

Partnerships Victoria



Guidance Material - March 2001

Practitioners' Guide

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Partnerships Victoria Guidance Material set includes:

- Practitioners' Guide
- Risk Allocation and Contractual Issues
- Public Sector Comparator Technical Note
- Overview

This document has been prepared by the Victorian Department of Treasury and Finance, with the assistance of Deutsche Bank.

Explanatory Note

This document is an Exposure Draft only and is being provided to interested parties for comment. A final version of this document will be published following the consultation process. The final version will be distributed to recipients of this draft and will also be available at www.vic.gov.au/treasury/treasury.html.

This Exposure Draft is one of an initial set of four documents, which make up the guidance materials for the implementation of the *Partnerships Victoria* policy.

This set includes:

- Public Sector Comparator - Technical note
- Practitioners' Guide
- Risk Allocation and Contractual Issues guide
- Overview

The Government is seeking comment from business and other interested parties on the content of this set of documents. Please forward your comments by Tuesday May 1, 2001 to:

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Overview

The *Partnerships Victoria* policy of June 2000 provides a framework for developing contractual relationships between the Victorian Government and private parties for the delivery of public infrastructure and related ancillary services.

Value for money and the public interest are key elements of the policy and are discussed in detail in this *Practitioners' Guide*.

The *Practitioners' Guide* provides detailed guidance to Victorian Government departments and agencies considering how *Partnerships Victoria* can be used to meet infrastructure and related ancillary service requirements, including accommodation availability services. The Guide gives step by step guidance on all elements of a *Partnerships Victoria* project, from identification of a potential project through to contract management. However, it does not remove the need for specialist input from the Department of Treasury and Finance and external advisers.

The process set out in the Guide is designed specifically for budget sector entities and more generally for government business enterprises. (Variations in the approval process for government business enterprises are set out in Chapter 22, Government approvals.)

Structure

The Guide has three parts:

- **Part One** provides an overview of the nature of the projects contemplated by *Partnerships Victoria*, the key drivers for developing projects and the critical elements for achieving a successful result;
- **Part Two** details the necessary steps for developing a *Partnerships Victoria* project; and
- **Part Three** discusses some key issues associated with a *Partnerships Victoria* project, including risk allocation, protecting the public interest, probity, financing arrangements, contract development and taxation.

The *Practitioners' Guide* has been written so that each subject area can be read separately, without a need to read the entire document. Some topics are therefore dealt with at varying depths in different contexts.

Supporting material

The *Practitioners' Guide* is one of several publications supporting the implementation of *Partnerships Victoria*. Other publications include a *Risk Allocation and Contractual Issues* guide and a technical note, *Public Sector Comparator*.

Amendments

Amendments to guidance documents will be published on the *Partnerships Victoria* website (www.partnershipsvictoria.vic.gov.au).

Part One: Partnerships generally

Part One provides an introduction to *Partnerships Victoria* projects. In particular, it addresses the nature of a *Partnerships Victoria* project, the circumstances in which such an approach may be appropriate and the qualities of a successful *Partnerships Victoria* project.

1. Practical application of the policy

Under the *Partnerships Victoria* policy, deciding whether or not a service should be delivered by a *Partnerships Victoria* project depends on three core questions:

- (i) which part or parts of the proposed service should government itself deliver to its citizens?
- (ii) for all other aspects of the service and supporting physical infrastructure, which project model delivers the best value for money?
- (iii) does that model satisfy the policy's public interest criteria? If not, can the public interest be satisfied by either building safeguards into the contract or through regulatory measures (and at what cost), or must the project be reconceived to 'reserve' further areas of service for provision directly by government?

2. What is a partnership?

A *Partnerships Victoria* project results in a contract for a private party to deliver public infrastructure based services. The policy does not cover outsourcing or other service delivery arrangements where no capital investment is required.

A common misconception regarding *Partnerships Victoria* contracts is that they are principally about private sector financing of public infrastructure. This is incorrect. *Partnerships Victoria* is about achieving outputs by creating a business opportunity for the private sector, while providing value for money to government, in the public interest.

Projects with the following key characteristics are likely *Partnerships Victoria* candidates:

- **Scale.** *Partnerships Victoria* projects have a contract value equal to at least \$10 million (in net present cost terms);
- **Measurable service outputs.** Government requirements can be expressed and measured in output terms. Payment mechanisms are generally structured around these output specifications to provide incentives for achieving key performance indicators;
- **Non-core services only.** Contracts are likely to include a requirement for a range of services to be delivered, including accommodation availability, information technology outputs and the like. However, *Partnerships Victoria* contracts do not include delivery of core government services — those services where it is in the public interest that government retains direct control (for example, police, custodial, public system teaching and judicial services);
- **Risk transfer.** A *Partnerships Victoria* project needs to be structured to achieve optimal risk allocation. Value for money is a key driver of the policy and if sufficient risk cannot be transferred to private parties, it is likely that a *Partnerships Victoria* approach will not deliver value for money;
- **Long term.** Contracts tend to be long-term (up to 30 years or more), and reflect an acceptance of whole-of-life cycle costing risk by the private party. Arrangements are governed by a well drafted and binding contract. Hence it is important that the nature of the service is such that government is able to take a long-term view of the service requirements and can identify private parties who demonstrate an ability to deliver and to work effectively with government over an extended period;
- **Innovation.** The project is sufficiently complex or otherwise allows innovative solutions; and
- **Market appetite.** The project creates a genuine business opportunity which is likely to attract a sufficient number of private parties and create an effective and competitive bidding process.

The presence of these characteristics will not always mean that *Partnerships Victoria* is a viable option. However, where they are present, *Partnerships Victoria* options will be properly considered. Within the Budget approval process there will be an assessment of the effectiveness of the investigation of *Partnerships Victoria* options.

There is no preferred model. *Partnerships Victoria* projects accommodate a range of roles for the parties, as indicated in Table 1.

Table 1: Range of partnership models

Increasing role of the private sector →				
Private party role	Infrastructure services only	Infrastructure and ancillary services	Infrastructure and partial private-to-public service delivery	Infrastructure and service delivery to users
Government role	All public-to-public services	Delivery of core public services	Delivery of core public services	No operational role
Example	Public buildings	Non-core hospital services, non-judicial court services	Community facilities linked to educational facilities (e.g. after-hours usage)	Rail, roads, port facilities, car parks

Partnerships Victoria projects also accommodate a range of commercial scenarios, varying from:

- (i) an arrangement where demand is effectively controlled by government and the costs of service delivery are substantially or fully funded by government (for example, non-judicial court services); to
- (ii) an arrangement where government has little control over demand and shares the costs of service provision with users (for example, public transport services); to
- (iii) an arrangement where government has no control over demand, costs of service delivery are fully funded by users and government's role is limited to providing some infrastructure (for example, land) or project facilitation in areas such as planning. A port project may be an example of this model.

In structuring the most appropriate approach, the focus should be on the output specifications, the public interest, the capabilities of both government and the private sector, the optimal risk allocation environment and commercial viability. Considering these issues will indicate the most appropriate model for a particular project. The objective is to achieve effective and efficient value for money outputs. This must remain the aim, rather than a desire to promote any particular model.

3. The benefits of a partnership

Partnerships Victoria can potentially deliver significant benefits in quality of services and the cost of providing them. *Partnerships Victoria* shares many of the characteristics of the public-private partnerships models adopted by a number of countries around the world, including the United Kingdom (where a large number of projects have been completed), South Africa, Ireland, Germany, the Netherlands, Japan, Finland and Denmark. The United Kingdom experience has been the subject of extensive review and projects there have been found to deliver average savings of 17 per cent compared to traditional public sector delivery.¹

Partnerships Victoria seeks to draw upon the best available skills, knowledge and resources, whether they are in the public or the private sector. The *Partnerships Victoria* approach has a demonstrated ability to deliver strong value for money results for Victorians. This is driven by:

- **Risk transfer.** Risk retained by government in owning and operating infrastructure typically carries substantial, and often unvalued, cost. Transferring some of the risk to a private party which can better manage it at least cost can substantially reduce the overall cost to government;
- **Whole-of-life costing.** Full integration — under the responsibility of one party — of up-front design and construction costs with ongoing service delivery, operational, maintenance and refurbishment costs;
- **Innovation.** The *Partnerships Victoria* approach focuses on output specifications, providing wider opportunity and incentive for bidders to develop innovative solutions in meeting these requirements; and
- **Asset utilisation.** Infrastructure developed by government is rarely used to generate third-party revenue, given the absence of commercial motivation. Private sector providers are motivated to develop opportunities for revenue beyond the government payment stream and this is used in part to reduce the cost of services to government.

Various techniques for harnessing these value for money drivers are dealt with in Part Two and Part Three of this *Practitioners' Guide* and in its companion volume, *Risk Allocation and Contractual Issues*.

Partnerships often also deliver the following:

- **Focus on service delivery.** *Partnerships Victoria* allows a sponsoring department or agency to enter into a long-term contract for infrastructure and related ancillary services to be delivered when and as required. Senior management is freed from the everyday issues of infrastructure ownership and management and the delivery of related ancillary services. Management's focus on service delivery is not distracted by construction time and cost overruns, maintenance needs, infrastructure not quite fit for purpose, and staff and client unrest that could be resolved by a refurbishment if only funds were available; and

¹ Arthur Andersen and Enterprise LSE, *Value for Money Drivers in the Private Finance Initiative*, a report commissioned by the Treasury Taskforce, UK, 17 January 2000.

- **Predictability of costs and funding.** *Partnerships Victoria* ensures whole-of-life costing and budgeting are considered, providing infrastructure and related ancillary services to specification for a significant period, and including any growth or upgrade requirements. This provides budgetary predictability over the life of the infrastructure and reduces the risks of funds being diverted (for example, away from scheduled refurbishment) during the life of the project.

A further key economic driver is the leverage derived from payment by government beginning only when output specifications are achieved — in practical terms, when commissioning tests are passed. Moreover, *Partnerships Victoria* projects involve government having access to facilities or services; payment is conditional on the private party achieving key performance indicators and may be interrupted or abated in the event of failure to deliver.

4. Creating a successful partnership

While a successful result from a *Partnerships Victoria* project depends upon a large number of variables, the following key factors are particularly relevant:

- **Planning and specification.** The extent to which the requirements of the project are carefully thought through before the project is put to the market directly relates to the efficiency of the bid process and the quality of the result. The focus should be on the outcomes that government is looking to achieve and specifying the outputs required to achieve them. This is very important, because how outputs are defined will affect bidders' opportunities to be innovative in designing their inputs to achieve the government service outcomes;
- **Clarity of requirements.** The contractual arrangements need to identify the output requirements and the key performance indicators, so that performance monitoring can be managed effectively and the risk of disputes is minimised;
- **Business opportunity.** The project must be commercially structured to create a viable business opportunity for private parties;
- **Certainty of process.** It is critical to ensure that bidders are provided with a precise description of what is required and the hurdles that need to be cleared if government is to proceed with the project. It is equally important that provided those hurdles are cleared, the project does proceed to completion. The budget process is central to this question, as any necessary government funding must be secured before the bidding process starts;
- **Consideration of the long-term nature of the relationship.** When considering the shortlist of parties to be invited to bid, it is critical to consider their ability to deliver over an extended period of time (up to 30 years, or more) and their track record. The question of whether a relationship between government and the party can be sustained within the terms and for the period of the contract must be considered;
- **Bid evaluation.** The focus needs to be balanced across all key elements of the project as identified in Chapter 18. Comparing only the financial aspects of bids does not always lead to the best result;
- **Recognition of the partnership.** The intention is to enter into a contract that creates a long-term relationship for the mutual benefit of the parties. This needs to be taken into account both during the bidding process (understanding the cost and risk that bidders take on) and during project implementation by government;
- **Project resourcing.** The project must be properly resourced, including appointment of specialist advisers where required, to allow the process to move forward efficiently, in line with the timelines given to bidders, and for all key questions and issues to be dealt with quickly; and
- **Contract management.** Completing the contractual arrangements is only the first step in the delivery of a project. The process needs sound contract management arrangements, including early involvement of those who will be responsible for administering the contract.

The process for developing a *Partnerships Victoria* project, from needs analysis and resource assembly through to contract management, is set out in Part Two. Critical elements that may hinder achievement of project objectives, and project management issues, are dealt with in greater detail in Part Three.

Part Two: How to develop a partnership

Part Two provides a step by step guide through an eight-stage process covering the identification, development and implementation of a *Partnerships Victoria* project. The Guide highlights the drivers behind potential projects and key issues to be considered at each stage. However, no guide in this area can provide a complete how-to manual. On each project, the Department of Treasury and Finance provides assistance, drawing on knowledge of the handling of commercial, financial and process issues across a range of projects. External advisers are also called on for key areas of expertise.

Process

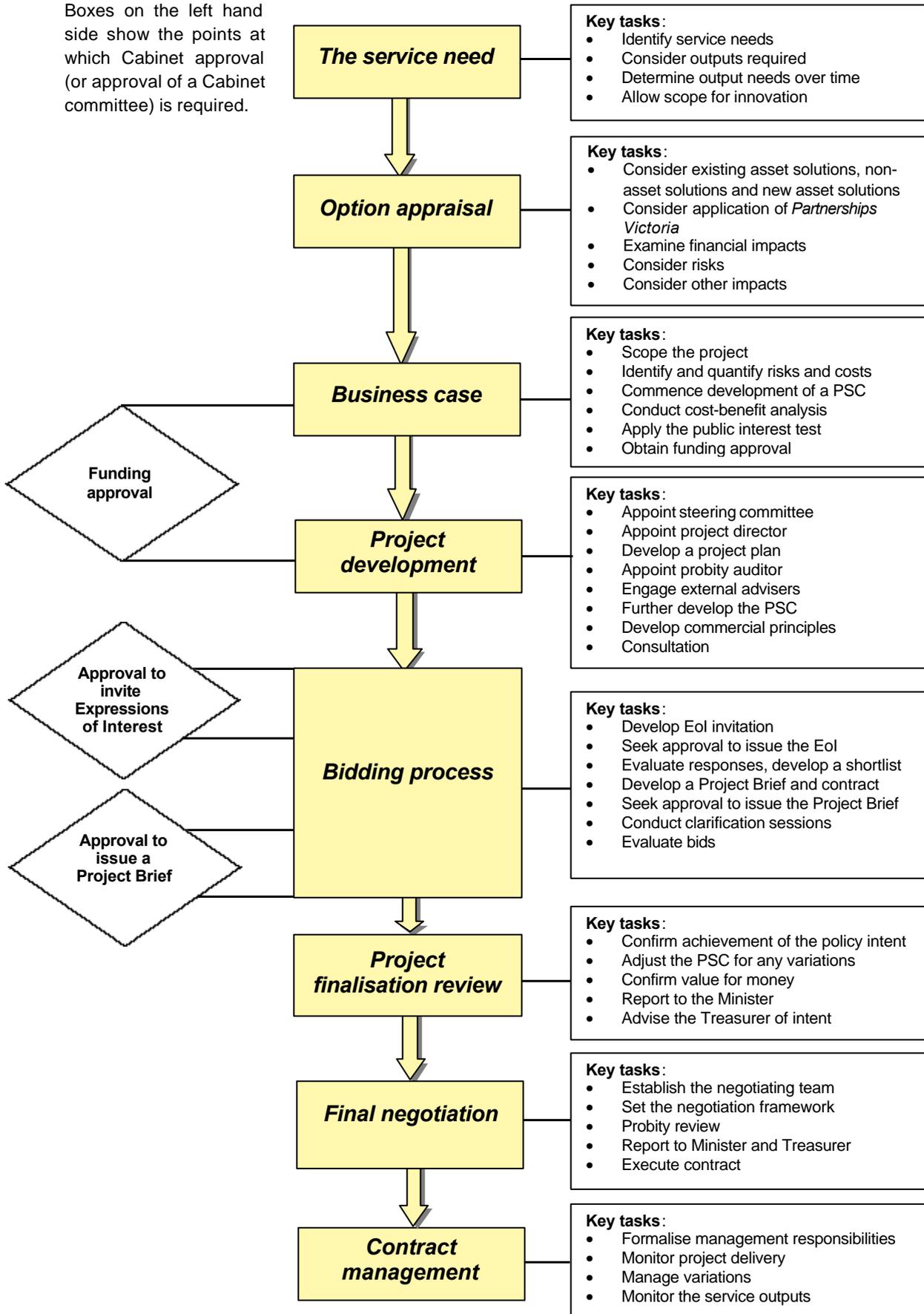
Part Two of the Guide follows the structure of the process chart in Figure 1, providing detailed comment on each of the key stages in developing a *Partnerships Victoria* project.

It is expected that most projects will progress through the process outlined, in order to achieve consistency both in government processes and in how projects are put to the market. However, there may be circumstances in which government decides that a project is to be developed through a different process. In such cases, it is important to ensure that all interested parties, particularly bidders, are made aware of the variation and that the varied process is clearly communicated and maintained.

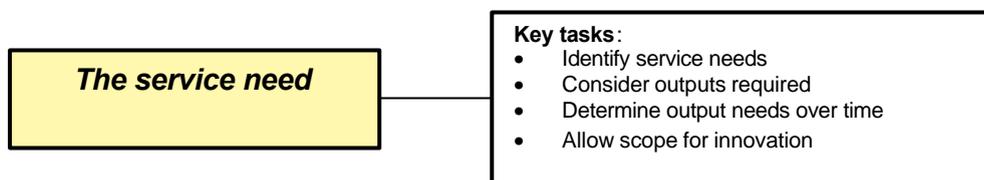
The text refers specifically to the process observed by budget sector entities and is generally applicable to government business enterprises. Variations relevant to government business enterprises are set out in Chapter 22, Government approvals. Where reference is made to 'Cabinet', the reference includes a Cabinet committee, or other body or person exercising authority delegated by Cabinet.

Figure 1: Major stages in developing a Partnerships Victoria project

Boxes on the left hand side show the points at which Cabinet approval (or approval of a Cabinet committee) is required.



5. The service need



The process of developing a potential *Partnerships Victoria* project flows from normal consideration of the needs of a department or agency in delivering the outputs required by government.

A department or agency is responsible for delivering particular outputs in pursuit of outcomes required by government to meet the service needs of the community. For example, government wants to achieve an outcome of improved access to health services in a region; this requires outputs including the specified availability of particular hospital accommodation and related ancillary services.

The proper identification of outputs necessary for achieving particular outcomes is of fundamental importance. Of similar importance is the proper specification of the objectives of the project that will deliver the outputs. Project objectives must be defined in precise terms, which nevertheless are sufficiently broad to accommodate any changes to definitions of service needs as they may be refined during development of the project.

There is value in involving private industry parties in identifying innovative and cost-effective means of providing services. For example, an annual business forum setting out a department's strategic objectives and infrastructure challenges may generate alternative ways of defining project objectives.

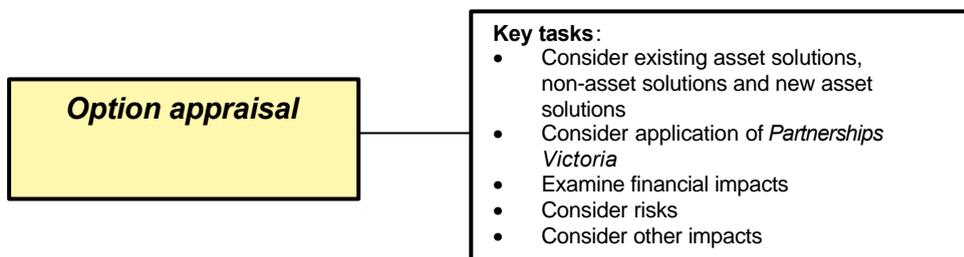
The identification of service needs is part of a normal planning process. However, at this stage the potential to deliver through a *Partnerships Victoria* structure and the benefits that may accrue should be considered. The *Partnerships Victoria* approach adds value by focusing on outputs only and not on a prescriptive solution or on defined inputs, and so allows a bidder to devise innovative solutions. The approach also prompts consideration of and planning for service needs well into the future, and provides a flexible means of expanding, contracting or enhancing service delivery over time.

The definition of service needs should be refined throughout the process, until the release of the Project Brief.

While most *Partnerships Victoria* projects are likely to relate to services to be paid for by government (for example, hospital beds and ancillary services, or court services), there may be some projects where government plays a key role but does not pay for the services. For example, should port outputs require the development of a new port facility, government may drive the process through recognition of the economic need for increased capacity, but such a project would be funded by users of the facility. The type of project in this respect has specific implications for the Public Sector Comparator (PSC) process and bid evaluation, which are further explained in Chapters 14 and 18.

If the department or agency and the Minister consider that meeting an identified service need has a sufficiently high priority, the next stage is identification and appraisal of options for achieving the necessary outputs.

6. Option appraisal



6.1 Option identification

The first step is to consider available options for meeting the service need. Assistance with this element of the planning process of a department or agency is provided by infrastructure investment policy and guidelines issued by the Department of Treasury and Finance.

Partnerships Victoria opens up a range of options for delivering requirements, and has some advantages over more traditional delivery methods. However, it does not suit all needs and other options should be properly considered before a preferred delivery mechanism is recommended. Delivery options could include:

- **Existing asset solutions.** Consider whether existing infrastructure held by the department or agency, or by another government body might be used. This may involve upgrade or refurbishment to bring the infrastructure to the required standard and may also bring a cost in the form of revenue forgone if the asset might otherwise be sold;
- **Non-asset solutions.** Service needs may be met without creating additional assets, through reconfiguring the means of service delivery, developing initiatives to manage demand more effectively, or increasing use of existing assets (for example, extending the hours of operation of a court facility); or
- **New asset-based solutions.** New infrastructure may be developed. For example, a new prison may be required to meet increased demand which cannot be managed effectively through other options.

Partnerships Victoria is typically more suited to asset-based projects, including major refurbishments. Where new or largely refurbished infrastructure is involved and the project value exceeds \$10 million, the *Partnerships Victoria* delivery mechanism should be fully considered, unless it is not in the public interest.

6.2 *Partnerships Victoria* as an option

However, before starting detailed analysis of a potential *Partnerships Victoria* delivery mechanism, the following criteria to assess the potential to deliver value for money should be considered:

- **Scale of the project.** As noted in the policy, a *Partnerships Victoria* project is generally unlikely to provide value for money where the net present cost of the cash flows is less than \$10 million. Below this threshold, the likely level of transaction and other costs for both the

public and the private parties may make it difficult to achieve value for money outputs. It may be possible to aggregate a number of related projects to achieve this threshold;

- **Outputs capable of clear specification.** It must be possible to define required outputs in clear and measurable terms around which a payment mechanism can be structured;
- **Opportunities for risk transfer.** Transfer of risk to a private party is a primary driver of value for money outputs. Where opportunities for risk transfer are limited, the potential to deliver value for money compared with a publicly owned asset approach is reduced. (See also Chapter 13, Risk and reward.); and
- **Market capability and appetite.** There must be a potentially viable commercial project and a level of market interest in the project. Assessment of each of these matters may require preliminary market sounding, including discussions with potential bidders, financiers and advisers. In planning such discussions, measures must be taken to ensure that no potential bidder is advantaged and that no improper use is made of the intellectual property of others. All market-sounding activities should be documented in records to be made available to a probity auditor if a project eventuates.

If the project meets at least the above criteria, it is worth moving forward with the *Partnerships Victoria* options analysis. If any of these criteria cannot be met, other options should be explored.

6.3 Reporting on evaluation of options

The next step is to develop a detailed options report covering the most viable delivery options available to meet the identified needs. The purpose of the report is to identify the advantages and disadvantages of each option and to examine critically the risks and benefits to government of each of them.

This analysis should be consistent with any infrastructure investment policy and guidelines applying at the time.

Where a *Partnerships Victoria* structure is proposed, the options report should specifically discuss why this option is expected to deliver value for money. The analysis should cover the range of delivery options available (as discussed in Chapter 2), from delivery of infrastructure services only, through to a fully integrated service proposition. An example of the latter would be a water treatment service at a facility to be designed, built, financed and operated by a private party.

