrate how other procurement policies and documents have been considered.

Audit approach

The audit team conducted the audit in accordance with ASAE 3500 Performance Engagements and ASAE 3000 Assurance Engagements Other than Audits or Reviews of Historical Financial Information. The standards require the audit team comply with relevant ethical requirements and plan and perform the audit to obtain reasonable assurance and draw a conclusion on the audit objective.

Our procedures included:

1. Interviewing staff from the Department of Premier and Cabinet (and other agencies) who play a role in governance activities described in the Guide, members of USP steering committees and advisory panels who have worked in the governance framework described in the Guide, proponents of USPs which have been assessed under the guide.
2. Examining documentation, including minutes, terms of agenda and other internal documents relating to governance activities described in the Guide, policy materials and process descriptions used by other agencies which support the management and assessment of USPs, review materials and other evaluations of the USP process.
3. Analysing data including statistics related to USPs received by DPC and other agencies over the last four years.

We also examined:

- documentation from other stakeholders obtained throughout the audit such as research and studies, statistical data and analysis
- information from other jurisdictions for comparison.

Audit methodology

Our performance audit methodology is designed to satisfy Australian Audit Standards ASAE 3500 on performance auditing. The Standard requires the audit team to comply with relevant ethical requirements and plan and perform the audit to obtain reasonable assurance and draw a conclusion on the audit objective. Our processes have also been designed to comply with the auditing requirements specified in the *Public Finance and Audit Act 1983*.

Acknowledgements

We gratefully acknowledge the co-operation and assistance provided by the Department of Premier and Cabinet, NSW Treasury, Transport for NSW, the Historic Houses Trust, and

Infrastructure NSW. In particular we wish to thank our liaison officer and staff who participated in interviews and provided material relevant to the audit.

Audit team

Jason Appleby and Gordon Eastwood conducted the performance audit. Andrew Hayne and Kathrina Lo provided direction and quality assurance.

Audit cost

Including staff costs, travel and overheads, the estimated cost of the audit is \$190,000.

Performance auditing

What are performance audits?

Performance audits determine whether an agency is carrying out its activities effectively, and doing so economically and efficiently and in compliance with all relevant laws.

The activities examined by a performance audit may include a government program, all or part of a government agency or consider particular issues which affect the whole public sector. They cannot question the merits of government policy objectives.

The Auditor-General's mandate to undertake performance audits is set out in the *Public Finance and Audit Act 1983*.

Why do we conduct performance audits?

Performance audits provide independent assurance to parliament and the public.

Through their recommendations, performance audits seek to improve the efficiency and effectiveness of government agencies so that the community receives value for money from government services.

Performance audits also focus on assisting accountability processes by holding managers to account for agency performance.

Performance audits are selected at the discretion of the Auditor-General who seeks input from parliamentarians, the public, agencies and Audit Office research.

What happens during the phases of a performance audit?

Performance audits have three key phases: planning, fieldwork and report writing. They can take up to nine months to complete, depending on the audit's scope.

During the planning phase the audit team develops an understanding of agency activities and defines the objective and scope of the audit.

The planning phase also identifies the audit criteria. These are standards of performance against which the agency or program activities are assessed. Criteria may be based on best practice, government targets, benchmarks or published guidelines.

At the completion of fieldwork the audit team meets with agency management to discuss all significant matters arising out of the audit. Following this, a draft performance audit report is prepared.

The audit team then meets with agency management to check that facts presented in the draft report are accurate and that recommendations are practical and appropriate.

A final report is then provided to the CEO for comment. The relevant minister and the Treasurer are also provided with a copy of the final report. The report tabled in parliament includes a response from the CEO on the report's conclusion and recommendations. In multiple agency performance audits there may be responses from more than one agency or from a nominated coordinating agency.

Do we check to see if recommendations have been implemented?

Following the tabling of the report in parliament, agencies are requested to advise the Audit Office on action taken, or proposed, against each of the report's recommendations. It is usual for agency audit committees to monitor progress with the implementation of recommendations.

In addition, it is the practice of Parliament's Public Accounts Committee (PAC) to conduct reviews or hold inquiries into matters raised in performance audit reports. The reviews and inquiries are usually held 12 months after the report is tabled. These reports are available on the parliamentary website.

Who audits the auditors?

Our performance audits are subject to internal and external quality reviews against relevant Australian and international standards.

Internal quality control review of each audit ensures compliance with Australian assurance standards. Periodic review by other Audit Offices tests our activities against best practice.

The PAC is also responsible for overseeing the performance of the Audit Office and conducts a review of our operations every four years. The review's report is tabled in parliament and available on its website.

Who pays for performance audits?

No fee is charged for performance audits. Our performance audit services are funded by the NSW Parliament.

Further information and copies of reports

For further information, including copies of performance audit reports and a list of audits currently in-progress, please see our website www.audit.nsw.gov.au or contact us on 9275 7100.

Our vision

Making a difference through audit excellence.

Our mission

To help parliament hold government accountable for its use of public resources.

Our values

Purpose – we have an impact, are accountable, and work as a team.

People – we trust and respect others and have a balanced approach to work.

Professionalism – we are recognised for our independence and integrity and the value we deliver.

Professional people with purpose

Making a difference through audit excellence.

Level 15, 1 Margaret Street
Sydney NSW 2000 Australia

t +61 2 9275 7100

f +61 2 9275 7200

e mail@audit.nsw.gov.au

office hours 8.30 am–5.00 pm

audit.nsw.gov.au