The key issues to be addressed in relation to each *Partnerships Victoria* option include:

- **Project overview.** Project objectives and the outputs being sought are defined. There will be strong alignment between the service need, output specifications, project objectives and the strategic plan of the sponsoring department or agency;
- **Financial impacts.** The options analysis will include a preliminary view on the cash and accounting impacts of each option. For example, an analysis of a public sector delivery option would show the initial capital expenditure, life cycle maintenance and refurbishment costs (based on schematic design data) and the costs of operation. A *Partnerships Victoria* option analysis should include well informed discussion about the potential level of annual charge to government by the private party. This analysis of financial impacts will provide a preliminary basis for development of the Public Sector Comparator and assist in identifying the reference project for that;

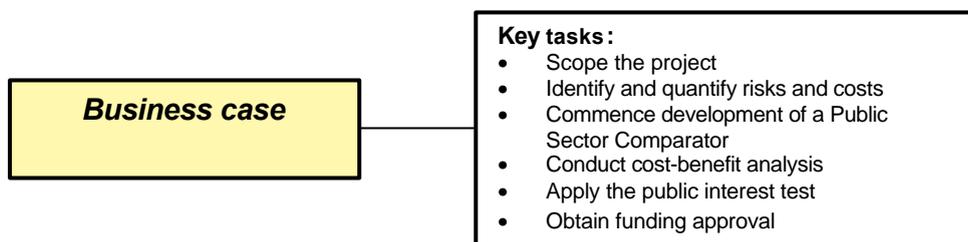
- **Risk analysis** The risks to government in relation to each of the options are discussed. The discussion should specifically identify the risks that may be passed efficiently to a private party. Guidance on the identification, assessment and allocation of risk is provided in the companion publication, *Risk Allocation and Contractual Issues*;
- **Public interest.** A preliminary view is given of the impact of each option on the elements of the public interest set out in the policy. A full public interest test is performed when more reliable data is assembled during construction of a business case;
- **Affordability.** The ability of the sponsoring department or agency to fund the project, or to gain additional funding through the State Budget development process, is considered. This requires at least some preliminary consideration of the annual cost to government of a *Partnerships Victoria* solution; and
- **Service delivery impacts.** The service delivery issues associated with each option are discussed, and include any transitional management issues. For example, if a greenfield development is being considered along with a refurbishment or upgrade project, management issues during the capital works would be canvassed.

The options analysis should be supported by a recommendation as to which project and delivery option(s) should be pursued.

The options analysis is undertaken by the department or agency which may seek technical assistance from the Department of Treasury and Finance in appraising the options and, in particular, identifying and assessing *Partnerships Victoria* options.

The options analysis is not intended to form a final view on the most appropriate delivery mechanism. If, at this stage, a *Partnerships Victoria* option appears to merit further consideration, a business case is developed for consideration by government.

7. Business case



Development of a business case is a key step in the decision-making process. It sets out an overview of the rationale supporting a *Partnerships Victoria* approach and a preliminary view as to how the project will be delivered. The development of the business case provides an opportunity for government to form a view on the particular *Partnerships Victoria* approach before significant resources are expended on developing the detailed elements of the project.

7.1 Function of the business case

The main functions of the business case are to:

- scope the project from an output and cost perspective;
- develop an overview of the structure of the proposed arrangements;
- examine the financial impacts of the project to government;
- analyse the costs and benefits associated with the project and demonstrate that it provides a net benefit;
- consider the likely level of market interest for the project; and
- demonstrate that the public interest is protected.

7.2 Content of the business case

The development and content of a business case are discussed below. The format of the business case should conform with the infrastructure investment policy and guidelines adopted by government at the time.

- **Project objective.** The objective of the project and its alignment with the department or agency's strategic plan should be re-affirmed. This consists of a review of the project scope in relation to portfolio policy, wider government policy and future strategic direction. The service need is most likely to have been identified through the strategic planning process, so confirmation of project objectives is often a relatively simple task. However, considerable time may have passed since the project was initiated, and social, economic and political conditions may have changed. Therefore it should be reviewed in the wider social and economic context. The objective and scope should be re-examined at each significant milestone throughout the project development process;
- **Outputs to be delivered.** A description of all elements of the service is to be provided. For example, in a court project, the scope of the services to be delivered may include

accommodation availability, administration, catering and some non-core services such as security or information technology;

- **Risk analysis.** The business case should identify all material risks associated with the project, specifying the external and project development risks for government, the project risks to be allocated to a private party, and those to be retained by government. It should also include any project transition risks, such as interest rate or planning risks that may be carried by government until transferred to the private party when contracts are operating. This is a key area of the business case, as optimal risk allocation is a fundamental driver of value for money. For risks that are proposed to be retained by government, the business case needs to explain why government is considered better able to manage or mitigate these risks. The business case should include at least a preliminary view on the cost to government of the risks which are to be built into the Public Sector Comparator. (Risk allocation issues are covered in detail in *Risk Allocation and Contractual Issues*, while the technical note, *Public Sector Comparator*, provides guidance on quantifying risk.);
- **Project structure.** The project structure may not have been developed in detail at this point. However, the business case should indicate the structures being considered (some options are discussed in broad terms in Chapter 2) and discussion of why a particular option is preferred. Structural options may include:
 - **Design, build, finance and operate (DBFO).** A private party is contracted to provide particular service outputs which require it to design, build, finance and operate infrastructure. The private party owns the asset which may or may not be subject to defined transfer provisions at the end of a contract term. (Issues associated with predefined transfer mechanisms are discussed in detail in Chapter 15, Commercial and financial issues.);
 - **Design, build and operate (DBO).** A private party is contracted to provide service outputs which will require it to design, build, operate and maintain appropriate infrastructure. In this case, government normally owns the infrastructure after satisfactory completion of commissioning, but the private party carries the risk that the facility is capable of meeting specified service needs during the contract period;
- **Indicative costs and preliminary PSC.** A preliminary net present cost financial analysis of the capital, maintenance, ancillary services and residual value must be conducted. This will fully cost the project to determine likely funding requirements and forms the basis of the PSC used later to provide a benchmark for assessing bids. The purpose and composition of the PSC are further explained in Chapters 8 and 14 and in the companion technical note, *Public Sector Comparator*. The principles and practices set out in the technical note should be observed in developing a preliminary PSC;
- **Government support required.** Details of the extent of necessary government support for the project are set out. This may vary from full financial and contractual support through to government taking a facilitation or regulatory role only. For example, in a port terminal project, government may run the bidding process, but the cash flows to support the project are likely to come from users of the new facility;
- **Cost-benefit analysis** Consistent with government policy, before making a decision in principle to commit to a major infrastructure project, a full cost-benefit analysis of the potential project is prepared. Full account is taken of the value of any public land or other assets being committed to the project. The analysis should demonstrate that the proposed approach offers value for money in comparison with other options, including a do-nothing option;
- **Market appetite.** This discussion should focus on the level of likely market interest in the project (recognising the need to deliver a genuine business opportunity to the private sector)

and offer reassurance about how competition in the bidding process will be secured. Any consultation that has occurred should be summarised;

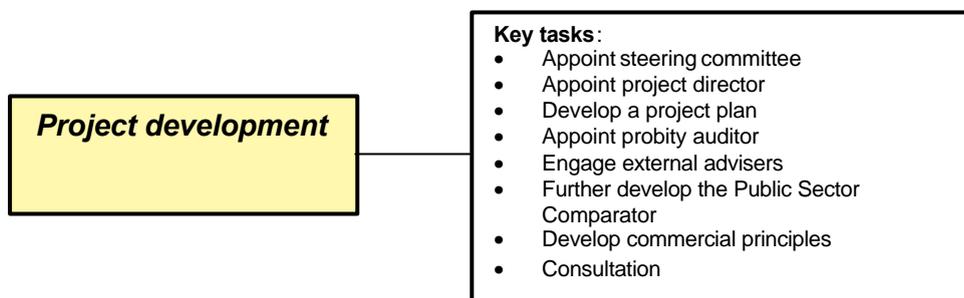
- **Proposed performance measurement and payment mechanisms** Outputs to be purchased and the key performance indicators which will measure performance are outlined. As far as possible, the discussion should also cover the relationship between payments from government and the related necessary level of performance. For example, in a road project where service charges are funded by government, the contract may be based in part on lane availability, with the contractor suffering an abatement of fees for every hour that a lane is not available;
- **Stakeholders.** Key stakeholders are identified. This includes other government departments, third parties and the public. The discussion should describe the nature of each relationship and the project's impact on each stakeholder. This is important for establishing where the service will begin and end. Information on the process and results of any consultation should be included. As the project has not been approved by government at this stage, there is limited scope for consultation and it may be necessary to explain the tentative stage of the proposal before any consultation. Processes of consultation are discussed in Chapter 23, Communications;
- **Employment and local content impacts.** The business case must include an analysis of any relevant employment-related issues and how the project conforms with government's local content policy;
- **Public interest.** The proposed project is tested against the public interest, which is discussed in Chapter 17. Including this test in the business case will ensure that public interest issues are properly documented for consideration in the project approval process. Any measures necessary to protect the public interest will be set out later in the Project Brief and contract, to ensure that bidders are fully aware of specific requirements in this area;
- **Site issues** Where a physical site is involved, the business case should indicate whether government intends to specify a preferred site, nominate a definite site or leave the question of location open to bidders (for example, in a hospital project where site selection could be driven by the need to service a particular locality);
- **Environmental and planning impacts.** An analysis is undertaken of the impacts on the environment, including any potential constraints, management of planning issues and any specific impacts on development in the area surrounding the preferred or available sites (where these are nominated). Consideration should be given to any benefits of the department or agency undertaking any statutory planning or environmental impact requirements; and
- **Project timetable and resourcing.** An indicative project timetable should show each of the key stages in the process and the estimated time for service delivery to commence. Discussion should also deal with the resources required to deliver the project, how they will be secured (internal or external) and the expected costs of the procurement team.

The business case is prepared by the department or agency and assistance is available, on request, from the Department of Treasury and Finance. Prior to formal Cabinet consideration, the project proposal as developed in the business case is considered by the Department of Treasury and Finance to review its conformity to government policies, its viability and its priority.

The business case is submitted to obtain government endorsement of the project and approval of funding. Government consideration of budget-sector proposals is generally undertaken within the annual Budget formation process, allowing *Partnerships Victoria* proposals to be assessed and prioritised alongside other infrastructure-based proposals. For complex or sensitive projects, it may be appropriate at this stage to seek only in-principle endorsement by government and

funding for further feasibility analysis with a view to a more advanced business case being presented.

8. Project development



Following endorsement by government and any necessary approval of funding, the project is further developed, requiring the assembly of resources and development of the project structure and commercial principles, in readiness for the seeking of formal market interest.

8.1 Assembling resources

While some resources will have been devoted to developing the business case, a full team is not assembled until the proposal has been endorsed by government. Once government approval is achieved, a procurement team is needed to develop and deliver the project.

Probity issues, such as identifying any conflicts of interest, should be dealt with when the team is first established. These issues are discussed in Chapter 21, Probity.

Figure 2 outlines a typical project management structure, including the project director and other specialist members of the procurement team.

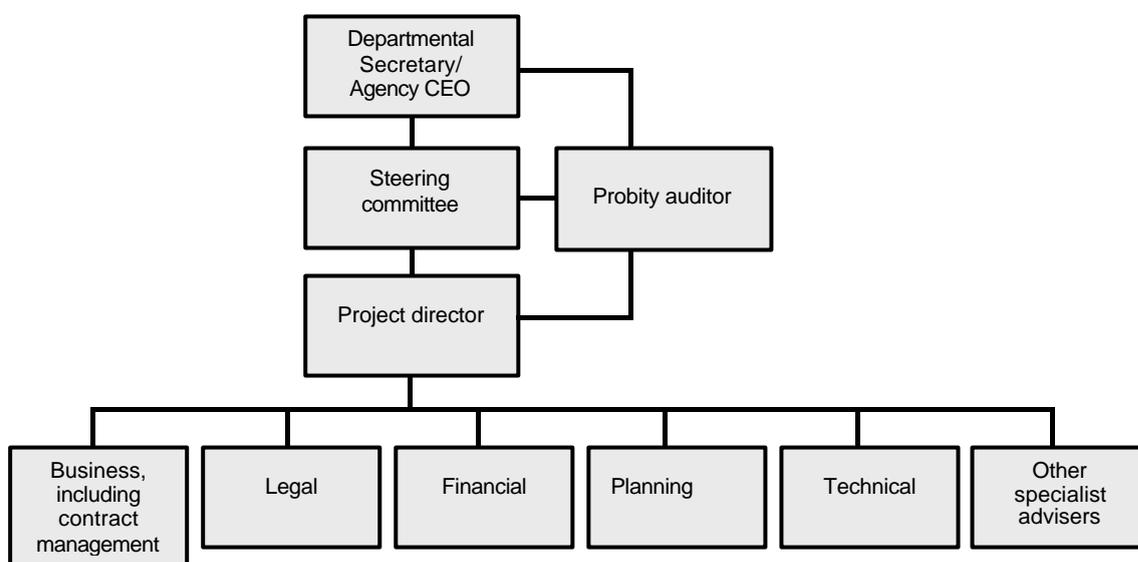
The specialist expertise required for the project includes financial, technical, operational and legal skills. The exact skills and experience required vary with the type of project.

Internal resources may fill some of these specialist roles, depending on the availability of the relevant skills and experience within the department or agency, or which may be seconded from others. However, external legal and other skills will be required. The project director remains responsible for delivering all critical elements of the project.

The specialist areas of expertise that may be required are:

- **Steering committee.** For all major projects, a steering committee is established to direct the development of the project and deal with key issues, including the content of key documentation and the selection of a preferred bidder. The composition of this steering committee is at the discretion of the department or agency. However, the Department of Treasury and Finance will be invited to make an experienced officer available to contribute knowledge of the handling of commercial, financial and process issues in *Partnerships Victoria* projects and to facilitate government approvals;

Figure 2: Procurement team organisation



- Project director.** The role of the project director is key to the success of the project. This is a full-time dedicated role, having overall responsibility for delivery of the project and management of all members of the procurement team, including external advisers and consultants. The skills of the individual should include project management, well developed commercial skills applicable to developing and negotiating contractual arrangements and knowledge of government processes;
- Business and service delivery.** It is critical that the project development phase is completed with considerable senior management input from the department or agency and from other government experts. For example, in a road project it is expected that the service specification elements would be devised by senior officers of VicRoads and the Department of Infrastructure. The project must be developed in accordance with current government objectives and knowledge of the economic environmental and social context. This is information that senior management is best equipped to access. Accordingly, arrangements may be needed to reallocate workload to ensure that an appropriate level of senior management is committed to participation in the steering committee and otherwise to support the project;
- Probity auditor.** Bid management demands the use of best practice principles, particularly in government where the use of public funds is under constant scrutiny. A probity auditor is therefore expected to be engaged to ensure that a transparent and robust process is followed. The probity auditor must be capable of bringing an objective viewpoint to the project, and is required to endorse a probity plan and monitor the bid process throughout. Probity matters are discussed in greater detail in Chapter 21;
- Legal.** *Partnerships Victoria* arrangements involve complex contractual arrangements between government and private providers. For this reason, it is important that the procurement team includes legal expertise. The advisers should have proven experience and a demonstrated track record in advising on public-private partnership projects. The legal advisers play a key role in developing the risk allocation matrix, preparing a contract for release with the Project Brief, structuring the project, analysing departures from the Project Brief and contract and documenting the final contractual requirements;

- **Financial.** The procurement team is likely to require support from a financial and commercial adviser, to assist with development of the Public Sector Comparator, the proposed commercial arrangements, risk allocation, bid evaluation and contract negotiations. The adviser will also provide continuing advice on likely market support for the project, consulting with industry parties as necessary. The person appointed should have a demonstrated track record in working with government on projects of a similar nature;
- **Planning.** A planning adviser may be required if a preferred site for development has been acquired or identified. An early appointment may help to identify planning policies and other controls that apply to the infrastructure proposal. Council planning permits, or approvals for planning scheme amendments from the relevant Minister, may take a number of months, and the associated risks may not be transferable to the private party in a way that demonstrates value for money. Similarly, there may be environmental impact matters to address before the project is put to the market. Accordingly, early focus on this aspect of the project is important. The planning adviser may also fill a key role in ensuring that aspects of public interest are protected;
- **Technical.** The procurement team will invariably require technical specialists, due to the need for infrastructure development of some kind. The skills required depend upon the nature of the project and are likely to include at least design, construction, quantity surveying and engineering skills. Where projects involve technology, technical consultants are required to assist with drafting appropriate performance specifications, evaluation of the technical components of bids, and the audit or inspections of systems during the testing and implementation phase. Their advice is also used in constructing a Public Sector Comparator; and
- **Other specialist advisers.** Depending on the nature of the project, specialist advice may be needed in areas such as:
 - **Industrial relations**, to ensure that any employee-related issues are properly handled; or
 - **Communications**, to assist with communications regarding the project generally, and specifically to assist with the consultation process which forms a part of all *Partnerships Victoria* projects. Further discussion of this issue is in Chapter 23, Communications.

Guidelines for the engagement of external advisers are available from accredited purchasing units in departments and from the Victorian Government Purchasing Board website, www.vgpb.vic.gov.au. In engaging advisers, considerations should include securing the services of appropriately qualified, experienced and reliable people, their timely availability, whether they are based locally or interstate, and negotiating a competitive fee. In engaging advisory firms, it is critical that key individuals who are to provide the services are identified, along with the degree of their time commitment.

The Department of Treasury and Finance has substantial experience in delivering similar-type projects, and advises the Treasurer on financial and commercial aspects of projects. The Department of Treasury and Finance is invited to assign an appropriately experienced officer to membership of the steering committee.

Staff being considered for contract management should also be included on the procurement team and involved in developing the project as early as possible. This will ensure that they have an excellent knowledge of the conceptual underpinning of the arrangement, as well as the contract terms, conditions and service levels. They will also be better able to take 'ownership' of the contract and successfully form the necessary relationships with their private party counterparts prior to implementation.

Throughout the process, input and support must also be obtained from key stakeholders, including community groups.

8.2 Project plan

One of the key initial tasks for the procurement team is to develop a detailed project plan and timetable. This plan needs to take into account all the key steps in the process including consultation, market testing and the government approval process. Each project requires separate consideration of the timetable appropriate to the transaction; however, a sample timetable is provided for guideline purposes in Appendix F.

The success of the project depends on the quality of the up-front work put into development and structuring of the project. Accordingly, it is important to recognise the value of this investment and not attempt to rush the process.

8.3 Public Sector Comparator

The Public Sector Comparator, or PSC, is developed to a preliminary stage in the business case phase. It is developed in detail in the project development phase, and should be finalised prior to release of the Project Brief.

The Public Sector Comparator plays a key role in the *Partnerships Victoria* process and sufficient resources should be allocated to its development to ensure a high-quality analysis of cash flows and risks. The Public Sector Comparator is the quantitative benchmark against which the value for money delivered by private bids is compared.

A poorly developed PSC may lead to a poor decision at the end of the bid evaluation process, such as a decision to deliver the project through traditional methods with insufficient funding allocated.

In most circumstances, an aggregate figure comprising the Raw PSC (i.e. base cost, unadjusted for risk) plus Competitive Neutrality adjustments, together with key assumptions, is disclosed to bidders, to enable them to clarify whether their concept of project scope is similar to that of government. (This is discussed further in Chapter 9, Bidding process). This means that the PSC will be subject to detailed analysis by the market and it must therefore have a robust development process.

Identifying project risks and ascribing a value to them is complex and departments and agencies generally require the assistance of the Department of Treasury and Finance and/or a financial adviser to develop this element of the PSC. Detailed guidance on this can be found in the technical note, *Public Sector Comparator*. Under no circumstances should the costs allocated to particular risks be disclosed to bidders.

8.4 Commercial principles

Resources including information now available to the project are used to flesh out the commercial principles identified in the endorsed business case. A more detailed specification of intended commercial arrangements will be needed to guide development of an invitation to submit Expressions of Interest and to assist potential bidders in assessing their capability to undertake the private sector role in the project. Application of resources at this stage also allows validation of the business case or modification of some aspects before commencement of the bidding process.

At this stage, the procurement team is able to specify more precisely the outputs needed and the role that a private party should play in delivering those outputs to maximise the value for money.

Detailed modelling will allow for retention or rejection of variations on project structure and key contractual provisions. Further analysis of risk allocation, payment mechanisms and the end of term arrangements will equip the procurement team to engage in constructive consultation and further research.

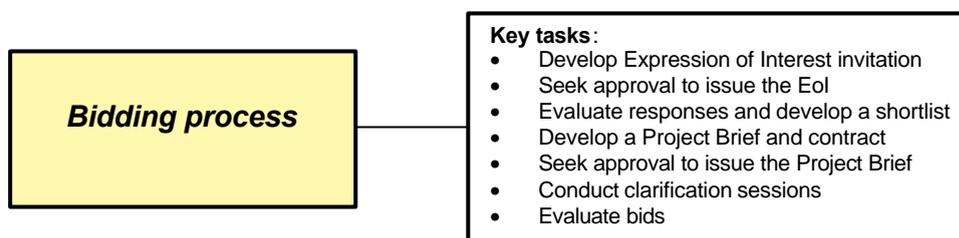
Most importantly, work at this stage will help verify various assumptions and conclusions presented in the business case. At this stage, a decision must be made as to whether to proceed with the project as defined by the business case that has been endorsed by Cabinet, or to seek endorsement of a variation.

Commercial principles are further discussed in Chapter 15, Commercial and financial issues.

8.5 Consultation

It is useful to include the private sector in consultation during the project development phase to flesh out commercial principles. Key advisers, associations, or specific companies may be contacted to address prime issues such as checking the availability of certain sets of skills in the industry or organising a forum of interested parties to provide public input on issues. Within such a consultation process, government can relate the project to other objectives including local industry development, job creation and skills and technology transfer. Appropriate consultation makes it more likely that the final package presented in the bid stage will be attractive to the private sector. A forum is also an effective way for government to receive feedback on issues with which it may have little expertise. Government also has an opportunity to express its key objectives for the project, to explain the public benefits and to market the project generally. (Consultation is discussed in greater detail in Chapter 23, Communications.)

9. Bidding process



The next stage involves developing the bid documents, formally engaging the market and identifying preferred bidders. Within this stage, Cabinet approvals are required before issuing an invitation to register Expressions of Interest and prior to issuing a Project Brief.

9.1 Key principles

The key principles to be observed throughout the bidding process include:

- **Timeline management.** The bidding stage must be carefully managed to ensure adherence as far as possible to agreed timelines. Failure to meet critical dates increases bid process risk and creates inefficiency for both government and bidders;
- **Invest time in development of the process and bid documents.** Sufficient time needs to be invested in developing a well thought through process and high-quality bid documents;
- **Project resourcing.** As discussed in Chapter 8, the project must be properly resourced. Government objectives require the process to run efficiently, protect the State's interests and deliver value for money outputs, and to ensure that the bidders are invited to enter an efficiently-run process, without unnecessary cost;
- **Clarity of communication of government requirements.** The requirements of government, any constraints and the hurdles to be met for the project to move forward must be well thought through, effectively communicated and held consistent throughout the process; and
- **Probity.** The process is to be managed in accordance with well developed probity principles and a probity plan. (This is discussed in more detail in Chapter 21.)

9.2 Expression of Interest

The key tasks in the Expression of Interest (Eol) phase are:

- Develop the Expression of Interest document
- Obtain approval to issue
- Call for Expressions of Interest
- Receive and evaluate responses
- Shortlist parties

While some consultation with market participants and marketing of the project may precede this stage (and is encouraged within proper probity constraints), the EoI is the first step in the formal bidding process. The purpose of the EoI document is to:

- formally advise the market of the project and the services that government seeks to have delivered;
- communicate to the market the proposed timeframes, evaluation criteria and hurdles to be met for the project to move forward;
- confirm the level of market interest in the project and provide an avenue through which potential bidders can comment on the proposed project structure; and
- gain responses from the market which allow government to form a view of those parties best capable of delivering against the project objectives over the term of the proposed contract.

The EoI document should provide sufficient information so that responses enable government confidently to select the bidders (usually three or four) most capable of providing the services on a sustained basis over the contract term.

The EoI is also a key document for bidders, providing a framework to allow them to make an informed decision as to whether they wish to invest resources in the bidding process. It is particularly important that the EoI states the results which need to be delivered before government will proceed with private investment.

(i) Develop the Expression of Interest document

The EoI typically draws upon much of the work in the business case phase. While it is not intended to set out the detailed service delivery specifications, it contains sufficient information to allow potential bidders to form a view on whether they have the necessary capabilities, the parties they may need to join with to develop a viable bid, and the likely project risks. The EoI should not require potential bidders to expend significant resources in preparing a response.

The contents of the EoI document should include:

- a brief description of the department or agency's background, function and purpose;
- an overview of the project, its objectives and how it fits into the strategic plan of the department/agency and government;
- the proposed risk allocation of the project;
- details of the services that the private sector is being invited to deliver (e.g. in a court project, the EoI may indicate that bidders are expected to deliver the accommodation availability, catering, security, and some administration, but not core judicial services);
- the proposed timeframes for the project, including dates for all key milestones;
- specific constraints that are relevant, including the level of funding available from government where a cap exists;
- the commercial principles that are to apply, including the proposed payment mechanism (to the extent it has been developed), and the manner in which site issues are to be dealt with;
- details of the basis for evaluation of the responses to the EoI. The areas of evaluation typically include:

- the track record of the bidder in delivering services of the nature required by government;
 - the balance of skills and expertise in a consortium and the capacity of members to work together;
 - the ability of the bidder to meet the financial requirements of the project; and
 - satisfactory probity review of all members of the consortium.
- general EoI terms and conditions including:
 - a statement that government retains the right not to proceed with the project (unlike the Project Brief, which represents a formal commitment to proceed, subject to requirements being met);
 - a statement that no costs associated with preparing a response to the EoI will be reimbursed by government under any circumstances;
 - details of the manner in which intellectual property contained in the EoI responses will be treated. Typically this provides assurance that information provided by a bidder will not be released. However, government retains the right to accommodate comments made in the EoI stage in revisions to the proposed Project Brief;
 - advice that government is not required, and does not intend, to release any details regarding the evaluation process after it has occurred; and
 - the format, date and place of receipt of EoI submissions; and
 - the specific information that bidders must provide in their response. This will typically include:
 - details of the bidder, including details of each participating organisation if the bidder is a consortium, the formal nature of their agreement to bid as a consortium and indicative terms of arrangements of any special purpose vehicle;
 - an overview of the bidder's proposed approach to the project, only to the extent necessary to ensure that any particularly creative solution is accommodated in the Project Brief and to demonstrate that the bidder understands government requirements. (The document should specify that this is to be only a brief, indicative, non-binding overview);
 - information on the bidder's expertise and capability and why it considers it can satisfy the requirements of the project;
 - details of the financial position of each member of the bidder consortium and proposed parent backing, if relevant;
 - information regarding conflict of interest and confidentiality requirements;
 - confirmation that neither the bidder nor any member of the consortium has any actual or potential conflicts of interest; and
 - evidence of the bidder's capacity to manage the indicative level of transferred risks.

An example of the structure of an EoI document is set out in Appendix A.

(ii) Obtain approval to invite Expressions of Interest

The invitation to lodge Expressions of Interest must be approved by Cabinet before it is released. The Cabinet paper seeking this approval should discuss:

- any changes to the proposed service outputs, commercial principles, cost to government or any other material aspect of the project differing from those in the business case, or in later approved variations;
- the proposed project structure and the respective roles of government and the private party;
- information on market interest and apparent capacity for the proposed *Partnerships Victoria* approach to provide a value for money solution; and
- the project timetable.

The responsible Minister normally would consult with the Treasurer on the invitation to lodge Expressions of Interest before seeking Cabinet approval.

(iii) Call for Expressions of Interest

The Eol typically is publicly advertised to provide an opportunity for all interested parties to respond, and it may also be brought to the attention of any parties who are particularly qualified for the task. The timeframes for responses vary depending on the scale and nature of the project, although a typical period for responses is six to eight weeks.

Where it is considered relevant, depending on the nature of the project, a briefing session may be held for parties interested in responding to the Eol. These can add value to the project by more clearly communicating the requirements of government, and by receiving comments from the market about the project, its proposed structure and possible alternative modes of delivery.

Broad advice on Expressions of Interest is set out in Victorian Government purchasing guidelines.

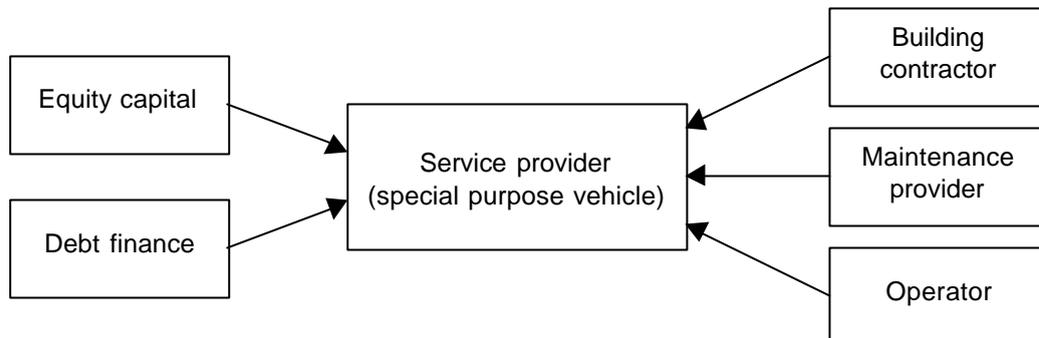
(iv) Receipt and evaluation of Eol responses

Responses to the Eol must be evaluated in accordance with the criteria set out in the document. The evaluation team for the Project Brief may not be fully assembled at this stage, hence it is necessary to check that the team evaluating the Eol includes members with skills relevant to the evaluation of each of the key criteria.

Submissions received should be kept secure and access granted only to the evaluation team. Eol submissions received after the specified closing date and time should not be accepted.

Partnerships Victoria transactions often lead to parties forming a consortium in order to meet all of the needs of government. Accordingly, responses are likely to reflect the involvement of a number of parties through a structure such as that in Figure 3.

Figure 3: Common consortium structure



Thus the Eol evaluation needs to focus not only on one party, but on all members of the bidding entity or consortium and on the relationships proposed to operate between them.

The evaluation should develop a view on the capability of each bidder to deliver consistently against the objectives of government and to work with government in a long-term relationship. In addition to the bidder's ability to deliver the services, the evaluation should consider each entity's financial position and its ability to meet the requirements of the contract over the full term.

An appropriately experienced specialist person or agency should undertake a probity review of bidders who may be capable of delivering the project. This should focus on the corporate standing of each entity within each consortium, and identify any issues associated with current or previous operations which could cause probity concerns in the future. For example, if a party had been investigated by the Australian Securities and Investments Commission at some time, this would need to be fully examined. The probity review should also cover any international connection of the consortium.

Further advice on Eol evaluation is included in Chapter 18, Bid evaluation.

The evaluation process and recommendations should be documented and signed off by the evaluation team.

Based on the evaluation, the procurement team arrives at a shortlist of parties to receive the Project Brief and an invitation into the formal bidding process.

The shortlist generally includes three to four parties to ensure that adequate competition is created and the risk of a party withdrawing is covered. A shortlist of more than four is likely to lead to some shortlisted bidders losing interest, as the chance of success — 20 per cent or less — may not warrant the significant investment of time and resources in preparing a bid.

9.3 Project Brief and contract

Development of the Project Brief and the contract should, by this stage, have been under way for some time, concurrently with other stages of the project.

The Project Brief is the formal bid document issued by government. Its issue to shortlisted parties signals a commitment to deliver the project, subject to defined hurdles being cleared. This makes the Project Brief the single most important document in the *Partnerships Victoria* process. It is therefore important that sufficient time and expertise is invested in its development. Shortlisted parties expend considerable time and money on the bidding process, and a poorly

structured definition of the service requirement, lack of clarity about the hurdles to be met, or subsequent amendments to the Project Brief are likely to draw criticism and adversely affect the timeframes.

Inclusion of a well-crafted contract with the Project Brief will increase the efficiency of the process, to the benefit of all parties. It is generally in the interest of government departments and agencies that *Partnerships Victoria* maintains the highest reputation in this regard.

An outline of the information to be included in the Project Brief is provided in Appendix B.

The key tasks in developing the Project Brief are as follows:

- Develop the output specification
- Develop the commercial principles
- Develop the bid template
- Develop the conditions of bid
- Prepare the contract
- Establish the evaluation criteria
- Obtain approval for issue

(i) Develop the output specification

The output specification in the Project Brief should clearly set out the outputs that the department or agency is seeking. The requirements should be expressed, as far as is possible, in output terms and not in prescriptive input terms. For example, a project for a water treatment facility might specify the requirement as a need to ensure delivery of drinking-quality water (e.g. to World Health Organisation quality standards), rather than as a need to build a plant with defined engineering characteristics. Prescribing a solution based on inputs may result in viable alternative solutions and potential risk transfer being discounted too early in the process. It also discourages innovation.

This section should be based on the data collated when the project was scoped and the outputs determined during the business case phase. The output specification should include the following:

- **Description of environment.** This may include the overall department or agency, interacting units, geographic locations, systems and infrastructure;
- **Background to the project.** This is a description of the social, political and economic circumstances that have led to the development of the project;
- **Description of government's role in the project.** A description of government's role including project arrangements and legislative/regulatory constraints;
- **Project purpose and objectives.** This is a statement of the project objectives as approved by government;
- **Description of the service delivery requirement.** This describes what the service is, the service standards required and, where relevant, the interaction with the departmental or agency service delivery role. It does not prescribe the procedure for satisfying all the requirements; rather it specifies what outputs the department or agency requires;
- **Performance measurement and proposed payment arrangements.** This section discusses how the performance of the private party will be monitored and measured. For example, in a water treatment project, it would be reasonable to measure both the volume of

water provided and the quality of the plant's output. This section may also refer to the commercial principles and discuss the relationships between performance and payments. The proposed payment arrangements must support the risk allocation being sought; and

- **Implementation requirements.** Where transitional arrangements are involved, (e.g. decommissioning an existing facility) the Project Brief needs to set out the relevant issues to be considered.

(ii) Develop the commercial principles

The commercial principles to apply to the project will be a focus for each of the shortlisted parties. While this may have been addressed at some level in the EoI document, to inform potential bidders of the general structure of the project, the actual arrangements proposed need to be stated in the Project Brief and the accompanying contract. The commercial principles section typically addresses the following issues:

- **Payment mechanisms** This sets out how the services delivered will be paid for. This is based on a principle that government only starts making payments when service delivery commences (i.e. post-commissioning) and that payments cease or reduce if key performance indicators are not met at the specified level. This section should set out the requirements for reporting the key performance indicators to apply under the contract. For example, payment may be determined in part by availability and usage of the accommodation services at the required standard, and in part by delivery of the ancillary services to the specified standards. This discussion should also refer to how variations to the service requirement would be dealt with. The payment mechanisms should allow for abatement of payment when key performance indicators are not met. Payment mechanisms also support the risk allocation set out in the contract. (This is dealt with in greater detail in Chapter 15, Commercial and financial issues.);
- **Risk allocation.** The Project Brief should include a detailed risk matrix which summarises those risks which the draft contract transfers to the private party and those that are retained by government. This should be supported by discussion of the basis for the proposed risk allocation. An example risk allocation matrix is attached as Appendix E;
- **Site issues** The manner of dealing with the site associated with an infrastructure project will vary with each project. However, subject to tax implications, government generally looks to hold freehold title to the land which it provides to the contractor on a leasehold basis. This structure provides greater certainty to government in case it needs to step in under the terms of the contract to ensure service continuity;
- **End of term arrangements.** This section covers the proposed arrangements at the end of the contract period in relation to assets owned by the private party. These arrangements could vary from a scenario where government and the private party are not subject to any predefined arrangements, to a defined transfer price for which government can purchase the assets. This matter gives rise to a range of commercial, accounting and taxation issues which are discussed further in Chapters 15 and 16;
- **Key contractual provisions.** The contract should be provided to shortlisted parties at the same time as the Project Brief. The Project Brief should discuss the significance to government of some of the key terms of the contract, including the default and cure regime and end of term arrangements. It should also cover circumstances in which government can force certain action to be taken — a replacement service provider or operator to be appointed, for example — or take control of the infrastructure, payment mechanisms and abatement regime. The Project Brief should also discuss the security that government is prepared to allow financiers to take in relation to the project. Any such discussion should include a caveat that the discussion serves to describe, but not override, the rights and obligations specified in the contract;

- **Conforming bids.** The Project Brief should also provide that bids conforming to all requirements of the Brief and contract constitute conforming bids and will be considered in accordance with *Partnerships Victoria*. It should also identify parameters within which variations to the provisions of the Brief and the contract will be accepted and the terms on which they will be accepted and evaluated. For example, the Brief may provide that a bid with variations to particular risks or physical aspects of the project (e.g. the site) will be considered as a conforming variant bid. An undertaking should be given to consider such variant bids if they are accompanied by a basic conforming bid. The conforming variant bid would be considered against the Public Sector Comparator, with appropriate risk adjustment. The Brief should specify that any bid that is not submitted in keeping with these provisions may be regarded as a non-conforming bid and may not be considered further; and
- **Capital structure.** Government does not typically specify the level of equity which it requires to be contributed to projects. This is generally driven by the requirements of the financiers. Infrastructure taxation risk is currently dependent on capital structuring, and this risk is borne by the private party. However, capital structure, and financial backing to any special purpose vehicle, will be taken into account when assessing bids and the potential risks.

(iii) Develop the bid template

The Project Brief will require a copy of the audited financial model that bidders have prepared for financiers. The financial model must identify all payments to be made by the department or agency and set out capital and operating costs, all key project cash flows, treatment of tax, and progressive profit and loss data. The financial model must be a working model with full operating instructions.

The Project Brief must also identify the key financial information to be set out in bids for ease of comparison and the format in which it is required. In certain circumstances, the procurement team may issue an electronic version of the bid template with the Project Brief and require bidders to lodge it with their responses. This may provide the procurement team with more extensive information in a consistent format and the ability to analyse bids on a scenario basis.

The bid template typically requires the following financial information to be provided:

- details of the service charges on an annual basis over the proposed term of the contract, broken down into separate components, such as a facilities component and various ancillary service components;
- where enhancements over and above the requirements of the Project Brief are proposed, the specific costs associated with those enhancements;
- the impact of volume requirements outside the range required by the contract;
- details of the key components of the bid, including building costs, professional fees and transaction costs;
- details of the proposed capital structure and sources of finance;
- details of any financial support or guarantee, where use of a special purpose vehicle is proposed; and
- any departures from the contract.

(iv) Develop the conditions of bid

The 'conditions of bid' section specifies the rules under which the bid process will be conducted. At a minimum, the following matters must be addressed:

- **Mode and time of lodgement.** Time, place, form of lodgement (i.e. fax, email or hard copies), number of copies to be lodged and date and time of lodgement;
- **Communication during the evaluation period.** A provision that the department or agency may approach bidders with queries about their submissions;
- **Format of bid submissions.** The submissions must follow prescribed formats;
- **Negotiations with bidders.** The department or agency may negotiate with one or more bidders without negotiating with the rest;
- **Reservation of rights.** The department or agency may select different private parties for different components of the project and it may also vary the project requirements;
- **Presentations.** Some or all bidders may be invited to make presentations to the evaluation team; and
- **Confidentiality of submissions.** The department or agency will keep the bid submissions confidential.

The rights of the department or agency should be exercised in accordance with the project probity plan, which is discussed in chapter 21 and a template of which is provided in Appendix C.

(v) Prepare the contract

This section refers to a contract; however, it is likely that there are a number of contractual documents associated with each project. The contract is a comprehensive document, which includes certain schedules to be completed based upon information from the successful bid.

The contract should be developed in parallel with the Project Brief and should be issued to all shortlisted parties at the same time. This ensures that bidders are aware of the specific contractual terms that government is seeking and have an opportunity to raise any issues of concern. It also limits subsequent negotiations to clearly identified and fully drafted departures.

The contract should not be developed until the key risk allocation issues and commercial principles have been settled. It should reflect these principles and be written using plain English.

The Project Brief normally includes a statement indicating that government may entertain variations from the contract, in nominated areas. Bidders should be advised that bids which do not conform with the contract or with permitted variations from it, may not be considered. (See the section on developing the commercial principles, earlier in this chapter.)

The structure of a *Partnerships Victoria* contract differs from a standard procurement contract because it is not part of a traditional product supplier/buyer relationship. Under *Partnerships Victoria* contracts, the parties allocate risks between them and work together in an ongoing relationship to meet project objectives. It is also more complex than a standard procurement contract. For example, the Victorian County Court contractual framework includes a Crown lease, a court services agreement, a multi-party agreement for the financiers, a security arrangement in favour of the State (granting the State step-in rights), contracts relating to the

sale of a commercial site and building, bond issuance contracts and sub-contracts for operation, maintenance and finance.

(vi) Establish the evaluation criteria

Broad advice on evaluation criteria is set out in Victorian Government purchasing guidelines.

The Project Brief should set out the basis upon which bids are evaluated, including the categories to be assessed and the evaluation process to be followed. Evaluation criteria should be developed by reference to requirements in the Project Brief. While the criteria will vary for each project, the key categories for assessment typically include:

- **Service delivery.** The approach to delivery of the outputs sought by government;
- **Facilities solution.** The physical solutions being proposed. For example, in a hospital project, this would focus on the design of the facility, construction principles to be employed, flexibility for later alterations, risks associated with the proposed approach and the value for money represented; and
- **Commercial issues** The commercial proposition, the risk allocation which the bidder is prepared to accept, departures from the contract as issued and the proposed financing structure.

The evaluation criteria should include a list of all requirements which are considered mandatory. This will help determine which bids are conforming and which are not.

In a *Partnerships Victoria* project, the Public Sector Comparator forms a key part of the commercial issues evaluation criteria. In the absence of other factors, if no conforming bid offers value for money in comparison with it, the project will not move forward as a *Partnerships Victoria* project. The Public Sector Comparator should be finalised prior to issuing the Project Brief and only altered following receipt of bids for the purpose of comparison with variant bids, or to rectify an error.

The approach to evaluation can vary. In some circumstances, it may be appropriate to allocate weighting to each category and sub-category. This adds structure to the evaluation process and assists in demonstrating objectivity, but it will not provide the best result in all circumstances.

(vii) Obtain approval for issue

Cabinet must approve the Project Brief before it is released to shortlisted parties. The Cabinet paper seeking this approval should discuss:

- any changes to the previously approved service requirements, commercial principles, including risk allocation, or any other material aspect of the project;
- the proposed contract structure and the respective roles of government and the private party;
- the hurdles required to be cleared by bids before the project will proceed (including a financial position offering value for money in comparison with the Public Sector Comparator);
- the proposed level of disclosure of the Public Sector Comparator to bidders and confirmation that budget funding has been secured at Public Sector Comparator level;
- details of the shortlisted parties to whom the Project Brief is to be issued; and

- the proposed timeframe for execution of contracts and commencement of service delivery.

The responsible Minister will normally consult with the Treasurer regarding the completed Project Brief before seeking Cabinet approval to issue it to the shortlisted parties.

The process for handling a Project Brief should be no less rigorous than is provided in Victorian Government purchasing guidelines. Details of the number of copies released and the specific parties to whom they were released should be recorded and referenced to a unique identifier for each copy.

9.4 Bid evaluation

Bids should be evaluated in line with the evaluation criteria detailed in the Project Brief.² The key tasks to be completed in this stage of the process include:

(i) Assess compliance

Prior to a detailed evaluation, the evaluation team assesses the compliance of each bid. This eliminates bidders who have not satisfied the requirements specified in the Project Brief. It is carried out on the basis of compliance with mandatory criteria and compliance with the bid process. Issues concerning non-conforming bids are discussed in detail in Chapter 18. Evidence of non-compliance in all bids may indicate something fundamentally wrong with the process and should be a major warning sign for attention by the procurement team.

(ii) Bid clarification

A number of questions raised by a bid are likely to need clarification. These questions or issues should be documented and reviewed by the project director prior to being forwarded to the bidder. The bidder should provide responses to the issues should be provided by the bidder to the project director in writing. A formal meeting to discuss the responses may be appropriate and this meeting should be confined to the issues already raised. Care needs to be taken not to convey information on any other proposal.

Depending on the nature of the project, it is normally appropriate to invite bidders to make presentations on the key parts of their proposals. If this opportunity is made available, it must be extended to all bidders. Presentations should observe procedures set out in the project probity plan and may take place only after all bids have been lodged. The probity auditor should receive advance notice of presentations.

(iii) Review by evaluation teams

The evaluation team(s) review each of the complying bids in detail. Each of the key evaluation criteria is usually expressed as a rating against a predetermined scale, subject to mandatory requirements and eligibility criteria. The initial review is likely to identify a number of issues needing be clarified with bidders before a detailed evaluation can be concluded.

The financial evaluation should have early regard to the relationship between bids and the Public Sector Comparator. If it is clear from an initial review that bids (or a number of them) do not offer value for money in comparison with the Public Sector Comparator, this should be highlighted and may warrant early advice to the responsible Minister.

² A detailed discussion of bid evaluation is contained in Chapter 18.

Clarification sessions with bidders should observe procedures set out in the project probity plan, including providing advance notice to the probity auditor.

(iv) Evaluation reports

The evaluation process must be the subject of a detailed report. It is common for separate teams to be established to assess the service delivery, facilities solution and commercial elements. Where there are separate evaluation teams, separate reports would normally be compiled by all teams. These should then be combined into an overall evaluation report to the steering committee, ranking the bids from most attractive to least attractive. Evaluation reports are discussed in greater detail in Chapter 18.

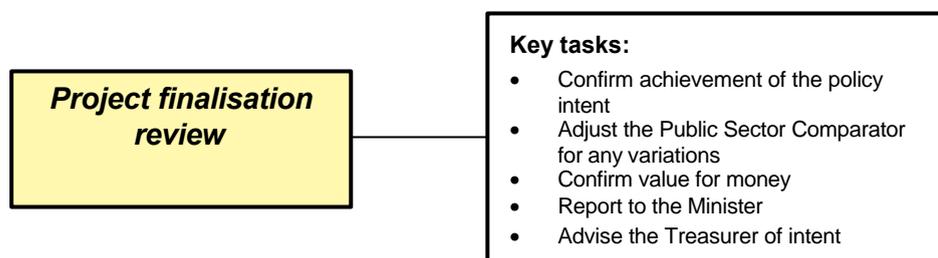
(v) Preferred bidders

The initial ranking of bids, documented in the evaluation report, may be reviewed after formal discussions between the evaluation team and the preferred bidder(s). Any outstanding details may be clarified during these formal discussions which normally take place in the presence of the probity auditor. This process should lead directly to the recommendation of the preferred bidder(s) by the evaluation team.

Based on the evaluation report, the project director, in consultation with the steering committee and the departmental Secretary or agency chief executive, should nominate one or more preferred bidders. Typically, a preferred bidder and a reserve bidder would be nominated. This keeps two bids active and places pressure on the preferred party to complete a contract within the defined timeframe. The responsible Minister should be briefed on the evaluation report and endorse the preferred bidder recommendations.

When the preferred bidder(s) have been identified — but before any public announcement or notification of the bidders — the development of the project is reviewed and the Minister formally advises the Treasurer of the next steps. This takes place during the next stage.

10. Project finalisation review



This stage focuses on a review of the project as compared to the objectives of government, and the Minister's decision on whether to accept a recommendation to finalise the contract. This process must be completed before the bidders are told the results of the evaluation. The project finalisation review follows the completion of bid evaluation and clarification. It is therefore based on a bid which the steering committee deems capable of being finalised, although detailed contract negotiations have not yet started.

10.1 Service outputs

The approved business case reflects a number of outputs that government agreed should be delivered and, in most cases, funded, either wholly or partly by government. The project finalisation review should align the bid evaluation results to those outputs and confirm that they are provided. Where any output is not included, the area of shortfall and how this is to be dealt with should be documented.

10.2 Value compared with the Public Sector Comparator

The project director, subject to guidance by the steering committee, must provide a report for the Minister on the financial result of the bidding process and whether or not the preferred bid offers value for money in comparison with the Public Sector Comparator — following any necessary calculation to take account of non-quantifiable factors and risks, costs and benefits that are not included in the bids or the PSC.

If the preferred bid meets this criterion, there is not normally any requirement to report further detail. However, there may be circumstances where the preferred bid meets the Public Sector Comparator but all the others exceed it significantly. This may raise concerns that the preferred bid is not capable of being delivered and government could be faced with a non-performing party or a claim for increased payments. This issue must be addressed during bid evaluation, documented in the project finalisation review and communicated to the Minister.

If the Public Sector Comparator has not been met, and the project director nevertheless recommends that a contract be entered into, the rationale for this decision must be documented. This may include a need to amend the PSC to take account of errors or omissions identified since it was established, reasons to adjust it to reflect additional services which government has confirmed it wishes to purchase, or a consideration of broader net benefits to government of using the *Partnerships Victoria* procurement approach for that project.

The technical note, *Public Sector Comparator*, provides further detail on circumstances in which the PSC should be adjusted.

10.3 Reporting to the Minister

The project finalisation review must be documented in a report for the Minister from the steering committee and the departmental Secretary or agency chief executive. The report should include a timetable for negotiations, contractual close and commencement of service delivery, and confirm that sufficient resources are available to meet this timetable. Where there are specific risks to completing the project within the timetable, or any other project risks that government should be aware of, these need to be documented.

10.4 Risk allocation

The project finalisation review is conducted before commencing final negotiation with a preferred bidder. Should it become apparent that variations to the contract (beyond those permitted in variant bids) would deliver value for money, this should be discussed in the review. For example, the risks associated with transitional management, originally to be passed in their entirety to the private provider, may be capable of better management by sharing individual transition risks between government and a bidder.

Probity advice must be received before entering any negotiation with an expectation that a variation to the contract beyond that permitted by the Project Brief may be discussed. The normal expectation is that other bids would be re-appraised before any such discussion with a preferred bidder occurred.

If no bid meets the requirements of the Project Brief, the project director should formally report on this situation. The report should include:

- the evaluation results and any net benefits that may be gained by government if it accepts any of the bids;
- options available to government, with appropriate analysis; and
- a recommended course of action (e.g. to proceed with a modified project, not to proceed with the project, or to deliver the outputs through a traditional public sector channel).

10.5 Advise the Treasurer of intent

After considering the project director's report, the Minister formally advises the Treasurer that:

- a conforming bid which provides value for money in comparison with the Public Sector Comparator has been received and that the Minister will enter into a contract with the preferred bidder, subject to final negotiations; or
- an amended approval to enter into negotiations with the preferred bidder(s) will be sought; or
- a contract should not be entered into, as no bid offering value for money in comparison with the Public Sector Comparator was received.

The Minister will seek approval of Cabinet (or a Cabinet committee) for any budgetary departures from the approved business case.

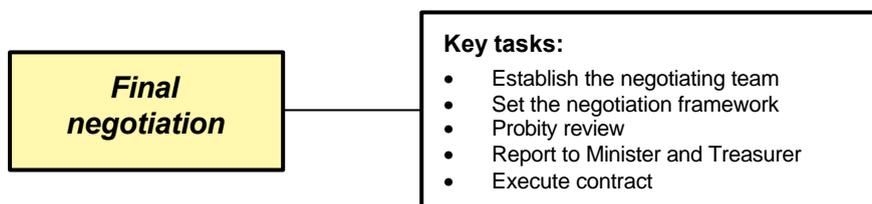
10.6 Advise bidders

Once the Minister and the Treasurer are satisfied that the project should move forward into detailed negotiations with the preferred bidder, all bidders must be advised in writing. It is good practice for the project director and a member of the steering committee to offer to meet with losing bidders to discuss their bids after contract execution.

Formal advice that any bidder is now a preferred bidder is made on condition that any residual issues are resolved within a specified time and that negotiations take place in an agreed timeframe.

The preferred bidder cannot negotiate on issues that were not already indicated in its bid as being departures from the contract, and the process is not an opportunity for the preferred bidder to further change the risk allocation. Government should reserve the right to open discussions with other bidders, particularly if the preferred bidder seeks to depart from its written proposal or fails to move forward in line with the timetable and process set by the procurement team. A performance bond from the preferred bidder may also be needed to discourage such behaviour.

11. Final negotiation



Once the Minister has approved the preferred bidder recommendation and the Treasurer is notified, plans should be made to move the contract negotiations forward as quickly as possible.

The procurement team may conduct negotiations with more than one bidder at the same time, keeping the preferred bidders in a competitive situation to ensure that the best arrangement is reached. (Chapter 21 discusses probity issues in detail.)

11.1 Establish the negotiating team

Negotiations are typically led by the project director, and as a general rule, smaller teams lead to more efficient negotiations. Note that the negotiating phase can significantly extend the project timeframe and budget if not well managed.

The legal advisers play a key role in supporting the negotiations. However, it may be appropriate to hold initial negotiations to identify key issues without legal advisers present. This enables negotiations around commercial issues rather than detailed points of law or contractual terminology. Once the commercial issues are agreed, reflecting this in the contract should be relatively straightforward.

11.2 Set the negotiation framework

The negotiating team and the preferred bidder need to work together to set terms for negotiations, as a framework for contract negotiations. The terms usually feature the following:

- **Definition of negotiating issues** The issues to be negotiated should be clearly set out, together with government's position on each of them. Without this structure, the negotiations could move into areas which are otherwise settled. The issues that the preferred bidder seeks to negotiate should be confined to those departures from the contract provided with the Project Brief, as reflected in the bid;
- **Control of drafting.** The drafting process should be managed by the legal advisers to the procurement team, including management of version control and assessing which parties need to review changes. The project director must ensure that amended documents are only circulated to parties with a direct interest, to avoid unnecessary discussions and delays. For example, there may be matters of interest to the preferred bidder's builder or its legal advisers which do not need detailed discussions or comments from the operator;
- **Recording of agreed matters.** All matters agreed upon during the negotiations should be recorded in meeting notes and agreed at the end of each meeting. This reduces the risk of issues being revisited and provides clear instructions for contract drafting purposes;

- **Do not revisit agreed issues or introduce new ones.** The project director should not admit any new issues into negotiations (i.e. issues not raised previously in bids) and the parties should agree not to re-open issues already agreed;
- **Agree timetable for the negotiation.** This is important to prevent delaying tactics and ensure the overall timetable for project implementation is upheld;
- **Agree dispute resolution process.** An agreed process for overcoming any impasse in negotiations typically involves seeking resolution from senior management. The parties need to ensure that the appropriate senior managers are accessible throughout the negotiations; and
- **Authority to commit.** Both negotiation teams need to appoint members with the authority to make decisions on behalf of their organisations (although movements away from the principles agreed by Cabinet require approval before the Minister, steering committee or project director is able to agree on these issues).

If the preferred bidder's circumstances change (though still conforming) and require the project to proceed on a materially different basis from the initial bid, the procurement team must undertake a full re-evaluation. This re-evaluation should then reconsider other bidders' proposals. Should the result of this re-evaluation indicate a worse position for government than the reserve bid, then the Minister and Treasurer must be advised, and a determination made at Ministerial level whether to proceed with the preferred bidder or another bidder.

The probity auditor should be advised where government requirements or project parameters materially change. Generally, new requirements must be developed, shortlisted proponents given equal opportunity to revise their bids and all revised bids must be assessed on receipt against these new requirements and criteria.

11.3 Probity review

The probity auditor will be aware of all aspects of the bidding and negotiation process. Before a contract is executed or a recommendation to do so is provided to the Minister, the departmental Secretary/agency chief executive and the project steering committee should require the probity auditor to report to them on the bidding process. This report should confirm that the probity plan has been followed and that all processes have been conducted fairly and equitably. (It would be expected that any issue of concern to the probity auditor would have been communicated to the steering committee and/or the Secretary at the time the issue arose.) A template for a probity auditor's final report is provided in Appendix C.

11.4 Report to the Minister and Treasurer

At the end of the negotiations, a report is prepared by the project director for the Minister and endorsed by the steering committee and the departmental Secretary/agency chief executive. This sets out any material changes to the previously agreed risk allocation and confirms that the proposed contract conforms to the business case, that adequate funding is available and that the department or agency recommends that a contract is entered into. If issues arise during final negotiations which change the risk allocation or do not meet all the business case requirements, they must be brought to the attention of the Minister, with a recommendation that the Minister seek Cabinet endorsement of the variations.

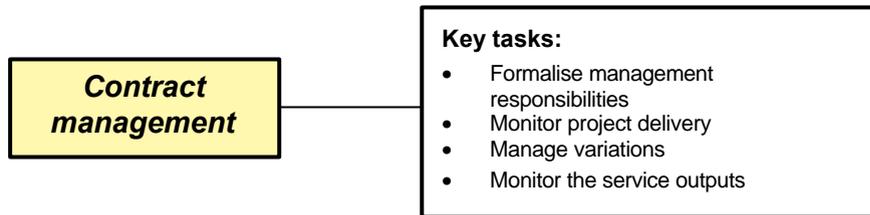
The Minister informs the Treasurer that the final contract conforms to the business case and of the intention to enter into a contract. Any last minute budgetary issues arising need to be resolved by Cabinet.

11.5 Execute the contract

Once the approval process is complete, the contract is awarded to the successful bidder. A suitable date and venue is nominated for contract execution and the Minister signs the contracts only after all other parties have signed.

A public announcement of the contract and the successful bidder must be made, in ways that conform with government policy and procedures.

12. Contract management



The construction and implementation phases, when the private party is making its major investment, are critical to the success of the project. While the bidding process is very important, it is the conversion of the contract into delivery of the outputs that is essential to meeting the overall project objectives. Contract management requires particular skills which need to be procured before the contract is executed. Timing may be critical, as both the public and government are looking forward to delivery of the service outputs from new infrastructure.

12.1 Contract management team

A smooth handover from the procurement team to the contract management team is best achieved during the construction phase. This is simpler if the contract management team is involved early in the project and, where appropriate, is part of the procurement team.

The contract management team should ideally include people involved throughout the business case, bidding and evaluation processes, as they are well versed on the contract and have had the opportunity to establish working relationships with the key private party personnel.

The contract management structure should be formally established, ideally before contracts are executed. Many issues need to be dealt with, including planning responsibilities that government may have retained, the building process, with the inevitable design and other variations that arise, and the finalisation of financing arrangements and drawdown. The contract management team needs resources to deal with all of these issues promptly. Retaining some of the procurement team advisers can ensure continuity and that specialist areas, such as legal, are properly resourced.

All final documentation should be understood by the contract management team and be readily accessible on file.

12.2 Monitor project delivery

Matters to plan for during the construction and commissioning phases include:

- setting and achieving contracted milestones for development, site acquisition, construction and commissioning;
- ensuring that financial arrangements are in place, ready to be drawn down as required;
- ensuring adequate insurance coverage is obtained;
- setting up appropriate quality management systems and providing for their audit;

- ensuring that government does not inadvertently take back risks allocated to the private party (for example, by approving design changes);
- ensuring that any later variations to contracts do not change the risk profile;
- ensuring that no changes in practice or procedure occur which amount to de facto waivers or contract variations without prior consideration and approval;
- ensuring that any critical issues and claims by any parties are investigated and dealt with in a timely manner;
- establishing a contingency plan in case of service failure during the project implementation phase (if relevant) — this includes identifying any possible need to step in or take other action to ensure the project is delivered in line with the contract terms and conditions;
- setting up a reporting and monitoring system — this should be provided for in the contract;
- developing a communications plan for public relations and for communicating key changes to internal stakeholders; and
- planning for obtaining completion and compliance certificates.

12.3 Manage variations

Variations to the contract — such as adjustments in output requirements which require changes in design fit-out quality — could lead to a price variation and possibly make the project no longer competitive.

The contract should clearly set out risks for which government is accountable and the means for passing related costs back to government. These principles should be followed, with a general rule that only government-initiated changes may lead to a change in price. For example, if a material proposed to be used in building a hospital is no longer available, the cost of a more expensive replacement should be borne by the contractor, even though it may be of a quality higher than specified in the contract.

12.4 Monitor service delivery

The contract must detail the level of reporting (against key performance indicators) that is required before and after commissioning.

The payment mechanisms and contract provisions give effect to the agreed risk allocation, and measuring performance against the key performance specifications must be done before payment is made. There may be situations when the contractor cannot fully meet its obligations and the government agrees not to take action or fully reduce payments. However, the key principles should be careful monitoring of performance and quality and maintaining the incentives and penalties specified in the contract.

The contract manager should apply common sense before taking action. For example, if a contractor regularly reports service delivery outputs above the levels required and so claims incentive payments, the benefit of such additional outputs should be reviewed.

12.5 Maintaining the integrity of the contract

The risk allocation approved by government is reflected in the contract and it is critical to ensure that the contractor is held to its obligations. Failure to do so breaks the approval given by government and diminishes the value of the often hard-fought achievements of the negotiating team. Variations to the contract or waivers of rights may be required in some cases, but these should be reviewed by the Secretary and approved by the Minister before any agreement with the contractor.

Part Three: Project delivery issues

Part Three deals with a number of technical and process issues associated with delivering a project. They are dealt with in some depth to highlight the range and complexity of matters to be managed. Expert advisers will be required in a number of these areas. Discussion of risk and the Public Sector Comparator is less detailed, as these matters are more fully addressed in the companion documents, *Risk Allocation and Contractual Issues* and *Public Sector Comparator*.

13. Risk and reward

13.1 The risk management cycle

The cycle of risk management involves risk identification, assessment, allocation, mitigation, monitoring and review.

In an optimal situation, each risk is placed in the hands of the party best able to manage it. However, consistent with the spirit of *Partnerships Victoria* and for the good of the project, each party should continue to monitor and contribute to managing the total package of risks (within limits, so as not to 'take back' risks). It is important for the parties to know who bears the liability for particular kinds of risk events. However, it is even more critical that risks are managed so as to minimise the occurrence of risk events and their consequences, if they do occur.

In each project, there is the risk that the project eventualities will differ from those on which the forecast costs and benefits were based. All risks must be identified, assessed and optimally allocated to the party best able to manage the risk and its potential results. There may be 'upside benefits' if the project circumstances are more favourable than expected and these are discussed later in this chapter.

13.2 Risk allocation inherent in the structure of a *Partnerships Victoria* arrangement

By contracting with a private party to provide services to prescribed standards, and basing payment on service delivery (so that government may reduce payment if the service is sub-standard), government implicitly transfers all the associated risks — including the risks of construction, ownership and operation of the underlying asset — to the private party. However, this transfer does not necessarily result in optimal risk allocation. It is necessary to identify and assess the various risks in a project, and to decide which of them government should expressly take back to achieve an optimal risk allocation. The take-back of these risks by government, and the terms for doing this, are contained in the detail of the contract provided with the Project Brief.

13.3 Optimal risk allocation

Optimal risk allocation aims to minimise both the chances of project risks materialising and the consequences if they do, by allocating risks to the party best able to control them at the least cost. It has two elements:

- (i) optimal risk management and impetus to achieve it; and
- (ii) value for money.

The first of these is, as noted, based on the view that the party best able to control a risk should be allocated that risk. This is because it is in the best position to manage it and it will have an incentive to do so if it incurs the costs of failing to manage it adequately. For example, construction risk is allocated to the private party, because it is in the best position to manage the construction process. The private party may in turn reallocate those risks to a construction sub-contractor, but retains the primary liability for those risks under the contract with government.

The second element — value for money — is related to the first, in that the party best able to manage a risk should also be able to manage it at least cost. In the construction example, the

private party is best able to minimise the cost to the project of a materialised construction risk, perhaps by adjusting other elements of the building.

Although many risks are in the control of each party, to some degree certain risks are completely outside the control of both parties. If neither party is in a position of full control, the risk allocation should reflect how the private party 'prices' the risk and whether it is reasonable for government to pay that price, taking into account the likelihood of the risk eventuating, the cost to government if it retained that risk and government's ability to mitigate any consequences if the risk materialises. Alternatively, the parties may share the risk through various risk sharing mechanisms that are documented in the contract.

13.4 Risk premiums

In risk allocation, nothing is free. In bidding for a project, the private party estimates the project risks and their potential impacts on project revenues, and sets premiums to insulate itself from the financial results of materialised risks. The premiums are averaged across the project or all projects in which the private party is involved and are weighted according to the probability and consequences of various kinds of events. In effect, the risk premium is a form of self-insurance. The financial consequences of some risks, either in full or in part, may be transferred to others, including insurance brokers.

Private parties accept most risks, provided the premium paid is sufficiently high. The question for government is whether the risk premium is value for money or whether it is more cost-effective for government to take on the risk itself, taking into account the likelihood of a particular risk occurring and how government may mitigate the impacts.

13.5 Use of the Public Sector Comparator

Among other functions, the Public Sector Comparator establishes a means for pricing risk. It can help to determine whether risks should be assumed by government, rather than government paying a higher price for their transfer.

When putting a project to market, government has decided its preferred risk allocation and includes a contract with the Project Brief (see Chapter 9, Bidding process). However, for nominated risks essentially outside the control of either party, government may ask bidders to submit proposals in respect of more than one risk package, so it can ascertain if it can achieve a better value for money risk transfer than the one represented in its base package. Care should be taken with this strategy to ensure that bidders are not left with an impression that the government is unclear about what it wants. The strategy can also increase costs to bidders, so any bidding framework with multiple scenarios should limit the variables as far as possible.

13.6 Risk allocation and project financing

The amount of risk the private party is prepared to assume is partly controlled by the project's debt financiers. Their overriding concern is the security of the project cash flows used to service debt, and they are therefore wary of any risk assumption which threatens cash flows. They seek to insulate revenue that services debt from the impacts of risk liabilities. This may limit the amount of risk the private party is able to assume, or may create a need for the risk to be shared by way of specialised mechanisms such as material adverse effect regimes. The usual effect of a material adverse effect regime is to allocate risk (at least in part) to government, or in any event, away from the private party, through a process of mitigation which involves aspects of risk sharing. By using these methods, debt financiers may achieve their aim of limiting exposure to an acceptable level.

13.7 Identifying risks

A number of techniques are available for identifying a project's potential risks. The most effective of these, possibly, is brainstorming among personnel with experience in that type of project and with department or agency officers familiar with the project or the service requirements. Checklists of risks applying to similar projects, and common risk categories and how they have affected projects, can provide useful material. Risk matrices are a way of identifying risks and may be a useful tool for listing all relevant project risks and their proposed allocation (including ways to possibly prevent or mitigate them). An example of a risk matrix is provided in Appendix E, which shows the value of separating risks into appropriate categories.

Many risks cannot be fully categorised in one or other category. A risk arising through competition from a competing network has characteristics of a network risk and/or a demand risk. A site risk from potentially contaminated land may also be a 'change in law' risk if environmental law or policy changes. There are no hard and fast categories, and no hard and fast boundaries between them. However, most literature recognises a core of risks which, although differently described, cover the same basic substance. Their categorisation is simply to facilitate identification, allocation and discussion.

Project risks are discussed in detail in the companion document, *Risk Allocation and Contractual Issues*, in which the following categories are used:

- site risk (including environmental and approvals risk);
- design, construction and commissioning risk;
- financial risk (including sponsor risk);
- operating risk;
- market risk;
- interface and network risk;
- industrial relations risk;
- sovereign risk (including change in law);
- force majeure risk; and
- asset ownership risk.

In addition, there are risks for the private party associated with the bid process (bid risk) and risks for government of changes in ownership of the project after the contract expires or is terminated (contract migration risk).

Before attempting to identify, assess or allocate project risks, government practitioners should consult the *Risk Allocation and Contractual Issues* guide to gain an understanding of the policy considerations underlying government's preferred allocation of particular risks, and the role of payment structures in aligning private sector drivers with government risk allocation objectives. Advice and assistance should also be sought from the Department of Treasury and Finance, as well as input from financial and legal advisers engaged by government for the project.

13.8 Perception of risks associated with role of government

When contracting with government, a private party may have an enlarged view of what would otherwise be usual commercial risks, due to its perception of government's 'special' powers and immunities in the legislature and in the market-place, and its fear that government will alter the rules to suit itself and disadvantage the private party. An example is a private party's fear that government will terminate the contract and assume the asset with nil consideration. A further risk that often enters the minds of bidders is that of the regulatory regime or, in some cases, the absence of an independent regulatory regime. Where a *Partnerships Victoria* project is being introduced into an area dominated by public providers, the establishment of an independent regulatory regime can give significant reassurance. This is a key issue for bidders and may need to be specifically addressed in the Project Brief.

These issues are discussed at some length in both Parts One and Two of the *Risk Allocation and Contractual Issues* guide. Public practitioners should be aware of these issues of concern when negotiating a *Partnerships Victoria* project. It may mean allaying private party concerns by, for example, having government assume liability for the financial consequences of discriminatory government measures to redress the perceived imbalance between the private and public parties.

13.9 Risks over which no party has control

There are some risks over which neither party has control, such as force majeure risk. The risk of a change in Commonwealth law is another example of a risk that neither the State government nor the private party can control.

Unless these risks are specifically taken back by government, they fall to the private party. From one perspective, this may be appropriate because many such changes, such as changes to corporate tax rates, affect the business environment generally. However, rather than incurring a high premium for transferring all of these risks (and thereby diminishing the value for money outcome), government may wish to adopt a shared approach to specific risks by using a mechanism such as the material adverse effect regime described above, where the parties act together to mitigate and share the consequences of the materialised risk. An example might be the cost of future capacity upgrades, which are dependent on future usage patterns which neither party can predict at the time of contract.

Where payment for the service is not made by government but by the end-consumer, the private party may be able to mitigate a materialised risk by passing through any additional costs to the end-users. Any passing through is, however, subject to appropriate contractual restrictions and may be subject to a regulatory regime which ensures that the level of pass-through is justified. Where government itself is the purchaser and cannot raise fees or tariffs to cover the additional cost, the risk must either be shared or taken back by government.

A force majeure event is generally defined to include 'acts of God' such as earthquakes and hurricanes and political events such as wars and revolution. While force majeure risk may be relatively low on the probability scale, it can be significant in negotiations because of its potentially catastrophic consequences for the project. The mitigation options available to the parties are almost exclusively concerned with minimising the consequences of materialised events.

Traditionally, in allocating force majeure risk, great emphasis has been placed on whether a particular risk is insurable or not. In reality, while the availability of insurance proceeds to assist in reinstating the underlying asset or repaying project debt is an important consideration for the

parties (particularly the private party) and may be a way of capping liability for particular force majeure risks, the key issue under a *Partnerships Victoria* arrangement is ensuring the continuity of service where a force majeure event occurs. Where the private party can insure against the force majeure risk at a reasonable cost, optimal risk allocation generally dictates that the force majeure risk is to be allocated to the private party. Taking into account the nature and impacts of force majeure risk (including force majeure risks which are non-insurable, or insurable but at an unreasonable cost), optimal risk allocation principles may dictate that better value for money can be achieved if the private party and government share the force majeure risk. It is both reasonable and critically important that the parties cooperate fully to mitigate the consequences of a materialised force majeure event, for the project and for each party.

A more detailed discussion of the range of issues raised by force majeure risk, including mechanisms for sharing it, can be found in Chapter 16 of *Risk Allocation and Contractual Issues*.

13.10 Symmetrical risk allocation

Changes during the life of the project may not always have negative impacts. They may result in 'upside benefits' which increase the profitability of the project in unforeseen ways. When determining a risk allocation, thought should be given to 'symmetrical' provisions which create entitlements to upside benefits as well as any liability arising from a materialised risk. This gives the parties an incentive to achieve efficiencies to benefit the project and allow benefits to neutralise losses from risk events.

It may not always prove possible to achieve a symmetrical risk allocation at reasonable cost, as bidders are likely to increase the cost of their bids in the absence of the opportunity of upside benefits. The opportunity to share in upside benefits may not be worth the opportunity cost reflected in the additional bid price. This is a matter for case by case identification. However, it is government's preferred position that where it agrees to share in the downside of a risk, it should be entitled to share in any upsides if that risk materialises.

13.11 Unintentional assumption of risk

Certain behaviours may negate value for money by resulting in government unintentionally taking back risks it thought it had successfully transferred to the private party. Becoming directly involved in a construction issue, or dictating design when construction and/or design risk have been allocated to the private party, may be cases in point. Interference which potentially compromises the risk allocation is to be distinguished from the monitoring, consultation and cooperation that may be associated with effective mutual risk management.

At a practical level, getting the right balance between a passive approach (where design and construction shortcomings are not picked up by government) and an interventionist approach (where government may unintentionally take back risks) requires significant project management skills.

13.12 Monitoring and review

Effective risk management requires the appointment of a contract management team, which should in turn develop a risk management plan describing the contract management measures to be implemented to manage and mitigate risks. (See also Chapter 12, Contract management, in this Guide, and Chapter 7 of *Risk Allocation and Contractual Issues*.)

The risk management plan should be regularly updated to:

- record risks averted (where they can be identified);
- record risks that have materialised;
- provide a risk management strategy for the future; and
- identify any potential new risks and measures to be taken in relation to them.

In this way, the risk profile of the project is continually reviewed, as are the resources that may be needed to contain the risks and keep the project and the partnership on a successful footing.

14. Value for money

The value for money of *Partnerships Victoria* bids is calculated through comparison with the Public Sector Comparator (PSC). The composition of the PSC and key principles applying to its development are set out below. This chapter also identifies other elements of value for money that should be considered following comparison with the PSC.

14.1 Public Sector Comparator

The Public Sector Comparator is the hypothetical risk-adjusted cost of public delivery of the output specification of a *Partnerships Victoria* project. The PSC:

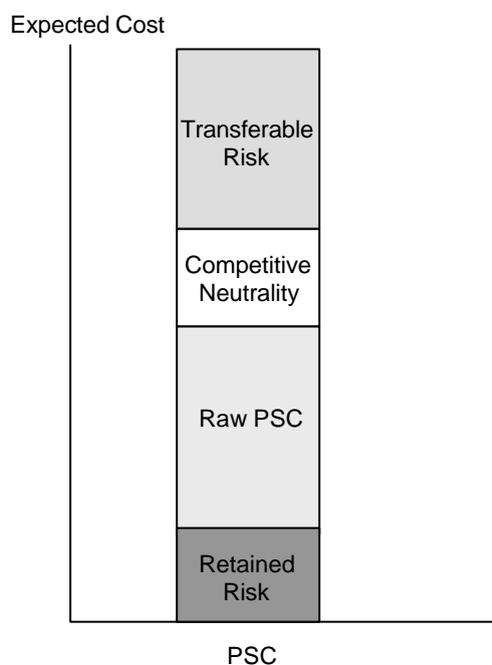
- is expressed in terms of the net present cost to government, calculated by a discounted cash flow analysis;
- is based on the most efficient public sector method of providing that defined output; and
- takes full account of the costs and risks which would be encountered by that style of procurement.

The primary purpose of the PSC is to provide a benchmark against which to form a judgement on the value for money of *Partnerships Victoria* bids. This exercise is distinct from the process of establishing the level of service charges actually affordable to government. The exercise of constructing a PSC allows a more accurate costing of the project and assists in refining and clarifying the required services and the performance levels sought.

The PSC is intended to reflect the costs and budgeting imposts of the project as if government were to deliver it. In order to properly reflect the costs of delivery, the PSC must include the value of risks retained by government (i.e. all risks in a public sector delivery model). This means that the risk identification and valuation exercise must be undertaken, whether the project is to be delivered via the *Partnerships Victoria* model or through traditional channels.

The PSC is categorised into four core components.

Figure 4: Components of a Public Sector Comparator



- **Raw PSC.** Provides a base cost of delivering the services specified in the Project Brief under the public procurement method where the underlying asset or services are owned by the public sector;
- **Competitive neutrality.** Removes any net advantages or disadvantages that accrue to a government business by virtue of its public ownership;
- **Transferable risk.** The value of those risks (from government's perspective) that are likely to be transferred to the private parties under a *Partnerships Victoria* approach; and
- **Retained Risk.** The value of those risks that are likely to be retained by government under a *Partnerships Victoria* approach.

The key principles in developing the Public Sector Comparator include:

- The PSC must reflect the full cost of government delivery of the services to the performance standards specified in the Project Brief. That is, it must reflect the full risk-adjusted cash flows over the full term of the proposed contract required by the department/agency to deliver the services;
- The cash flows reflected in the PSC should be developed on the basis of government's most efficient means of delivery under a publicly owned facility. For example, in a hospital accommodation project, the building cost element should be developed on the basis of directly relevant experience of the department or agency in building a similar facility or on the basis of an opinion of development costs obtained from an external consultant with expertise in the development of assets of this nature. This may involve providing the facility under a turnkey, or design and construct contract;

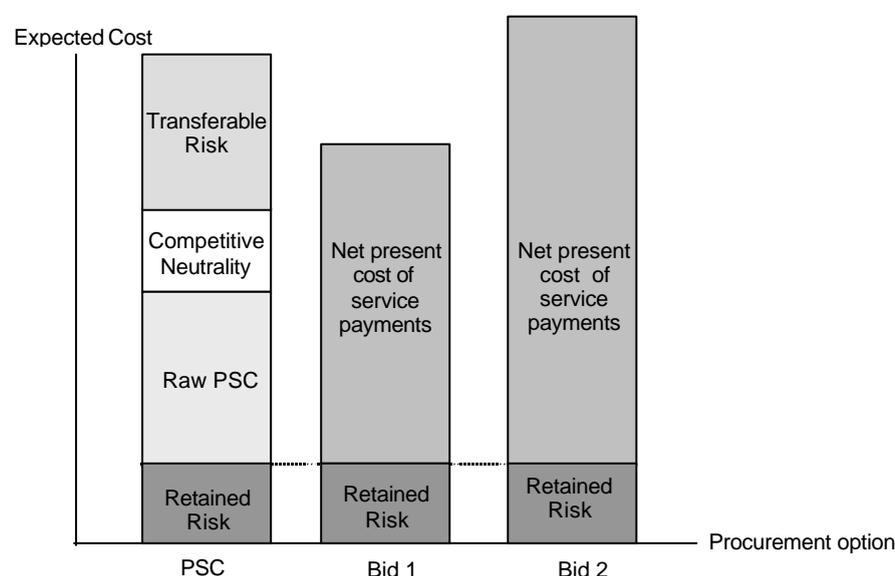
- Project risks are included in the cash flows in the relevant year(s), rather than as a premium added to the discount rate;
- The cash flows reflected in the PSC must be discounted, using the appropriate current nominal discount rate, to arrive at a net present cost. This forms the basis for the financial aspects of bid evaluation. The appropriate discount rate is published on the *Partnerships Victoria* page of the Department of Treasury and Finance website at www.vic.gov.au/treasury/partnerships/html; and
- The risks to be retained by government must be clearly identified and the full costs associated with these risks estimated and added to the cash flows in the relevant years. This is a particularly specialised aspect of the process of developing the PSC and may require input from specialist resources.

For a fuller discussion of the PSC and detailed advice on its construction, see the *Public Sector Comparator* technical note.

14.2 Value for money assessment

Figure 5 illustrates the value for money comparisons between a Public Sector Comparator and *Partnerships Victoria* bids. The diagram shows the risk adjustments in aggregate to demonstrate how they determine whether the best value bid offers value for money compared with the PSC. The risk adjustments are derived from the detailed cash flow costings which are required to build up the overall net present cost estimates.

Figure 5: Value for money



In the absence of non-quantifiable factors and subject to consideration of relevant costs, risks, or benefits that are not included in the PSC or in bids, Bid 1 would be selected, as it represents the best value for money to government.

Non-quantifiable factors, on occasions, can have significant influence. For example, a bid may offer substantial, but non-quantifiable, community benefits on a project which would not be undertaken at the time by government because of, say, higher priority demands for available

capital funding, or because of inherent market risk that would not be accepted by government, but is acceptable to a private party with greater capability to mitigate or manage it.

Relevant costs and risks that are not included in either the PSC or in bids would include the additional government funded transaction costs (including the cost of a procurement team), contract management costs and any additional unmitigated sponsor risk associated with a *Partnerships Victoria* project compared with traditional procurement. Consideration of these should take account of whether the costs and risks apply only to the particular project, or whether they should more appropriately be accounted for against projects generally. Principles applying to accounting for these costs and risks and for the long-term benefits of *Partnerships Victoria* are discussed below.

Because *Partnerships Victoria* has a long-term perspective, not all the benefits of a particular *Partnerships Victoria* project will be evident when the project is considered in isolation. Changes effected by the policy over time will allow a much greater application of management attention and resources to the core business of service delivery. Resources, including time, currently absorbed by asset-related matters may then be applied to enhanced service delivery. Similarly, the range of benefits obtained through *Partnerships Victoria* will grow as the market matures and the benefits of cooperative relationships are better appreciated by all parties. Additionally, costs incurred in the development and management of early *Partnerships Victoria* projects will result in lower transaction costs in future, as skills and techniques develop and a growing body of precedent becomes available.

Therefore, and as a general rule, costs, risks and benefits should be taken into account at the level at which they would occur in a mature market where *Partnerships Victoria* has become a standard method of project procurement. This approach provides an even means of comparison, by not giving advantage to traditional methods of project procurement whose development costs are sunk in the past.

15. Commercial and financial issues

This section discusses some key commercial and financial matters relevant to *Partnership Victoria* arrangements, including taxation and payment mechanisms.

Taxation, an area of Commonwealth law that is expected to undergo substantial reform in 2001-02 is of significant interest to the private parties involved in, or considering *Partnerships Victoria* arrangements. Government officers seeking to establish the potential viability of a project, or involved with the evaluation of bids, require a sound working knowledge of relevant taxation provisions. The treatment here will be supplemented by further advice to be published on the *Partnerships Victoria* website following implementation of the Commonwealth taxation reforms.

Payment mechanisms are the structures at the heart of a contract, by which incentives are provided and the financial obligations of government are regulated. The discussion here highlights a number of common issues and some principles that are appropriate to *Partnerships Victoria* arrangements.

This section also discusses the desirability of having a commitment to a bid by debt financiers; the costs of preparing bids; some key considerations relating to the ownership of an infrastructure asset at the end of the contract term; and handling of the risk of interest rate movements between submitting a bid and finalising the commitment of debt finance.

15.1 Taxation

Comments in this section reflect the current taxation environment (as at March 2001). This area is undergoing detailed review as a result of reforms proposed in the 1999 *Review of Business Taxation: A Tax System Redesigned* (the Ralph Review).³ Given this environment of change, practitioners should ensure that they obtain up-to-date taxation advice in relation to each specific project.

Taxation issues can significantly impact on the financial outcome of a bid by a private sector entity. While the general principle should be that all tax risks are transferred to the private party, government needs to consider the impact that the tax assumptions underlying a bid may have on the pricing outcome and risk profile.

The principal issues in relation to income tax are:

- the existing anti-avoidance provisions;
- the proposed depreciation rules; and
- the proposed leasing rules.

(i) Existing anti-avoidance provisions

Section 51AD and Division 16D of the Commonwealth *Income Tax Assessment Act 1936* deny tax deductions to private sector owners where tax-exempt entities, such as government, use or are deemed to control the asset.

³ Review of Business Taxation: A Tax System Redesigned, Report by a committee of review, (John Ralph AO, Chairman), Canberra, 1999.

Where Section 51AD applies to a project, the private owner/lessor is denied tax deductions for ownership costs associated with the project, including interest, depreciation and repairs and maintenance.

Where Division 16D applies, the transaction is treated as a loan with only the deemed interest component of any revenue derived from the project being assessable to the private owner/lessor, and deductions connected with ownership, such as amortisation of buildings, depreciation and other capital allowances, being denied. Importantly, where Division 16D applies, interest deductions are still permitted to the private owner.

(ii) Proposed depreciation rules

An exposure draft of new tax depreciation provisions was released in December 2000. These are designed to take effect from 1 July 2001 and contain important amendments to existing law as to who is eligible to claim tax depreciation.

Under current law, the legal owner of an asset is generally entitled to claim depreciation. Under the proposed amendments, the 'holder' of an asset will be entitled to claim depreciation. The holder may be deemed to be a different party from the owner, for example, where the State is a lessee of an asset and it is reasonable to expect the State will, at some time, become the legal owner.

If these provisions are legislated, they may operate to deny deductions to private sector owners and transfer tax deductions to the State. As the State is unable to use these deductions, the overall financial efficiency of the project will be adversely affected. However, if the contract is structured appropriately, transferring the major risks associated with the asset, the private sector may be able to claim the deductions.

(iii) Proposed leasing rules

Most *Partnerships Victoria* projects come under the broad definition of leasing proposals. The Ralph Review proposed that the existing taxation of leasing transactions should be substantially amended. Under the proposals, which have not as yet been legislated or released in Bill form, leases will be treated as either 'routine' or 'non-routine' lease transactions.

Routine leases are generally those with a short life and/or those concerning assets with a low value. They will adopt the treatment currently given to leases, where the lessor generally takes depreciation benefits.

Non-routine leases (those with a relatively longer life or concerning assets with a high value), will be treated as a sale and loan, effectively transferring the benefit of tax depreciation deductions from the lessor to the lessee (i.e. in a *Partnerships Victoria* project categorised as a non-routine lease, from the private party to the government).

Again, if these rules are legislated, they are likely to deny deductions to private sector owners, with the consequence that the cost of providing those projects affected by the changes will increase.

The Ralph Review also referred to a category called 'service arrangements', although it did not define them. However, a number of *Partnerships Victoria* projects may fall within this category rather than into the routine or non-routine lease categories.

If the new leasing rules are legislated, then Section 51AD will be abolished, and Division 16D replaced or substantially reworked.

It is important that government should not provide indemnities to bidders and contractors in relation to risks associated with tax. It is the responsibility of bidders to effectively structure their bids to maximise the value, including the impact of tax.

Taxation rulings are not typically required at the bid stage. However, where government has concerns relating to tax risks and their impact on the project, it may be prudent to require the preferred bidder to obtain a non-binding ruling before contractual execution. The Project Brief should indicate that government may require this.

Taxation issues associated with *Partnerships Victoria* projects can be complex and the advice of external advisers and/or the Department of Treasury and Finance is often essential.

15.2 Payment mechanisms

The payment mechanism is at the heart of the contract, as it puts into financial effect the allocation of risk and responsibility between government and the private party. It determines the payments that government makes to the private party and establishes the incentives for the private party to deliver the service required in a manner that gives value for money.

(i) Features of the payment mechanism

In general terms, the key features of a payment mechanism must be:

- no payments should be made until the service which has been contracted is available. For example, in a water treatment project, no payments would begin until the plant has been commissioned and water of the required quality is being received;
- there should be a single charge for the service, not separate charges for elements relating to availability or performance. The service charge generally comprises a number of separately identifiable elements; however, government prefers these to be converted to a single project obligation;
- the single charge should only be paid to the extent that the service is available (e.g. proportionate to the number of available places or units); and
- the payment mechanism should seek to make deduction for sub-standard performance so that the private party's financial motivators coincide with those of government. Deductions should reflect the severity of failure, so that no service should lead to no payment, but a minor failure to a lower level of deduction.

The basis of *Partnerships Victoria* — the receipt of specified outputs and services — requires that payment should not be made up of sub-elements related to delivery of any inputs (e.g. completion of stages of construction, cost of materials or labour).

The payment mechanism must relate to the services being provided, and never contain a fixed element which the private party always receives irrespective of performance (e.g. which covers the private party's debt service obligations). The debt providers should have confidence (taking into account, where relevant, advice from their technical adviser) in the ability of the private party (i.e. their borrower) to perform or remedy defective performance and in their ability to change the operator, if necessary.

The payment may in some cases be determined by usage or volume. Complete transfer of usage risk is only appropriate where the private party can reasonably forecast or influence future usage. This may be the case where the private party is satisfied with predictions of the level of demand for the service or where there is significant third-party revenue which the private party's

performance can affect. In many projects, demand or scope for generating significant third-party revenue is not possible to predict and so it is unlikely to offer value for money to transfer significant volume risk. A part of usage risk can, however, be transferred in most contracts, particularly that relating to third-party usage. Transfer of a degree of usage risk does bring advantages of simplicity as customers 'vote with their feet' on the availability and quality of the service.

(ii) Direct financial or indirect non-financial incentives

If the private party fails to perform, both direct and indirect incentives through the payment mechanism can be applied to remedy the failure.

The direct approach involves immediate reductions in payment. In a project with an availability-based payment mechanism, the whole of the payment is subject to reductions for unavailability. For example, when considering a road project, the reduction could be an hourly rate that differs according to the private party's ability to manage the risk, illustrated in Table 2.

Table 2: Sample scale of payment reductions for unavailability (availability-based contract)

Event	Payment reduction (Hourly \$ amount, for illustrative purposes)
Road closure due to unplanned maintenance	1,000
Road closure due to emergency maintenance	800
Road closure due to unplanned work by utilities	600
Road closure due to emergency work by utilities	400
Lane blocked due to broken down vehicles	200

This structure motivates the private party to proactively manage those risks which it is able to manage, on a basis which delivers best value to government. For example, heavy penalties for unplanned maintenance during heavy traffic periods provides additional motivation to undertake maintenance work at night when traffic demands are light.

The indirect approach depends on the level of performance of the available service. It involves the award of performance points for substandard performance, the number of points varying according to the severity and regularity (if a ratchet mechanism is used) of the breach. When the private party accumulates a certain level of performance/penalty points, a range of other incentives can be imposed, from formal warnings to financial penalties or, in extreme cases, eventual termination for a breach of the contract.

Other indirect measures may include public reporting of performance against agreed benchmarks. If implemented sensibly, this can be a strong motivator for the contractor to perform or risk public pressure. In constructing points-based performance payments (for incentives and penalties), care needs to be taken that unintended consequences do not arise whereby incentives cancel out sub-optimal performance.

(iii) Structuring the payment mechanism

The structure of the payment mechanism is critical in implementing the risk allocation and in providing the correct incentives to the private party.

Depending on the nature of the project, the payment mechanism may contain elements that relate to:

- availability of the service;
- performance of the service;
- usage of the service; and
- wider defined benefits.

Many *Partnerships Victoria* projects use a combination of two or more of these elements (e.g. availability and service delivery). For example, a court services project may use an availability component for payment associated with the physical courtrooms and a service delivery component for operational services, such as court reporting and prisoner movements. It is important that these elements are not subject to their own independent payment regimes. They need to be part of a unitary payment which reflects overall service performance. In this way, payment for usage, for instance, is not made without regard to whether availability or performance standards were met for the service.

The most appropriate combination of payment elements differs from project to project and is influenced by factors such as whether the government is the customer, the extent to which demand risk can be efficiently allocated to the private party, the nature of the services provided and government's objectives for the project.

For many *Partnerships Victoria* projects, the provision of **available services** is very important. That is, the government needs the facility to be available and ready to use, regardless of the extent to which it is actually used. Available services may comprise accommodation places or units, such as courtrooms, prison cells or hospital beds, or peak capability levels, such as for a water treatment facility. Where the government requires available services, it is appropriate for a payment element to directly relate to this service.

Availability is measured not simply by the accommodation or capacity being available but also by its being available at the specified performance standards, such as a courtroom being clean, with available air-conditioning and all audiovisual systems ready and in working order. In accommodation service projects, debt financiers will typically seek to align the accommodation service element with the private party's debt repayments. In such cases, it is important that a suitable payment abatement arrangement be in place so that if the accommodation services are not provided at the required time, to the required level or at the required standard, and the failure in service amenity is material, the debt repayments are not quarantined.

For *Partnerships Victoria* projects where services other than availability are being provided, such as transport services or the treatment of raw water, or where ancillary services such as cleaning and security are being provided, it is appropriate for a payment element to relate directly to the **performance** of these services. The payment relates to the service being provided to the specified standards. Where the service performance level is less than specified, there should be scope for suitable abatement of payments.

Payments based on **usage or transaction** level may be appropriate where the level of usage is a strong indicator of the service benefits being provided. Service areas where such a payment element may be used include transport (through the use of fares in rail projects and shadow tolls in road projects), water treatment and wastewater treatment services, and some information technology services which provide transaction-based services. Usage-based payments can expose the contractor to significant levels of demand risk; however, this can provide strong motivation for maintaining and enhancing service delivery where demand can be affected by the private party (for example, in an education accommodation project where the facilities can be

leveraged to generate revenue from users such as sporting clubs or private education/training businesses).

In some projects, there may be some **broader service benefits** which government is willing to pay to have provided. This may occur, for instance, where improvements in safety or community access are important government objectives for the project. If such benefits are measurable, they can provide a suitable basis for payment.

(iv) Securing finance

A payment mechanism should not ring-fence or guarantee the private party's finance charges. The relatively weak risk transfer created by such a structure would not usually give good value for money and government would be taking the risk of the interfaces between, say, the availability and the service delivery elements.

Experience has shown that payment mechanisms based on availability benefits or usage, or a combination of them, are capable of being financed, provided the payment mechanism fits the project, the risk allocation reflects a commercial position, reasonable cure periods are included and deductions are appropriately weighted. Financiers typically expect reductions for availability payments, performance deductions, or (with usage being an element of the payment), likely downturn in usage, all to be accommodated within their financial models. Their aim is to achieve minimal risk of losing the whole payment.

In a growing number of projects, project bonds are an important form of debt finance: the more secure the likely returns, the higher the credit rating for the bonds, and the lower the cost of this debt.

However, government needs to ensure the current balance is achieved between providing comfort to bond holders and transferring sufficient risk to the private party, so that the government achieves the best value for money outcome.

(v) Flexibility

The payment provisions should be sufficiently flexible to accommodate:

- **Future changes to the contract.** Changes may be necessary due to expansions required to facilities or infrastructure. Flexibility in the contract means that government can meet additional requirements on a commercial basis (i.e. without the risks that dealing with a monopoly provider would bring), without needing to negotiate a separate arrangement.
- **Different contract periods for different aspects of the service delivery.** For example, it may be desirable to re-let the operating contract after every five years, or more frequently for ancillary services, whereas the provision of the infrastructure service may be a 30-year contract.

15.3 Requirement for committed finance

Shortlisted bidders must demonstrate that they are able to secure finance to fund the project. This usually takes the form of commitment letters from the providers of both debt and equity. It should be recognised that these commitments generally provide an opportunity for financiers to withdraw from the project, as opposed to full underwritten finance which binds a financier. The presence of these documents in a bid package provides comfort to government that the required funds are available, removing much uncertainty and risk. It is appreciated that this requirement

comes at a cost, particularly on very large projects, but the benefits to government are generally warranted.

15.4 Compensation for losing bidders

The investment made in the bidding process by private parties should be recognised. The rules governing the process and the hurdles to be met should be clear and consistent. In this environment, bidders are able to assess the risks associated with their investment in the process and make an informed decision on whether to go forward. A poorly structured bidding process, where these rules are not clear and consistent, leaves government exposed to claims from losing bidders.

In normal circumstances, government would not contemplate the payment of any part of the bid costs incurred by unsuccessful bidders. Only in very limited and clearly defined circumstances may government consider a contribution toward bid costs. These circumstances should be identified and made known at the outset of a project.

15.5 End of term arrangements

One of the key considerations that must be addressed in relation to a *Partnerships Victoria* project is the end of term arrangements. The transaction is usually governed by a contract which has a length of up to 30 years, or more. At the end of term, the assets through which the services are delivered (for example a hospital facility) may either:

- transfer to government for a defined consideration (as is the case in a build, own, operate, transfer scheme). The defined consideration could be zero or a nominal sum;
- remain with the private sector party with no predefined rights for government to acquire the assets; or
- be available for government to acquire through an option arrangement (for example, first option to acquire at market value or at a pre-agreed price).

In considering which of these alternatives may be appropriate to a particular project, the key considerations include whether government expects the asset will be needed to remain in the public network at the end of the contract term, the strategic importance of the site to government, the accounting implications of a predefined transfer mechanism and the risks to government of 'paying twice' for the asset.

Where government expects it will require the asset beyond the end of the current term, it is logical to consider a predefined transfer mechanism or an option exercisable at government's discretion. Government then requires the asset to have an agreed useful life and meet performance standards to ensure that the asset is in reasonable condition and fit for ongoing use by government. In considering transfer arrangements, it is important also to review the potential liabilities associated with infrastructure assets. For example, transfer back to government of an outdated water treatment plant delivers liabilities including those associated with decommissioning and potentially demolishing the asset to unlock alternative use or sale of the land. The asset may also have environmental liabilities attached. This risk is best mitigated by the imposition of appropriate handover obligation and may include sponsor guarantees or a financial bond.

As discussed in Chapter 16 (Accounting and disclosure), end of term arrangements can impact on the balance sheet treatment of a *Partnerships Victoria* contract.

There is a trade-off between accepting the risk of residual value and cost to government. As far as the private party accepts the risks associated with recovering its capital by selling the asset at end of the term or of generating ongoing cash flows through continued usage after the contract expires, the cost to government during the contract term will be reduced. While this is a favourable outcome, the risk to government is that the asset will be required at the end of the term, and government will need to either purchase it at a negotiated price, or pay an ongoing service charge to the private party in order for the outputs to continue. The bid evaluation process should include an analysis of the amortisation of the capital investment to ascertain the extent to which the private party is accepting residual value risk.

15.6 Financial close processes

Following the contract being executed, the preferred bidder generally has to secure final arrangements with financiers. When these are secured, financial close can occur. Bids normally assume that the cost of debt finance reflects an agreed margin above a reference rate rather than a prescribed interest rate. This is due to the timing of the drawdown of funds being difficult to determine while interest rates move on a daily basis.

The risk allocation reflected in a Project Brief normally indicates that the risk of movements in interest rates between submission of bids and financial close are to be borne by government. This means that the service charges reflected in the contract can only be settled at, or following, financial close. Recalculation of services charges is performed within the financial model that was provided with the bid. The means of applying the model for this purpose needs to be agreed with the private party prior to financial close. At financial close, the service charges can be recalculated using the actual interest rates, and these charges are then inserted into the relevant schedules to the contracts.

15.7 Cure regimes and step-in rights

Issues of cure regimes and step-in rights are dealt with in detail in *Risk Allocation and Contractual Issues*.

The *Partnerships Victoria* model envisages a contract between government and a single entity (recognising that there will usually be a consortium behind the entity). If services are not provided at the standard required by government, there should be both an abatement of fees payable to the private party and a requirement to cure the problem. The severity of the penalty should reflect the severity of the service delivery issue and a 'major' and 'minor' default regime may be appropriate.

The private party should be provided with written notice of any service delivery issues and have an opportunity to cure them within a defined period. The financiers to the project often include a requirement in the debt agreements that they receive copies of any default notices and this provides additional incentive and leverage for the private party to resolve the problem. If service delivery problems continue beyond a reasonable period of time (as defined in the contract), the private party normally has the right to replace the operator before government moves to final termination.

As the services to be delivered under *Partnerships Victoria* arrangements are often sensitive in nature and important to the community (such as hospital accommodation services, educational infrastructure, roads and water treatment services), it is important that government has a right to step in where absolutely necessary to restore service delivery. This is only an issue to the extent that services are delivered by the private party (for example, it would not relate to clinical services in a hospital). In extreme cases, where default notices do not lead to rectification of continuing service delivery problems, government may have a right to acquire the underlying infrastructure assets, using a predefined valuation mechanism.

The presence of a reasonable cure regime is important for financiers. A regime which imposes harsh penalties without a reasonable opportunity to remedy the problem is likely to make the project difficult to finance and increase the cost of finance, leading to a poor value for money outcome.

16. Accounting and disclosure

Issues associated with the accounting treatment of contracts of the nature contemplated by *Partnerships Victoria* are often an area of concern. Government needs to carefully manage the liability side of its balance sheet, which is closely monitored by a large number of parties, including rating agencies. However, the Department of Treasury and Finance does not promote the view that the balance sheet treatment of contracts should drive the structure of *Partnerships Victoria* projects. Just because a high quality, high value for money project may be difficult to structure as off balance sheet, this does not mean that it should not be taken forward. However, the Department of Treasury and Finance must be kept informed as to the likely balance sheet status of *Partnerships Victoria* projects.

16.1 Accounting treatment

Partnerships Victoria contracts may in some circumstances be classified as leases. These may need to be recognised or disclosed on government's balance sheet. So, while the accounting treatment of a particular contract should not drive the commercial framework, the impacts of the proposed structure may be significant in an accounting sense.

The provisions of the Australian Accounting Standard AAS17 are the most relevant in classifying *Partnerships Victoria* arrangements for accounting purposes. This standard sets out the tests to determine whether contracts are classified as operating or finance leases. If a *Partnerships Victoria* contract is deemed to be a finance lease, both the lease asset and the lease liability must be recognised in the State's balance sheet and amortised over the term of the lease. The key tests AAS17 requires are:

- **Present value of lease payments.** Where the present value of the payments (associated with the assets, not service provision) made by the State are equal to or exceed 90 per cent of the fair value of the leased property, prima facie the contract would be classified as a finance lease. The operation of this provision is not definitive. The extent to which it applies depends on the risks assumed by the private party;
- **Lease term.** Where the arrangements with government cover a period greater than 75 per cent of the useful life of the asset, prima facie the contract would be classified as a finance lease;
- **Bargain basement provisions.** Where the contractual arrangements include an option for government to acquire the asset at the end of the term for a value which is so far below the likely fair value that it would be highly unlikely that it would not be exercised, the arrangements would prima facie be deemed to be a finance lease.

These tests are all designed to determine whether the risks and benefits associated with the property have been transferred to the private party in a *Partnerships Victoria* contract. Where the capital investment associated with the asset is substantially amortised by payments due from government over the term of the contract, it is likely that the contract would be deemed to be a finance lease. The specific characteristics of each project will have to be reviewed in the context of AAS17 to determine the appropriate accounting treatment.

16.2 Further accounting guidance

The Department of Treasury and Finance has produced a number of Accounting and Financial Reporting Bulletins which deal with issues associated with accounting for, and disclosure of,

contracts of the *Partnerships Victoria* type. They can be accessed via the Financial Management Package, available through legal publishers Anstat Pty Ltd, or as otherwise advised on the *Partnerships Victoria* website at www.partnershipsvictoria.vic.gov.au.

The financial/accounting advisers to a particular project should be consulted in relation to these issues, as a number of technical documents have been issued on the subject. It is important that the issues are addressed during the project development stage, as it can be complex and expensive to restructure a proposed arrangement late in the process as a result of concerns over accounting treatment. The Department of Treasury and Finance should also be consulted to ensure that the impacts of the proposed contractual arrangements are properly understood before the Project Brief is issued.

17. Public interest

The public interest must be considered from the early stages of the option appraisal process. The introduction of additional measures later in the project development process to protect the public interest may be more difficult or costly once bidding has commenced or contracts have been negotiated. There also may be instances where the government is using a project to advance or extend the level of protection of the public interest. The detailed public interest test can be found in Appendix D.

17.1 Protection of the public interest: what does it mean?

The *Partnerships Victoria* policy provides that protecting the public interest entails an assessment of the impact of the project on the following eight elements of public interest:

(i) Effectiveness

Is the project effective in meeting government objectives?

The public interest is served by truly effective achievement of project objectives.

(ii) Accountability and transparency

Do the partnership arrangements ensure that the community can be well informed about the obligations of government and the private sector partner, and that these can be oversights by the Auditor-General?

Government policy, at the time of publication of this Guide, is set out in the statement, 'Ensuring Openness and Probity in Victorian Government Contracts', announced by the Premier on 11 October 2000.

The only contract matters withheld from voluntary disclosure are:

- trade secrets;
- genuinely confidential business information; and
- material which if disclosed would seriously harm the public interest.

Government must generally weigh the public interest in maintaining confidentiality against the public interest in disclosure. Confidentiality is particularly important during the bid stage where confidential commercial information is supplied by bidders and disclosure of cost structures would disadvantage the competitive bidding process. However, transparency of the bid process is paramount to give bidders certainty and meet probity requirements.

When drafting contracts, government parties must ensure that appropriate information on the project's performance is available for release during the service period.

(iii) Affected individuals and communities

Have those affected been able to contribute effectively at the planning stages, and are their rights protected through fair appeals processes and other conflict resolution mechanisms?

The term 'planning stages' here encompasses the initial stages of a project prior to government going to the market, and up to the stage where the contracted private party receives final planning approvals.

Any need for a prior economic, environmental, social and regional impact analysis should be considered. Advice may be sought on the impact of any environmental and planning laws or regulations.

Planning for public consultation must allow ample time for special interest groups to voice their opinions or concerns, and for working with special interest groups to ameliorate their grievances, seeking solutions which can be set out in the contract.

(iv) Equity

Are there adequate arrangements to ensure that disadvantaged groups can effectively use the infrastructure or access the related service?

These needs may be identified, in part, in the public consultation process referred to above. In planning infrastructure and service delivery, disadvantaged groups such as the elderly, the disabled, non-English speaking and indigenous Victorians and other minority groups must be considered. It may be necessary to plan a process for resolving complaints.

(v) Consumer rights

Does the project provide sufficient safeguards for consumers, particularly those for whom government has a high level of duty of care, and/or those who are most vulnerable?

Best practice contract management procedures must be used, especially in those areas that involve non-delegable duties, such as hospitals, prisons and educational facilities. Regardless of any legal obligation on government in respect of such duties and all other services it is obliged to provide or has committed to provide, government also has a broad responsibility to the community and the service recipients. That is, a political accountability applies, irrespective of whether government is providing the service directly or indirectly through a private party. Independent regulatory bodies with comprehensive regulatory functions may be required to ensure that the public interest is protected. Consumers' first line of remedy should be the private party, as in most instances the private party is best placed to provide immediate relief, and appropriate provisions in the contract should be considered. *Australian Standard AS 4269 – 1995, Complaints Handling* sets out essential elements for the management of complaints.⁴ In addition, statutory protection may be contemplated (for example, the Essential Services Ombudsman, the Energy Industry Ombudsman) to provide an independent channel of redress with powers to hear, investigate and resolve consumer grievances.

Where legislation is enacted in respect of a proposed contract, consideration should be given to whether the legislation would limit the application or action of other statutes and due process to the detriment of public interest. For example, the *Melbourne City Link Act 1995* overrides various other statutes in order to facilitate the construction and viability of the project.

⁴ Standards Australia, *Complaints Handling*, AS 4269, Standards Association of Australia, Homebush, 1995.

(vi) Public access

Are there safeguards that ensure ongoing public access to essential infrastructure?

It is particularly important to ensure ongoing, continuous supply of services to the public despite any breach of the contract by the private party, or if the private party is replaced. This is addressed by providing adequate safeguards in the contract. Coordination and integration with existing infrastructure and services must also be considered.

Accessibility of essential services in rural areas may be an issue.

(vii) Security

Does the project provide assurance that community health and safety will be secured?

Each project has distinctly different issues. Particular areas to consider are corruption, crime, public health risk, quality and security of supply, the latter being of special concern when the market is immature.

(viii) Privacy

Does the project provide adequate protection of users' rights to privacy?

Relevant legislation and government policy and how this matter has been handled in previous projects should be considered.

17.2 The test for assessing the public interest

Each potential *Partnerships Victoria* project must be tested against each of these eight elements in turn, and a decision made on whether suitable measures can be established that adequately protect the public interest. An on-balance determination is then required to decide whether the inability to adequately protect any of the eight elements renders a *Partnerships Victoria* approach inappropriate.

Results of the public interest test, presented in the general format outlined in Appendix D, must be included in the business case submitted in support of a request for approval to invite Expressions of Interest. The test is set out in a table with three columns in Appendix D. The columns cover:

- **Public interest element.** This lists each of the eight elements of the public interest test.
- **Standard.** This lists the government standard to apply for each public interest element. These standards may derive from government policy, legislation or regulation, current practice, or may be developed specifically for the project.
- **Assessment.** For each identified public interest issue, an assessment is made of whether appropriate mechanisms are available to provide an adequate level of protection. The mechanisms to be used need to be identified.

The on-balance determination of whether the public interest can be adequately protected under a *Partnerships Victoria* contract requires a judgement of whether the failure to adequately

protect any individual public interest element is a significant concern and whether it outweighs (on its own, or together with other failures) the benefits to the public interest arising from the potential project being delivered as a *Partnerships Victoria* project.

17.3 Protection of the public interest and the procurement process

Public interest is initially considered during the option appraisal stage of the procurement process, when a department or agency decides whether, consistent with the *Partnerships Victoria* policy, it should explore delivery of the project by way of a public-private partnership.

The full public interest test is applied in the later stages of the development of the business case. Government will take account of the test when considering an application for project funding.

It is important that government has sufficient evidence of protection of the public interest before approving funding and allowing significant resources to be committed to project development.

Subsequent applications for approval to invite Expressions of Interest or to issue the Project Brief must highlight any alterations to the project which impact on the public interest.

The Project Brief should include a clear description of the public interest issues and the manner in which any areas of potential concern have been taken into account in the proposed contractual or regulatory framework. Bidders should be given clear direction in relation to any hurdles or absolute constraints resulting from measures taken to protect the public interest.

17.4 Reporting to government

Results of the public interest test in the general format outlined in Appendix D, together with an on-balance assessment of the test results, is included with documentation seeking project approval.

The application itself must quantify any deficiencies identified in the assessment of each of the eight public interest elements and also set out any means planned to address these deficiencies. Where appropriate, alternative options for addressing deficiencies should also be identified.

18. Bid evaluation

Bid evaluation is a critical element of the *Partnerships Victoria* process, from the perspective of both the government (with the objective of securing the best outcome available) and the bidders who expect the evaluation process to be clear and consistent.

Bid evaluation takes place at two stages in the process, when Expressions of Interest invitations are received and when final bids are lodged.

18.1 Evaluating Expressions of Interest

The objective of evaluation of Expressions of Interest is to determine whether the parties have the financial capacity, technical capability, demonstrated understanding of government requirements and resources to deliver the project. Responses to an Expression of Interest invitation do not normally require any indication of price.

The key evaluation criteria to be applied to Expressions of Interest include:

- **Track record.** The bidder's experience and track record in delivering projects of a similar nature (recognising that a number of parties are likely to be involved in each consortium bidding for the project). This assessment criterion needs to take into account not only the bidder's ability to deliver against the physical aspects of the project (for example, development of a hospital facility) but, importantly, its ability and track record in delivering outputs under long-term contractual arrangements.

A lack of demonstrated track record in delivering projects of this nature does not necessarily mean that a bidder should not be considered. However, in the absence of a specific track record, it is particularly important to consider the organisation's broader experience, wider track record and management team and form a view on its ability to properly structure, deliver and service a *Partnerships Victoria* arrangement.

- **Financial position and financing.** *Partnerships Victoria* transactions normally require the successful bidder to finance a substantial capital cost for the project. This varies depending on the nature of the project, but can be expected, in most cases, to exceed \$20 million. It is therefore important to consider the ability of the private party to secure this finance. This requires an examination of the financial position of the members of the consortium, consideration of market perception of the organisations and the risks associated with their operations generally. There is little point in taking forward a private party with a financial position which reflects marginal profits and a weak balance sheet, as it is unlikely that the required finance could be secured on competitive terms or terms acceptable to government.

Consideration of the financial position should also take into account the ability of the bidder to support the contractual arrangements over the term. Financing the initial development of the project is clearly critical, but it is just as important that the private party's financial outlook is sufficiently robust to give government comfort that the service delivery requirements and government's rights under guarantees can be supported over time.

The evaluation process should also have regard to the indicative financing structure reflected in the Expression of Interest, which should be reviewed to assess its deliverability and the likely economic outcomes. For example, an Expression of Interest for a rail project may propose debt finance to be provided by CPI-linked bonds. However, if the nature of the project cash flows or the market for bonds at the time are not considered likely to support the bond issue, government should examine the fallback financing strategy.

- **Approach and innovation.** The invitation for Expressions of Interest should call for bidders to outline indicatively and briefly their proposed approach to delivery of the project and of the services over the life of the contract. The bid should be reviewed and an assessment made as to whether it demonstrates an understanding of government's objectives and the service delivery outcomes required. For example, in a water treatment project, it would recognise the engineering and environmental issues, together with those associated with commissioning the plant. It is important that the opportunity to demonstrate ability and to ensure scope for innovation is limited. Bidders must not be induced to spend significant sums in preparing a response to an invitation to express interest. The Expression of Interest document should express a limit on what is expected.

The Expression of Interest invitation usually allows or encourages bidders to propose innovative solutions to the service delivery objectives. Accessing good ideas is a key objective of *Partnerships Victoria* and innovative approaches with the potential to deliver improved value for money or improved service outcomes should be regarded positively. However, while an innovative approach may prima facie deliver high value, the risks associated with its implementation should be considered specifically.

- **Composition of consortium.** The composition of the consortium proposing to deliver the project is an important consideration. The responses to the call for Expressions of Interest should clearly define the roles of each participant and demonstrate how the relationships between the parties are proposed to operate. To the extent that the proposed organisations have not worked together previously, the evaluation team should particularly consider how the members of the consortium will collaborate to deliver the necessary outcomes.

(i) Shortlisting Expressions of Interest

The evaluation of Expressions of Interest should lead to a shortlist of parties to be invited to continue in the process and to whom the Project Brief will be issued.

The evaluation process is focussed on forming a view on whether the parties have the requisite capability to deliver the project. This process will usually result in some parties being advised that they will not be invited to move forward in the process. The number of parties that are shortlisted will vary from project to project. However, the objectives of the process should be to:

- only shortlist parties which government genuinely believes have the capability to deliver the project — parties should not be shortlisted to make up the numbers;
- shortlist more than two parties to maintain competitive tension and protect against the risk of a withdrawal; and
- maintain motivation for bidders to invest in the process by not shortlisting too many (e.g. if more than four parties are shortlisted, they may take a negative view of the odds of success and not be prepared to take the bid risk).

Application of these criteria usually sees three to four private parties shortlisted.

18.2 Evaluating final bids

The evaluation criteria to be applied need to be developed in the context of the elements and characteristics of each project. While the criteria may often fall into the three common areas of commercial issues, building/infrastructure issues and service delivery issues, in some projects others may require consideration, such as contribution to regional development.

The basis upon which bids are to be evaluated must be clearly communicated in the Project Brief (there may be some limited reference also included in the call for Expressions of Interest) so that bidders are able to develop bids recognising the key issues of the evaluation process. This does not mean that details of the weighting of each category need to be disclosed. The evaluation process should also be discussed in the Project Brief.

(i) Compliance and conformity

One of the initial tasks to be completed when bids are received is to assess how far they conform with the requirements of the Project Brief. This requires an assessment not only of compliance with the conditions of the bidding process (for example, lodgement time, mode of delivery, number of copies, etc.) but also of the extent to which the requirements of the Project Brief have been met. For example, the project may require delivery of infrastructure and limited ancillary services. If a bid assumes a service delivery specification which is greater than that required by government, and does not treat this as an option, then the bid may be deemed to be non-conforming. Any bids deemed to be non-conforming should be noted as such and considered separately.

The Project Brief is accompanied by a contract which expresses government's position on risk allocation. Government expects a limited number of variations from the contract, in pre-specified areas where variations to specified risk allocation and other specified matters will be considered.

Conforming bids may also include additional features or enhancements beyond the requirements of the Project Brief. The Project Brief should specify that all enhancements are to be individually priced so that government can evaluate them separately. The financial evaluation should detail the cost to government of each enhancement and comment on the value for money of each proposal. This will require consideration of the service delivery outputs to be delivered by the enhancement. In most circumstances, the PSC should be adjusted to take account of the enhancement. The evaluation should also raise the separate question of whether the enhanced service delivery meets a priority need that justifies any further allocation of funds.

If government attempts to transfer risks which are difficult for the private party to manage, a number of non-conforming bids may result. Prior consideration of the difficulties that may arise at this point brings into focus the extreme importance of doing all of the analysis and consultation necessary to arrive at a risk allocation that can be financed and can allow bidders to offer value for money.

(ii) Bidder presentations

Depending on the nature and scale of the project, shortlisted bidders may be invited to deliver a presentation, covering the key aspects of their proposal and clarifying matters identified in writing by the project director. This reduces the risk of misinterpretation and allows the procurement team to get a better feel for the basis upon which the bid has been developed and understand specific aspects in more depth before the detailed evaluation process begins. Advance notice should be given to the probity auditor and an equal opportunity must be given to each bidder. The presentations should take place after written proposals have been lodged, to ensure that no opportunities exist for bids to be changed as a result of the discussion. This timing also provides the procurement team with some time to review the bids and identify any issues that they would like bidders to clarify.

(iii) Financial evaluation

Assessment of the financial proposition in each bid is a key component of the evaluation. However, the financial considerations are only one element of a well balanced evaluation process. The financial evaluation centres around a comparison between the cost to government of the payments reflected in each bid over the full contract term and the Public Sector Comparator. If one or more of the bids offers value for money in comparison with the PSC and meets all the other bid, risk allocation and service delivery requirements, government should move forward into contractual negotiations after bid evaluation. In circumstances where none of the bids offers value for money in comparison with the PSC, further analysis may be required, but in the absence of other offsetting net benefits (see Chapter 14, Value for money), the project should be delivered through traditional methods.

The cost to government of each bid should be assessed on a discounted cash flow basis, taking into account all cash flows over the contract term including any residual value payable at the end of the term. The payments required to be made by government should be discounted at the appropriate current nominal discount rate to arrive at a net present cost. This allows bids to be compared on a consistent basis, both against each other and against the PSC. Advice on the appropriate discount rate at the time will be available on the *Partnerships Victoria* website, www.vic.gov.au/treasury/partnerships/html.

Financial template

The financial advisers should develop a financial template to be issued to all shortlisted parties as part of the Project Brief. It may sometimes be appropriate to provide the template in an electronic copy as well, so that bidders can use it to develop their financial proposition.

The financial template will take different forms depending on the nature of the project. However, the objective is to ensure that all bids provide a financial proposal submitted in a consistent form to enable easy comparison. Detailed information about the cost structure assumed by the bidder is normally required, to allow the procurement team to consider the sustainability of the proposition.

The financial template should be subjected to a financial model audit, signed off by the financial advisers. The probity auditor may also audit the financial template to satisfy him or herself as to its integrity.

Practical tips for financial evaluation

The financial evaluation of bids requires a well structured approach and careful consideration of the risks to government. Bids can easily be misinterpreted or risks not identified which can lead to government being exposed during final negotiations. Some of the key areas to focus on include:

Viability of bid proposition. Government should be focussed on the financial impacts of the bid in terms of cost to the Budget and is therefore likely to be highly interested in bids which reflect aggressive pricing. However, while the risks of business failure can be laid off to the private parties to some extent through equity investment and guarantees, the objective should be to enter into a viable long-term arrangement. Accordingly, it is important to focus on the components of a bid and properly assess the underlying assumptions.

The financial template should incorporate the requirements for information regarding the key components of a bid, including building cost, financing structure and major cyclical maintenance items. The revenue to the private party will normally be dominated by the service charge which

is bid. However, where this is not expected to be the case, the financial template should require specific disclosure of third-party revenue. The process should focus on each element of the financial template and question the reasonableness of each major driver. The operating cost structure can be assessed based on assumed rates of return to equity, allowing a view to be formed on the reasonableness of these costs. The outcome of this detailed review should enable the procurement team to have an opinion on:

- the reasonableness of the capital costs and the likely extent of variation risk on any building component. This risk may be transferred to the private party contractually but there is little point entering into a relationship that is likely to see claims (albeit fruitless), being put to government as a result of cost overruns;
- the efficiency, pricing and deliverability of the financing structure. Government is focussed on value for money; however, the providers of equity need a reasonable return to be motivated to deliver services at the standard required. Similarly, financiers need assurance of sufficient cover for debt serving. Failure to achieve this may result in a failure to fully meet service standards, cost cutting or an attempt to walk away from the project; and
- the level of reliance being placed on achieving bonuses for above-standard performance or volume/usage increases. It is risky for project cash flows to be too heavily dependant upon upsides which may not eventuate.

Certainty of financing. The Project Brief calls for bids to include commitment letters from the providers of debt and equity finance. The conditions should be thoroughly reviewed and a risk assessment made of whether the finance can be procured on the terms proposed. The review should be approached from the financiers' perspective and not just that of government. In reality, financiers can usually find a basis for withdrawal from the project despite the presence of 'commitment' letters (although their credibility with government subsequently suffers). The evaluation should therefore focus on whether the project cash flows and sponsor support show a proposition likely to meet the requirements of debt providers. Where the financing structure reflects a proposed capital markets issue (for example, a CPI-linked bond issue), committed underwriting should be specifically stated as a prerequisite in the Project Brief.

Sponsor support. The financing structure proposed by bidders must indicate some equity contribution by the sponsors (members of the bidding consortium). A 90 per cent debt-funded structure may give a lower bid price, but unless sufficient recourse to the sponsors exists, the project will lack a mechanism to achieve the necessary risk transfer. Contribution of equity funds or guarantees from the sponsors means that, if the services are not delivered and service charges are reduced completely or partly, the sponsors have a genuine commercial motivation to overcome the problem. Without this support, the risk transfer proposition is totally dependent on the financiers acting to rectify the problem. These issues need to be reviewed in detail, but generally debt financiers require sponsor support to protect them from the same risks that concern government.

Performance-based charges. The evaluation should particularly consider any proposed changes to the payment mechanisms which would increase the payments due for above-specification outputs. A signal may be a bid with a low service charge against the standard requirements but decreased hurdles for bonuses. The outcome could be a lower price against the base payments, but higher costs to government over the contract term.

Cash flow profile. The profile of payments outlined in bids should be assessed for any solvency issues for the private party. Bidders sometimes desire to 'back-end' payments so that service charges start at a low level and escalate during the term of the contract. This may reflect a value for money financing structure, but careful assessment is needed of whether sufficient cash flow is available in the early years to support operating costs and debt. Such back-ending is not fully

consistent with the pay for service philosophy of *Partnerships Victoria*. It may also have tax and balance sheet implications.

Residual value/debt amortisation profile. The bid evaluation process should specifically assess the rate at which debt finance is to be amortised. This allows the procurement team to understand the level of debt outstanding at each stage of the contract term. Assumption of residual value risk by the private party may give a lower cost for services to government during the term, but this structure also results in debt levels giving a higher step-in cost at any stage.

Taxation assumptions. The contract is usually drafted to transfer all taxation risks to the private party. The bid evaluation process should focus on the assumptions made about available tax deductions. Provisions in the *Income Tax Assessment Act 1936* may apply to projects to deny certain deductions (see Chapter 15, Commercial and financial issues). If the project structure assumes the deductions are available, the private party could face a much larger tax liability than is reflected in its bid, with severe consequences for its viability. If the procurement team is concerned about these tax risks, the preferred bidder should be required to obtain a ruling from the Australian Taxation Office to give government some assurance that the bid proposition is viable.

Risks of shared utilisation. Where a bid proposes that the infrastructure be used to service the requirements of both government and third parties, the associated risks need to be considered. Improved usage of the asset is a positive as it should lead to lower service charges to government. However, the third-party activities need to be appropriately partitioned. For example, in a hospital development where part of the facility is to be used to operate a private hospital, government must assess how a possible failure of the private operations could adversely affect services to government. This should include consideration of the financing arrangements and the specific rights of financiers if the private hospital fails.

(iv) Physical infrastructure evaluation

Evaluation of issues concerned with the physical infrastructure offered and other non-financial matters are potentially more difficult to deal with than 'cost to government' issues. This reflects the more subjective nature of the evaluation of areas such as service delivery and infrastructure/building issues. The key principle that should be applied in evaluating the non-financial components of bids is to focus on the outputs being sought by the bid process, not on the inputs, and to examine the risks to government over the life of the contract, rather than focus on the short term. For example, the infrastructure or building evaluation should consider the ability of a proposed design to deliver the outputs required over the life of the contract and the flexibility the design provides to increase service capacity if required.

This is an area with which evaluation teams can potentially have trouble. They must take care to avoid evaluating bids and ranking them against criteria that are covered within the bidder's risk matrix. In a water treatment project the output can be defined as 'clean water to quality X' where X may represent many chemical and biological characteristics. In assessing a concept design submitted with a bid, the temptation for an assessment team is to review the proposal against its own biases and preferences. As the risk of design is with the bidder, this must be avoided. The concept design must be reviewed primarily against the output criterion of producing 'clean water to quality X' and therefore the team must assess the ability of the proposals detailed in the bid to provide water to the required specification.

However, the bids should also be reviewed against criteria such as degree of redundancy (that is, over-capacity), flexibility of design, the proposed design agency, the aesthetic value of the design, technological superiority, robustness, occupational health and safety and environmental considerations. In this way, the different bids can be assessed, differentiated and ranked.

Similarly the bids can be analysed, differentiated and ranked against the following:

- the benefits and **impacts on the public** of the infrastructure solutions outlined in the bid;
- the **adequacy of the proposed infrastructure** assessed against its ability to deliver the outcomes specified in the Project Brief. This includes:
 - the level of confidence in the performance of assets;
 - required timing to achieve improved performance levels and credibility of benefits;
 - flexibility of infrastructure to changes in volume or scope; and
 - any legislative difficulties in implementation.
- **design and construction** in terms of functional, technical, operational and appearance criteria. This includes the overall quality of: engineering; architectural and landscape design; environmental considerations; construction methods and work programs for the project; nominated resources; engineering services, overall layout and relationships between spaces; traffic management and integration with service delivery and emergency management;
- ability of bidder's **management** structure to undertake the project; and
- **quality assurance** program.

(v) Service delivery evaluation

Service delivery is at the heart of the evaluation. The infrastructure may be excellent, but will it be operated satisfactorily and be available reliably? Will all services be delivered to specification?

Again, planning and resources for the evaluation are issues. The scope of service delivery will vary considerably between projects and it is likely that there will be fewer standard evaluation tools than were available for financial and infrastructure evaluations.

Given the underlying expectation that the practices of specifying outputs and recruiting from the widest available skills will generate innovative service delivery solutions, evaluation of the service delivery components of bids may require abandonment of conventional service delivery assumptions. Consequently, there will be a need to have in the evaluation team both experience in the particular area of service delivery and also a readiness to accept new approaches.

A variety of techniques of evaluation will be employed across the range of projects that will be delivered under *Partnerships Victoria*. Primarily the need is to evaluate three aspects of the bids: the service that is offered; the capability of an operator to deliver that service; and the reliability of delivery over time. These are discussed below.

Offer

The consideration here is whether what is offered in the bid includes the full range of outputs required and at the specified level of performance. There will also be a need to examine qualitative matters such as considerations of client relationships and any impacts on the community generally. Bids concerning service delivery may offer higher levels of service delivery than those specified in the Brief, or may offer enhancements of one sort or another. Such bids

require evaluation from the point of view of affordability and whether the enhancements offer value for money.

Capability

Commonly, services will be delivered by an operator who will be one member of a consortium formed to deliver the project. Evaluation will focus on the experience, skills and relevant track record of this operator. There may be a need, depending on the staffing needs of service delivery, to examine the organisation structure, staffing, training and research and development practices and plans of the operator.

Reliability

There is also a need to assess the level of confidence that may be placed in the ability of an operator to maintain service delivery standards over time, accommodating both foreseeable and unforeseeable developments. Although some contracts provide for competitive bidding of the operating component of the contract at regular intervals, the period of the operating component will nevertheless be such as to require careful assessment of bids. The business plan for operations should demonstrate capacity to manage or absorb the effects of all of the risks that will be allocated to the operator. Consequently there should be evidence of scope to accommodate reasonable variations in economic conditions, labour market, competitive environment and other areas of risk. Generally speaking, the most reliable indication of future performance is past performance. An evaluation team will look for a sound track record over a number of years, together with a sound plan into the future.

18.3 Indicative bids

In some projects, the incorporation of a request for an indicative bid in the call for Expressions of Interest may warrant consideration. An indicative bid is a non-binding financial proposal from bidders. It can be a useful tool in *Partnerships Victoria* processes but is more suited to processes where the sale of assets is involved. The risks around an indicative bidding process include:

- bidders may be motivated to propose a lower cost to government than they expect to reflect in their final bid, in order to position themselves better for shortlisting;
- bidders are often reluctant to invest substantial resources in the process prior to shortlisting and therefore any indicative bid may be based on superficial analysis, of little value to government; and
- the Project Brief has not been issued in final form at the Expression of Interest stage and therefore the service specifications may not have been finalised. This means that any financial proposition put forward by bidders may not be directly relevant to the final requirements.

18.4 Evaluation reports

The evaluation report should focus on describing:

- the financial propositions of each bid, the costs to government in net present cost terms, the expected annual cash impacts on the Budget and the key drivers of differences between the bids. For example, one bid may be significantly less expensive than others due to the

assumption of residual value risk or a lower building cost. Any risks associated with the financing structure should be detailed, including tax assumptions and any concerns over procuring debt and equity;

- the service delivery propositions of each bid, the extent to which they meet government requirements and the presence of any enhanced service outputs that are considered attractive. Any potential risks associated with a bidder's service delivery approach over time should be discussed;
- the robustness of the design and construction proposal, and its capability, where relevant, to allow efficient government provision of core services from the facility;
- the potential risks to government in entering into a contract with each party. For example, one party may have submitted a financially attractive proposal but the procurement team believes there is a significant risk of attempts to vary the service charges during the term;
- the capability of the consortium to deliver the services over the period of the contract;
- the extent of variations to the contract being sought and the impact of these on the risk allocation which government has previously approved; and
- the flexibility of each proposal to accommodate future requirements for expansion, higher volume/usage or changes in operating protocols due to policy change.

The evaluation report should arrive at a joint view from the separate evaluation teams (e.g. finance/commercial, building, service delivery) on the overall ranking of bids and a recommendation of which bid should be taken forward as the preferred party. The report should discuss the rankings within each area of evaluation and the basis for the procurement team's agreement on the preferred bidder. For example, Bidder A may be preferred by the commercial team, Bidder B by the building team and Bidder C by the service delivery team. These separate views need to be brought together to reflect the proposal which is considered *overall* to deliver the best value for money.

19. Intellectual property

19.1 Overview

Intellectual property is a key issue for both bidders and government in the formal bid processes and discussions around projects. Private parties wanting to discuss ideas for potential projects are traditionally concerned to ensure that intellectual property is protected. The legal characteristics (and limitations) of intellectual property need to be recognised. The key issues needing to be dealt with include:

- identification of intellectual property;
- treatment of intellectual property contained in formal bid documents; and
- the manner of dealing with intellectual property in contractual arrangements.

The discussion below deals with each of those key issues. The treatment of intellectual property in relation to unsolicited proposals is dealt with in the following chapter.

19.2 Identification of intellectual property

For present purposes, the term 'intellectual property' refers not only to legally protectable intellectual property (copyright, patents, registered designs etc.) but also to ideas and information protected only as confidential information at common law or under contract.

Departments and agencies should consider the manner in which genuine intellectual property presented by private parties may be protected. However, ideas or concepts presented to government, while they may be considered by the companies to reflect intellectual property, are often high level in nature and do not warrant the same level of protection.

Intellectual property commonly encountered in *Partnerships Victoria* projects of the nature contemplated by the policy includes:

- designs, drawings etc. relating to the construction of infrastructure and assets;
- technology associated with delivery of services (e.g. technical solutions for more efficient treatment of waste water). Such technology is usually governed by some form of licence in any event; and
- operational processes for delivery of outputs.

While government should be alert to the issues, the company is responsible for identifying specific intellectual property which it wishes to protect.

19.3 Bid documents

Partnerships Victoria's focus on achieving outputs for government means that a project's bid documents should contain details of the outputs that the government requires, rather than a prescriptive input-based approach. This allows for innovation and flexibility as to how outputs are delivered. For example, a rail upgrade project seeking to deliver higher speed services should be focussed on reducing journey times rather than on engineering specifications.

This approach in bid documents provides protection to private parties presenting proposals to government before a formal bidding process, as an output-based specification does not require discussion of details of the method or system of delivery.

19.4 Intellectual property presented during the bid process

Intellectual property in proposals or bids submitted as part of a bidding process should be protected and not made available to any other bidder. An objective of *Partnerships Victoria* is to encourage the private sector to develop innovative approaches to service delivery. Any perceived risk that bid information would be made available to other parties would seriously impede the objectives of the policy.

19.5 Treatment of intellectual property in contractual arrangements

The treatment of intellectual property relating to a *Partnerships Victoria* project needs to be reviewed in the context of each project and in consultation with the procurement team's legal advisers. As a general rule, government should seek to acquire a royalty-free transferable licence to the intellectual property for the life of the service requirement. In some cases, however, it is appropriate for government to seek ownership of the project intellectual property. The value of the intellectual property is typically reflected in the payments which government agrees to make. Government must ensure that it is able to access all the tools required to deliver the service over the life of the contract. If the private party is replaced under the contract, the new provider must be able to access any necessary intellectual property to continue delivering the required outputs.

19.6 Protection of intellectual property

Access to documents provided during the bidding process may be sought by members of the public through the *Freedom of Information Act 1982* (FOI Act). However, at the time of publication of this Guide, Section 34 of that Act exempts 'trade secrets' and other 'matters of a business, commercial or financial nature' from disclosure if 'the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage'. Loss of valuable intellectual property through premature disclosure may be regarded as meeting this criterion.

If information provided by a business to an agency or a Minister is sought under the FOI Act, 'reverse FOI' procedures apply. These procedures (see Section 34(3) of the Act) require the agency or Minister to notify the business and seek its views on disclosing the information. If the business opposes it but the agency or Minister considers the documents should be released, the decision favouring release must be notified to the business, which may appeal against that decision before the Victorian Civil and Administrative Tribunal (VCAT) under Section 50(2)(e) of the FOI Act. Documents are not to be released until after the 60-day appeal period has expired or, if an appeal is lodged, until after the VCAT decision. Similarly, if the agency or Minister decides not to release the documents and the person who requested them appeals against that decision, the business may take part in the VCAT proceedings to ensure that its own views are put to the Tribunal.

While government cannot fetter its statutory obligation to consider each FOI request on its merits, with regard to the particular content of the requested documents, the existence of the reverse FOI procedures should assure businesses that they will have both an opportunity to have a say in what is released under an FOI request, and rights to litigate in an inexpensive forum to protect their documents from disclosure.

There is also an exemption under the FOI Act for documents or information communicated in confidence to an agency or Minister (Section 35). This is less protective in these circumstances because the test is whether disclosure would be against the public interest by being likely to impair government's future ability to obtain similar information. If it can be presumed that businesses will continue to bid for government contracts, despite the risk that information may be released under the FOI Act, this criterion may not be met.

This is a complex area and legal advice should be sought before entering into arrangements to protect intellectual property.

20. Unsolicited proposals

Government wishes to promote discussion with the private sector on ideas for improving the quality of infrastructure or services to Victorians. However, the private sector has traditionally been reluctant to present proposals for fear of seeing perceived intellectual property made available to the market through the bidding process. This is a difficult area where departments and agencies should seek advice when concerns arise. However, the general principles which should apply include:

- companies should be made aware before any discussions of proposals containing possible intellectual property that they are required to identify specifically the intellectual property that they want to protect;
- government is generally prepared to consider arrangements to protect genuine intellectual property which relates to how infrastructure or services are to be delivered, but it is normally unable to provide any protection or exclusivity about the particular service being discussed. For example, ideas about how to improve education infrastructure may be capable of protection, but a proposal to develop new infrastructure to service a growing area of population in the State could not be protected; and
- mechanisms should be adopted to ensure that open competitive bidding is maintained as far as possible.

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. 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. This 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.

Other courses may be available in particular circumstances.

Before agreeing to enter an agreement to protect intellectual property (including confidentiality, non-disclosure or exclusive dealing arrangements, or memoranda of understanding), legal advice should be sought.

21. Probity

21.1 Purpose and management of probity

The essential purpose of a *Partnerships Victoria* project development and implementation process is the formation and operation of a contract that provides the best available value for money, subject to protection of the public interest.

This purpose is supported by a probity plan to ensure that the purpose is achieved with fairness of process and with no person improperly achieving personal advantage or disadvantage through involvement in the process.

Probity is supported by open, competitive bidding and by public accountability, including accountability through the oversight of an independent probity auditor whose report on the probity of the process is made public.

Advice on probity considerations of such processes is available on the Victorian Government Purchasing Board website, at www.vgpb.vic.gov.au.

The essential tool of probity management is a well crafted probity plan that helps foster a probity culture, spells out proper process, results in records demonstrating the equity of the process and assists the efficient achievement of project objectives.

21.2 Probity plan

Key steps in drafting a probity plan are:

- plan the engagement and role of a probity auditor — one element of the role is to endorse the probity plan;
- formally specify levels of authority for making decisions and commitments and for the conduct of dealings with particular persons or bodies, including bidders;
- where decisions are to be taken by a group, constitute the group as a committee with formal terms of reference and recording arrangements;
- formally specify principles and practices regarding access, dissemination, use and storage in relation to project information and records;
- allocate responsibility and authority for management of probity, including responding to problems and queries;
- set out principles and procedures that will promote probity with efficiency. Ensure in particular that the principles and procedures will not inhibit achievement of project objectives. A principle or procedure must be redesigned if, for example, it could result in incomplete questioning of material presented by a bidder; and
- develop a strategy to promote a probity culture.

A sample outline of items that are commonly in the probity plan of a *Partnerships Victoria* project is set out in Appendix C (Probity documents). This outline may assist the drafting of a probity plan to suit a particular project.

21.3 Confidentiality and disclosure

While confidentiality is concerned primarily with inhibiting inappropriate transmission of information, one relevant issue for *Partnerships Victoria* projects is ensuring that people have all the information they need to fulfil their roles. Processes that ensure confidentiality must not be allowed to unduly delay the necessary dissemination of information.

Similarly, processes must serve the government commitment to openness. In particular, members of procurement teams must be aware of government policy on the public disclosure of bidding and contract-related information. Government requirements are set out in the website of the Victorian Government Purchasing Board, referred to above.

Although public servants are under ongoing obligations concerning probity, resulting from provisions of the *Public Sector Management and Employment Act 1998* and the Code of Conduct for the Victorian Public Sector, it nevertheless is wise to bring these obligations to their attention for a particular project. External advisers and others who are not bound by these provisions should be required to enter into a confidentiality undertaking of the nature of that set out in Appendix C2.

Some matters relevant to confidentiality are also referred to earlier in this Guide, in Chapter 19 (Intellectual property).

21.4 Bid and bid evaluation documents

The highest level of confidentiality is accorded to bids and bid evaluation documents. Typically, a limited quantity of numbered documents is stored in a secure place with access granted only to authorised persons who have a need for access. It may be appropriate to specify that work with the documents is to be performed only at that secure place, except that bid evaluation material with coded bidder identification may be removed for specific purposes, subject to appropriate safeguards.

21.5 Conflicts of interest

A conflict of interest arises where a member of a procurement team or an adviser to a procurement team has an affiliation or interest which might be seen to prejudice their impartiality. Conflicts of interest are commonplace and, provided they are identified early and dealt with effectively, are manageable without detriment to the project.

Responses to a conflict of interest, or potential conflict of interest, will vary depending on the circumstances. At one extreme, the conflict of interest may require the individual to be removed from the project. At the other end of the scale, it may be resolved simply by documentation and declaration of the conflict of interest. External advice, usually from the probity auditor engaged on the project, may be necessary to ensure appropriate resolution of any issues. The important point is to ensure that all members of the procurement team, and their advisers, declare any conflicts of interest before the beginning of the bidding process.

Equally important is the establishment of arrangements to identify and address any new or enlarged conflicts arising during the procurement process. This is particularly the case with

respect to advisers, whose firms invariably work on a range of projects with a range of clients at one time. In particular, declarations of interest should be reviewed when the identity of bidders and associated parties is known.

Not only must conflicts of interest be managed, but also the perceptions of a conflict of interest. Where perceptions of a conflict of interest have been identified, communication of the actual situation to interested parties (particularly bidders) may be warranted.

A template declaration of interest form, issued by the Victorian Government Purchasing Board, is included in Appendix C3. Members of the steering committee, the procurement team and others who may be in a position to influence decisions in any way should complete a declaration of this nature in sufficient time to allow it to be studied by the authorised officer, and for that officer to obtain advice on handling any issues.

21.6 Probity auditor

Partnerships Victoria projects are of sufficient size and complexity to warrant appointment of an independent probity auditor, who should be engaged before an approach is made to the market requesting expressions of interest.

The project probity plan should meet the requirements of the probity auditor and be endorsed to that effect by the auditor. Any subsequent departures from the probity plan should be discussed with the probity auditor and recorded.

The probity auditor is commonly an observer in dealings between bidders and the procurement team, such as at presentations and interviews. The probity auditor should also be available generally to answer questions and provide advice to the procurement team, steering committee, or the Secretary or chief executive of a department or agency.

Before a recommendation to sign a contract is made to the Minister, the Secretary or chief executive and the steering committee should require the probity auditor to report to them on the bidding process. The report should confirm that the probity plan has been followed and that all processes have been conducted equitably. A sample report template is provided in Appendix C (Probity documents).

Although there is no mandatory qualification, the probity auditor selected should be a respected professional with appropriate commercial experience, business acumen, problem-solving capacity and integrity. The probity auditor should be independent of political or commercial pressures. A draft sample brief for engaging a probity auditor is included in Appendix C.

22. Government approvals

The *Partnerships Victoria* policy provides:

'For each project, approval by Cabinet is required before Expressions of Interest are sought and again before the release of a Project Brief to shortlisted bidders. Release of the Project Brief is a significant milestone as it signals that the Government is prepared to proceed with the project provided that a conforming bid offering value for money in comparison with the Public Sector Comparator is received. The portfolio Minister will also inform the Treasurer before documentation is signed'.⁵

Part Two of this *Practitioners' Guide* sets out the major stages for developing a *Partnerships Victoria* project. This chapter summarises the government approval requirements through the process, referring specifically to processes that are observed at the time of publication. Significant changes to these processes or requirements will be identified on the *Partnerships Victoria* website at www.vic.gov.au/treasury/partnerships.html.

Identification of the service need for the project falls within the normal planning process of a department or agency, and the appropriate approval process during these stages will be determined at that level.

22.1 Project approval

Before approval is sought for the invitation of Expressions of Interest or for release of a Project Brief to shortlisted bidders, government approval to develop the project is necessary.

(i) Budget sector entities

Cabinet approval is required for project funding and endorsement to develop a *Partnerships Victoria* project. Potential *Partnerships Victoria* projects go through the same evaluation process initially as proposed public procurement projects. Regardless of the preferred means of provision, the proposal must first achieve endorsement and budget funding allocation from the Expenditure Review Committee of Cabinet.

All asset investment bids to the Expenditure Review Committee require an individual asset proposal template to be submitted. The Department of Treasury and Finance advises departments of the required timing and format of submissions, as well any further specific details required for projects proposing a *Partnerships Victoria* approach, as part of the annual budget information process.

The Expenditure Review Committee requires all proposals' costings to be agreed with the Department of Treasury and Finance before submissions are lodged with the Cabinet Secretariat. For *Partnerships Victoria* proposals, applications are supported by a business case as set out in Chapter 7.

For budget sector projects that do *not* require budget funding, this Expenditure Review Committee submission is not required. However, Cabinet approval for the project is still required at this stage and submissions are likely to be put to the Economic Development Committee of

⁵ Department of Treasury and Finance, *Partnerships Victoria*, Melbourne, 2000, p. 12.

Cabinet or its equivalent. The Department of Treasury and Finance contact officer for a department can advise on the process to follow at a particular time or for a particular project.

(ii) Government business enterprises

The *Partnerships Victoria* policy, when applied to the provision of infrastructure by a government business enterprise, is determined on a project by project basis, following consideration of the enterprise's business plan by the responsible Minister.⁶

If the project requires budgetary funding, either directly or indirectly, for associated works, the project will need to be considered by the Expenditure Review Committee of Cabinet.

Once a *Partnerships Victoria* approach is determined by the Minister, and any funding issues resolved, the project proposal is referred to the Economic Development Committee of Cabinet for approval, or the approval process may follow a streamlined process such as already in place for non-metropolitan urban water authorities.

This streamlined process takes account of the different governance arrangements for such authorities, including government-appointed boards. If the responsible Minister and the Treasurer agree, the process may be used for projects with a similar level of complexity and size, proposed by other government business enterprises.

The water authority or the other government business enterprise concerned prepares documentation for the appropriate approvals from relevant parties. The Department of Treasury and Finance can assist with the process and preparation of documentation if requested. A Department of Treasury and Finance officer is nominated for each project to assist with *Partnerships Victoria* policy matters and project delivery, as required.

In all circumstances, an application for project approval must be supported by a business case as outlined in Chapter 7. The application normally includes details of the membership and terms of engagement of a proposed procurement team, to be endorsed by the Minister and the Treasurer, although this endorsement may be sought later.

The *Partnerships Victoria* project proposals by government business enterprises that do not follow the streamlined approval process are considered by the Economic Development Committee of Cabinet or, in some cases, the Infrastructure Development Committee. Applications for project approval by the Committee are to be supported by the documentation identified above.

22.2 Approval to invite Expressions of Interest

(i) Budget sector

Cabinet (normally the Economic Development Committee) must approve the Expressions of Interest document before it is released to the market. Chapter 9 details what to include in an Expression of Interest document and Appendix A provides an example of the structure of the document.

⁶ Department of Treasury and Finance, op. cit., p. 4.

(ii) Government business enterprises

Following project approval, the non-metropolitan urban water authority or government business enterprise finalises the Expression of Interest document. Before release to the market, it must be forwarded to the Department of Treasury and Finance for review. For projects following the streamlined approval process, approval to release the invitation for Expressions of Interest may be given by the Treasurer. For other projects, the request for approval will be considered by the Economic Development Committee.

22.3 Approval to release a Project Brief and contract

(i) Budget sector

Cabinet approval, normally following consideration by the Economic Development Committee, is required before releasing the Project Brief and contract document. Chapter 9 provides guidance on what information to include in a Project Brief, and Appendix B provides an example of its structure.

Following receipt of bids in response to the Project Brief, the portfolio Minister (and Treasurer if appropriate) must endorse the procurement team's recommendation of a preferred bidder before any parties are advised.

During negotiations with the preferred bidder, Cabinet approval must also be obtained before varying any conditions or principles previously agreed. This relates, in particular, to any changes in the risk allocation which was agreed by Cabinet and set out in the Project Brief and contract issued to bidders.

(ii) Government business enterprises

Before releasing a Project Brief and contract to shortlisted bidders, the documents must be forwarded to the Department of Treasury and Finance for review. For projects following the streamlined approval process, approval to release the Project Brief and contract documentation may be given by the Treasurer. For other projects, the request for approval is considered by the Economic Development Committee or, in some cases, the Infrastructure Development Committee.

During negotiations with the preferred bidder, approval of the Treasurer or Cabinet (as appropriate) must also be obtained before varying any conditions or principles previously agreed.

22.4 Execution of the contract

(i) Budget sector

The portfolio Minister advises the Treasurer that the final contract conforms to the business case before the contract is executed.

(ii) Government business enterprises

Before contracts are executed, the Department of Treasury and Finance requires final sign-off from any professional advisers employed, confirming that acceptable commercial principles,

practices and value for money, in comparison with the Public Sector Comparator, have been achieved. The approval of the Treasurer is required before contracts are signed.

22.5 Exceptions and special projects

For specific projects, government may elect to follow a process of project development different from that outlined in Part Two, such as initiating special purpose legislation or setting up a statutory authority. While these circumstances may result in different approval processes, similar Cabinet approvals would still be required.

An example is the setting up of a joint working group and a special-purpose Cabinet committee to handle a group of rail projects.

23. Communications

This chapter discusses areas of communication to be considered in managing a *Partnerships Victoria* project and particularly when establishing a procurement team. Communication within the team, with bidders and potential bidders, and with stakeholders, interest groups and the media, are discussed.

A communications strategy should be established at, or prior to, the time of government agreeing to the project being implemented. This strategy may be drawn up as an early action of a project director, calling as necessary on external advice, but it needs the approval of the responsible Minister and preferably endorsement by corporate communications branches in affected departments and by the media unit.

23.1 Focus and purpose of project communications

Project communications have a variety of distinct purposes. The interests and needs of various stakeholders (bidders, users, investors, trade unions, politicians at local and State level and various special interest groups) vary widely, as do their perceptions of a particular project. A communications strategy should take account of the differing recipients, identify their likely concerns and possible misconceptions about the project, and provide a strategy to address and, where possible, mitigate these concerns. The strategy should also identify the key benefits and drawbacks of the project from the perspective of each group of stakeholders, and frame messages accordingly. Many of these benefits and drawbacks would have been identified with the application of the public interest test at the business case stage.

23.2 Consistency and clarity

Consistency and clarity in communications are important. On a major project, misunderstandings or perceived conflicts between statements can result in concern in the market or concern among stakeholders which, at a minimum, can result in lost time. Messages from government will also be filtered and sometimes blurred by the media before reaching their target audience. A communication strategy must identify the individuals authorised to speak for particular purposes and also the means by which their communications can be relayed quickly to others connected with the project.

23.3 Internal communications

The style and processes of communicating information and ideas within a procurement team vary with the management style of the most senior members. Tension may exist between a desire for an open, inclusive management style on the one hand and the dictates of probity and confidentiality on the other. Members of the team will have particular information needs that may be overlooked at busy times. The communications strategy should recognise the particular information needs of each member and others related to the project. Administrative arrangements should be designed to ensure that information is shared accordingly.

23.4 Bidders and potential bidders

Whatever the public communications strategies of the procurement team, specific processes are essential to ensure that bidders are properly briefed as the project goes forward. The key information on the bidding process itself will normally be combined in Project Briefs, information

memoranda, and data rooms, but it may also be wise to ensure that relevant public statements by Ministers and other public figures are quickly communicated to bidders and, where necessary, explained and put in their proper context. The more controversial or high profile the project, the more important such processes are likely to become.

On any large project, the Expression of Interest document is likely to be presented at a forum for interested parties (see Chapter 9). This is generally preceded by consultation with potential bidders, members of the public affected by the project and other stakeholders. Presentation of the Expression of Interest document in this way provides an opportunity for government's objectives, the hurdles that must be met and any other constraints to be explained. It also provides an opportunity for potential bidders to ask questions and clarify issues. Together, this improves the efficiency and outcome of the bidding process for all concerned

23.5 The public interest

The public interest should be considered from the outset of a project. The *Partnerships Victoria* policy is committed to protecting the public interest and determines that each potential project is to be assessed against the public interest. (Chapter 17 describes the public interest test to be applied.)

Public communication and consultation is one part of the public interest consideration. With any project, time must be given for the public and special interest groups to voice concerns and opinions.

Public consultation varies from project to project. In selecting the appropriate public consultation strategy, the procurement team should consider the size, complexity and sensitivity of the project. For small and non-controversial projects, consultation may need as little as ensuring notices appear in the local press. Other projects require a more elaborate process including regular press releases on project topics, public forums, and calling for and considering public submissions.

23.6 The market

Whether planned or not, each project communicates some messages to the infrastructure market. The market is particularly interested in the efficiency of processes, their predictability, probity and the like. A project bearing the *Partnerships Victoria* label benefits from market perception of reliability signalled in the name. However, any project also has potential to damage that market perception.

Against this background, it is important that communications about a project are consistent with the actions of the procurement team. For example, if the project is to include broad consultation with interested parties, interaction should be visible and any outcomes must be properly considered in framing the Project Brief. A failure to do so could draw the process into disrepute.

23.7 Scope of communications

A *Partnerships Victoria* project aims to procure certain *outputs*, which are required by government to achieve its particular *outcomes*. Thus, for example, while government may be pursuing the *outcome* of improved access to health services in a region, the procurement team may be commissioned specifically to procure the *outputs* of a particular number of hospital beds and some related services.

Clarity about this distinction can be particularly important, and the procurement team's work should relate only to its specific commission. The success of the team should not be related to

the *outcomes* sought by government nor the validity of the process which defined the required outputs.

A sound communications strategy succinctly defines the project objectives at an early stage and assists all members of the procurement team to use that definition consistently thereafter.

23.8 Disclosure of contract information

Government policy at the time of publication of this *Practitioners' Guide* requires maximum disclosure of all government contracts over \$10 million in value. Headline details of contracts valued between \$100 000 and \$10 million must also be disclosed.

To facilitate this process, the Victorian Government Purchasing Board maintains a contracts publishing system database, accessible via the Internet at www.contracts.vic.gov.au. Contracts with a value greater than \$10 million must be published in full (except possibly for specific detail clearly identified in the policy) on the Internet site, along with the original Project Brief documentation.

Further information on the contract disclosure policy and process can be obtained from the Victorian Government Purchasing Board Internet site.

Appendices

Model documents are provided to assist with:

- preparation of bid documents;
- observance of probity;
- conduct of a public interest test;
- analysis, mitigation and allocation of risk; and
- planning a project timeline.

Appendix A: Expression of Interest template

This template details the headings and typical contents that are expected in a *Partnerships Victoria* Expression of Interest document. The template is provided as a pro forma to assist the development of the Expression of Interest document for a *Partnerships Victoria* project. Every Expression of Interest document should be prepared taking into consideration the particular requirements of the project and this may require modifying the proposed headings and supplementing the proposed contents.

Consideration must be given to the availability, form and supply of all documentation supporting the Expression of Interest document. This may include policy material, industry statistics, technical reports, project reports, department or agency financial information and any other documents of potential interest to bidders. These documents can be:

- available in a data room;
- attached to the Expression of Interest; or
- not made available (legal advice should be sought if a decision is made to not disclose documents that could assist bidders in their bid or their decision to express interest in the project).

Expression of Interest template	
Heading	Contents
Introduction	This section gives a high level introduction to the project and advises that the process for delivery of the project conforms with the <i>Partnerships Victoria</i> policy.
Purpose and background	<p>This section gives bidders a context of project delivery within Victoria and the policies and practices pertaining to the project and the department or agency. It also gives an introduction to the project and its purpose. This includes:</p> <ul style="list-style-type: none"> • background of investment in Victoria and the Partnerships Victoria policy; • background information on the department or agency and its status and objectives in relation to government policy and reform; • industry information, where relevant, e.g. industry structure, regulatory arrangements, status of demand for services; and • purpose of the transfer of risk from government to a private party, what will be achieved in transferring funding, ownership, construction and operational risks.

Expression of Interest template	
Heading	Contents
The project	<p>This section gives bidders an understanding of the requirements of the project. This includes:</p> <ul style="list-style-type: none"> identifying the project objectives which have been identified to satisfy the service needs of the community; a history of relevant service delivery leading up to the identified service needs; the outputs to be delivered, in general terms (e.g. quality and quantity) and how they can be measured; details of the site location and characteristics, if it is proposed to use an existing government asset; reference to any environmental considerations that are known to impact on the project, including any known requirement for an environmental effects statement; and the development standards that are to apply to the project.
Risk allocation	<p>This section summarises the risk allocation acceptable to government including reference to variant risk allocations that may be acceptable. It should include a risk matrix that details all major risks and who will be allocated each risk under the contract.</p>
Pricing	<p>This section should identify key pricing issues such as potential revenue sources, base rentals payable, any concession periods, project life etc.</p>
Commercial issues	<p>This section should only be included where feedback on commercial issues is required from bidders at Expression of Interest phase.</p> <p>The section details the expected structure of commercial issues that will be included in the contract and can be used to explore the expectations and understanding of the bidders. This could include details relating to specific provisions that will be required in the contract such as leases, financial and other risk allocation, ownership, operation, milestones, asset and equipment provision, responsibility for planning approvals, environmental effect statements, step-in rights, technology updates, future business expansion, dispute resolution. The feedback received can often be used to assist in finalising the commercial principles that will be written into the contract.</p>
Evaluation process	<p>This section details the evaluation process that will be used to shortlist bidders. It includes:</p> <ul style="list-style-type: none"> an outline of the assessment and selection processes to be followed; and expected outcomes of assessment, i.e. shortlisting of bidders and that shortlisted bidders will receive a Project Brief sample and contract.

Expression of Interest template	
<p>Evaluation criteria</p>	<p>This section details the evaluation criteria, against which bids will be evaluated. The criteria relate solely to the capability of the bidder to meet government objectives for the project, and are used to shortlist bidders. Consideration should be given to the possible structure of the bidders and how the criteria will be applied to the bidding entity and the individual members of the entity. The evaluation criteria should include:</p> <p>Finance:</p> <ul style="list-style-type: none"> • financial capacity of the bidding team, its financial resources and corporate credibility. This could include issues such as credit ratings and balance sheet strength; • level of financial commitment that parties to the bid are willing to commit, e.g. balance sheet or other form of financial support; and • the likelihood that the bidder will be able to secure finance. <p>Commercial:</p> <ul style="list-style-type: none"> • demonstrated understanding of the project risk transfer; • acceptance of the risk matrix of the project; • proposed charging/pricing regimes, if applicable (although no detailed pricing information is required at this phase, it may be prudent to test the attitude and understanding of charging/pricing regimes at this stage); and • understanding of government policy objectives, particularly those of Partnerships Victoria. <p>Service delivery:</p> <ul style="list-style-type: none"> • demonstrated understanding and ability to meet the project objectives and the functional requirements outlined in the Expression of Interest invitation; • proven ability to deliver similar projects; • proven ability to deliver the quality of services at cost-efficient prices; • managerial/technical capacity to deliver the project; • current commitments of the bidder, consortium members and any other parties nominated in the bid; • the broad approach the bidder intends to adopt (as an indication of capability); • demonstration that the bidding entity has a commitment from the named parties to participate in the project; • record of maintenance of industrial and community relations; and • any history of contractual disputes in previous projects. <p>Skills and relevant experience:</p> <ul style="list-style-type: none"> • required balance of skills in the bid team; • proven ability to achieve service delivery requirements and proposed asset quality; and • track record in project delivery and quality assurance.

Heading	Contents
General terms and conditions	<p>This section details the terms and conditions of the Expression of Interest. It should be prepared with consideration of the terms of the disclaimer section. It should include clauses that cover the following issues:</p> <ul style="list-style-type: none"> • responsibility of bidders throughout the entire process to observe all regulatory, statutory and legal requirements and, during the final negotiation stage, any requirements to finalise taxation advice and seek taxation rulings before completing financial and legal documentation; • the process will be managed in accordance with the <i>Partnerships Victoria</i> policy and that the EoI should be read in conjunction with <i>Partnerships Victoria</i>; • the closing date and place for submission of Expression of Interest responses, including how late submissions will be treated; • the number of copies required and the required format for responses (nominating whether submissions must be sealed, whether submissions are acceptable by facsimile, email etc); • details of how queries about any aspect of the Expressions of Interest document will be managed; • details of how contact with the bid team and site inspections will be managed; • any payments or deposits required from shortlisted bidders, e.g. it is sometimes considered appropriate to incorporate the recovery of the costs of preparing Project Brief documents, the recovery of performance bonds or a portion of costs for assessing complex bids from the bidders; • independent investigation may be undertaken by the department or agency to verify the accuracy of statements made or to clarify information in each submission; • the status and use of the Public Sector Comparator in assessing later bids; • bidders must advise the project director promptly of any perceived errors, ambiguities or discrepancies in the Expression of Interest; • maintain the right to seek additional information from bidders; • the onus is on bidders to obtain timely approvals from the Foreign Investment Review Board, if relevant; • the treatment of intellectual property; • all bidders are required to enter into confidentiality agreements; • indicative timeframe for the bid process through to project commissioning; • the status of probity processes; • all documents submitted will be retained by the department or agency and are protected by confidentiality provisions in the Code of Conduct for the Victorian Public Sector and by confidentiality agreements signed by agency staff and project advisers; and • the government is not required and does not intend to release any details regarding the evaluation process after it has occurred.

Expression of Interest template	
General terms and conditions (cont'd)	<ul style="list-style-type: none"> the government is not required and does not intend to release any details regarding the evaluation process after it has occurred.
Disclaimer	<p>This section details a necessary disclaimer that aims to protect the department or agency. It should be prepared in conjunction with the legal adviser and includes:</p> <ul style="list-style-type: none"> non-acceptance by the department or agency of responsibility for any loss or damage that may arise from interpretations, errors or omissions from their Expression of Interest document; a statement that details the status of information supplied to bidders as part of the Expression of Interest process; bidders should not rely on representations made by government employees and their agents in relation to the project, other than expressly provided for in the Expression of Interest document; all submissions require a waiver of rights to claim costs or to appeal against a decision arising from the process; the department or agency has the right to accept or not accept, or not to proceed with any or all of the bids received. Government maintains the right to terminate the process after the receipt of Expressions of Interest; and the Government will have no contractual or other obligation as a result of the Expression of Interest.

Format for responses

The required format for responses to the Expression of Interest document should be carefully considered. To ensure that the responses are tailored to suit the assessment team requirements, it is useful to request that information be submitted in a uniform manner aligned to the selection criteria. The responses are normally structured in separate schedules to be submitted by the bidder and may include the following.

Format for responses to Expressions of Interest document	
Response heading	Required contents of bid
Identification of bidder	<ul style="list-style-type: none"> Details about the identity of the company or companies expressing interest (including all members of any consortium); the nature and structure of each bidding party; the legal and financial relationships of the bidding entities; details of all consultants and advisers; relevant roles and responsibilities of the parties; contact names and addresses, telephone and facsimile numbers; and any other relevant information.

Format for responses to Expressions of Interest document	
Response heading	Required contents of bid
Service delivery	<p>Bidders should be advised that responses under the service delivery heading will be analysed for two purposes:</p> <ol style="list-style-type: none"> 1. to gauge the capability of the bidder; and 2. to identify any particular approaches that should be accommodated in drafting the Project Brief. <p>Bidders should provide:</p> <ul style="list-style-type: none"> • an outline of an indicative approach to service delivery; • physical assets and technology expected to be used, including the introduction of new technology; • demonstration of the bidder's ability to meet defined project objectives; and • details relating to their quality assurance program.
Skills and experience	<ul style="list-style-type: none"> • Bidders should demonstrate technical capacity to undertake the proposed development and management of continuing operations; • skills, experience, resources and expertise in projects of a similar scale, including any history of participation in projects involving comparable documentation, negotiations, and development activity; • proven ability to deliver projects on time and to budget; • experience in the management and delivery of services; • qualifications of any consultants or contractors selected; and • experience in dealing with government agencies, community groups and other interested parties.
Financial capability	<ul style="list-style-type: none"> • Audited financial information for the past three years which establishes the financial position of each party to the bid; • financial capacity to undertake the project, including in-house capacity and access to external financial resources; • level of financial commitment by all parties to the bid; and • the status of the bid with respect to securing finance-the bidder must demonstrate the likelihood and manner in which finance will be secured.
Commercial	<ul style="list-style-type: none"> • An indication of the preferred approach to funding the development, including the nature of potential equity and debt provision; • demonstrated understanding of the project position on risk allocation; and • feedback on any issues raised in the 'commercial issues' section of the Expression of Interest document.

Format for responses to Expressions of Interest document	
<p>Legal</p>	<ul style="list-style-type: none"> • Bidders must provide a statement of actual or potential conflicts of interest; • disclosure of legal convictions against the bidder(s), related bodies corporate (under the Corporations Law), or any of their major shareholders or directors; • written agreement to probity investigations of any company or directors by the Victoria Police, the Australian Federal Police or the Australian Securities and Investments Commission; and • a statement that the bidder is willing to comply with any confidentiality requirements of the department or agency.
<p>Documentary requirements for bidders</p>	<ul style="list-style-type: none"> • The Expression of Interest submission must be signed by: <ul style="list-style-type: none"> ➢ the managing director, secretary or other director (where the bidder is a corporation); or ➢ a representative of each member of the partnership or consortium (where the bidder is a consortium); and ➢ other members of the bid team deemed appropriate. • The submission must include explicit agreement to the department or agency's requirements in relation to: <ul style="list-style-type: none"> ➢ copyright; ➢ waiver of any right to claim costs or to appeal against decisions arising from this process; and ➢ explicit certification that the bidder has all Expression of Interest documents.

Appendix B: Project brief template

This Project Brief template details the headings and typical contents that are expected in a *Partnerships Victoria* document. The template is provided as a proforma to assist the development of the Project Brief for a *Partnerships Victoria* project. Every Project Brief should be prepared taking into consideration the particular requirements of the project and this may require modifying the proposed headings and supplementing the proposed contents.

Consideration must be given to the availability, form and supply of all documentation supporting the Project Brief. This may include policy material, industry statistics, technical reports, project reports, department or agency financial information and any other documents of potential interest to bidders. These documents can be:

- available in the data room;
- attached to the Project Brief; or
- not made available (legal advice should be sought if a decision is made to not disclose documents that could assist bidders with their bid.)

This template has been prepared on the basis that all available data is to be disclosed and that certain documents that assist with the description of the project requirements are included as attachments to the Project Brief. It is assumed that the Project Brief will be accompanied by a contract.

Project Brief template	
Heading	Contents
Introduction/background	This section gives the status of the project delivery in the context of the project conforming to the Partnerships Victoria policy . It should detail the significance of the issuing of the brief, as the policy indicates that government is prepared to proceed with the project provided that a conforming bid offering value for money in comparison with the Public Sector Comparator is received.
Project objectives and outputs	This section details the objectives of the project and the outputs required.
Commercial principles	<p>This section should provide, as an aggregate figure, the Raw PSC with Competitive Neutrality adjustments and should set out the key assumptions adopted in construction of the PSC.</p> <p>This section may also include discussion on the significance to government of some of the key terms of the contract. This should only be done where there is a special requirement or issue surrounding a term and should include a caveat that the discussion serves to describe, but not override, the rights and obligations specified in the contract.</p> <p>It may contain details on the policy of private sector provision of infrastructure and the general philosophy of private party's risk acceptance associated with items of particular relevance to the project including design, development/construction, financing, taxation and commercial risks (market, insurance, inflation/costs, industrial relations), default, ownership, commissioning/delivery, management, technology and maintenance and repairs.</p>

Project Brief template	
Heading	Contents
Technical requirements	<p>This section details the technical requirements of the project. They should be detailed in terms of outputs rather than detailed specifications. For example, conventional specifications for a concrete structure will detail items such as concrete strength, aggregate type, reinforcement grade, cover to reinforcement and a number of other parameters; an output requirement would be that the structure has a design life of (say) 50 years. By stating the requirements in this manner, the aim is to maintain maximum flexibility in the options available to satisfy the objectives and to encourage innovative proposals while effectively allowing the design risk to be managed by the bidder.</p> <p>Other issues that should be detailed in this section are:</p> <ul style="list-style-type: none"> • the status of environmental issues on the project and the environmental effects statement (if any); • requirements for review and monitoring of performance of the contract; • status of property issues including ownership, caveats, property acquisition, permits and approvals; and • the role of the procurement team and probity auditor. <p>It is probable that the technical information supporting the project will constitute many documents that are attachments to the Project Brief or are contained in the data room.</p>
Evaluation process	<p>This section details the evaluation process that will be used to assess bids. It includes:</p> <ul style="list-style-type: none"> • the anticipated timetable for the bid and subsequent phases of the project; • an outline of the assessment and selection processes to be followed — this should include details of the evaluation panel and approval process; • that during the evaluation period, the bidder(s) may be requested to provide information by way of clarification, provide new information and/or lodge a revised or replacement offer; • expected outcomes of assessment, i.e. selection of a preferred bidder (if any); • a statement that neither the full evaluation process nor the analysis of the bids is to be released to bidders.
Evaluation criteria	<p>This section details the criteria against which bids will be evaluated. The criteria relate solely to the ability of the bids to meet or better the PSC and government objectives for the project. The evaluation criteria should be determined individually for each project. However, generally they can be ranked under the headings: overall criteria, commercially, technical, and service delivery, and should include:</p> <ul style="list-style-type: none"> • Overall criteria <ul style="list-style-type: none"> ➢ understanding of government policy and conformity with objectives; ➢ compliance with submission requirements; ➢ ethical and probity record;

Project Brief template	
Heading	Contents
Evaluation criteria (cont'd)	<ul style="list-style-type: none"> ➤ extent to which bidders can enhance performance objectives or add special value; and ➤ civic compliance elements. • Commercial <ul style="list-style-type: none"> ➤ the financial returns (or costs) of the bid measured in terms of net present cost to government; ➤ the proposed financing structure including the level, nature and degree of debt and equity; ➤ the strength and integrity of the proposed financing arrangements-this may be demonstrated by letters of guaranteed commitment from financiers; and ➤ the extent of support offered by parent companies and other bid entities. • Risk <p>Acceptance by a bidder of the risk profile that is acceptable to the department or agency is a critical component of a <i>Partnerships Victoria</i> project. The acceptance of the project's risk profile is demonstrated by the submission of a conforming bid which, by definition, includes acceptance of the contract and the risk profile embedded within it. A conforming bid may exceed the proposed requirement of the contract through enhancements. The extent (if any) to which a bid is non-conforming, or is a conforming variant bid, must also be established.</p> • Infrastructure/building <ul style="list-style-type: none"> ➤ the benefits and impacts on the public of the infrastructure solutions outlined in the bid; ➤ the strength of the proposed organisational structure; ➤ the industrial relations strategies; ➤ the adequacy of the proposed infrastructure assessed against its ability to meet the outputs specified in the Project Brief. This will include: <ul style="list-style-type: none"> – the level of confidence in the performance of assets; – required timing to achieve improved performance levels and credibility of benefits; – strength of operational processes; – flexibility of approach to changes in volume or scope; and – any legislative difficulties in implementation. ➤ design and construction in terms of functional, technical, operational and appearance criteria. The overall quality of engineering; architectural and landscape design; environmental considerations; construction methods and work program for the project; nominated resources;

Project Brief template	
Heading	Contents
Evaluation criteria (cont'd)	<p>engineering services, overall layout and relationships between spaces; traffic management and integration with service delivery and emergency management;</p> <ul style="list-style-type: none"> • Service Delivery <ul style="list-style-type: none"> ➢ ability of bidder's management structure to deliver the project outputs; ➢ degree to which proposals conform to the requirements of the Project Brief; ➢ degree of commitment and timing to achieve improved performance levels, as indicated by a proposed payment structure; ➢ quality assurance program; and ➢ the experience of the team nominated in the bid.
Information to be submitted and lodgement	<p>This section includes:</p> <ul style="list-style-type: none"> • the closing date and place for submission of bids, including details of how late bids will be treated; • the number of copies required and the required format for responses (nominating whether submissions must be sealed, whether submissions are acceptable by facsimile, email etc.); • the required scope of bids including confidentiality; compliance; warranties and acknowledgments, execution of submissions, guarantors, schedules to be completed, additional information from bidders; and • if considered appropriate, bidders may be invited to deliver a presentation to cover all or key aspects of their bid, if it will assist in clarifying matters raised in their bid.
Liaison, inquiries, data room protocol and project briefings	<p>This section includes provisions regarding:</p> <ul style="list-style-type: none"> • information with respect to the location, management, contents and protocol for access to the data room; • protocol for managing requests for additional information and clarification during the bid phase. It is usual that all requests are made in writing and that responses and any additional information are copied to all bidders; • all inquiries and contact from the bidder are to be made to a nominated representative of the department or agency, usually the project director; • within a short period from the issue of the Project Brief, each bidder is to nominate a representative for the bidder who shall be able to take binding actions on behalf of the bidder; and • a protocol for managing site visits and clarification sessions if required.
Conditions of bid	<p>This section details the conditions surrounding the bid and includes clauses covering:</p> <ul style="list-style-type: none"> • the nature of the bid constituting an offer that is capable of acceptance by the agency or department; • the validity period of the bid;

Project Brief template	
Heading	Contents
Conditions of bid (cont'd)	<ul style="list-style-type: none"> the department or agency will not in any circumstance accept responsibility for any costs that are incurred by a bidder; the department or agency reserves the right to make amendments to the Project Brief; and the Project Brief should also provide that bids conforming to all requirements of the brief and contract constitute conforming bids and will be considered in accordance with <i>Partnerships Victoria</i>. The Project Brief should also identify parameters within which variations to the provisions of the brief and the contract will be accepted and the terms on which they will be accepted and evaluated. An undertaking should be given to consider such variant bids if they are accompanied by a conforming standard bid. The conforming variant bid would be considered against the PSC with appropriate risk adjustment. The Project Brief should specify that any bid that is not submitted in accordance with these provisions may be deemed a non-conforming bid and may not be considered further.
Disclaimer	<p>This section details a necessary disclaimer that aims to protect the department or agency. It should be prepared in conjunction with the legal adviser and includes clauses covering:</p> <ul style="list-style-type: none"> bidders must make own independent assessment and not rely on information in the Project Brief; the information provided may not contain all the information that a bidder may require to complete their bid; the department or agency may update, amend or supplement information provided; the Project Brief does not constitute an offer and does not constitute an intention to enter into legal relations with a bidder; the department or agency does not accept responsibility for any loss or damage that may arise from interpretations or omissions from any information provided; a statement that details the status of information supplied to bidders as part of the bid process; bidders should not rely on representations made by government employees and their agents in relation to the project, other than expressly provided for in the Project Brief; all submissions require a waiver of rights to claim costs or to appeal against a decision arising from the process; and the department or agency has the right to accept or not accept, or not to proceed with any or all of the bids received. <p>If considered appropriate, many of the requirements of the disclaimer can be written into the 'conditions of offer' section of the document in the form of the bidder giving a warranty that each condition has been met. For example, a clause can be included: 'By submitting a bid, the bidder makes the following representations and warranties: The bidder has carried out all relevant investigations. The bidder has not relied on any representations made by government employees etc.'</p>

Project Brief template	
Heading	Contents
Attachments	<p>The following types of document are normally included with the project brief to assist in giving the bidder a full understanding of the project and fully detailing the requirements on the bidder.</p> <ul style="list-style-type: none"> • Technical <ul style="list-style-type: none"> ➢ performance requirements, technical and functional/operational specifications (where necessary), including integration and interface requirements, testing/commissioning of systems and other assets, and the transfer and disposal of assets; ➢ site details including requirements in relation to location, accessibility, existing infrastructure and services to the site, any special site characteristics, future expansion, environmental constraints, control and ownership of the site and the status of planning controls and approvals; ➢ minimum development standards and any necessary facility design and construction requirements; ➢ relevant policy objectives; ➢ government policies for that industry or policies with potential to impact on the project; and ➢ industry information, where relevant e.g. industry structure, regulatory arrangements, status of demand for services; • List of documents available in the data room.
Contract	<p>A contract is included with the Project Brief. The contract clauses must reflect the risk allocation approved by Cabinet and all of the Commercial requirements of the project. It should be structured in such a way to facilitate the incorporation of the technical requirements of the successful bid, usually as annexure. The contract typically consists of several documents, which are required to fully document the complex structure of the transaction.</p> <p>It would typically contain the following:</p> <ul style="list-style-type: none"> • Project agreement. The agreement typically covers all issues relating to the legal and commercial agreement between the parties and could include the following: <ul style="list-style-type: none"> ➢ conditions precedent; ➢ representations and warranties; ➢ guarantees; ➢ design obligations; ➢ project management arrangements including independent engineer (if applicable); ➢ construction obligations; ➢ completion; ➢ operation;

Project Brief template	
Heading	Contents
Contract (cont')	<ul style="list-style-type: none"> ➤ toll/pricing; ➤ payments; ➤ change in law; ➤ property; ➤ assumption of risks; ➤ government step-in rights; ➤ default regime; ➤ auditing and monitoring; ➤ termination; ➤ security for performance; ➤ probity warranties; ➤ insurance; ➤ indemnities; ➤ dispute resolution; ➤ force majeure; ➤ change in control; ➤ conflict of interest; ➤ Foreign Investment Review Board approval; ➤ competition and consumer affairs matters; ➤ involvement of and arrangements with financiers; ➤ taxation requirements; ➤ reporting requirements for contract management; and ➤ requirements for review and monitoring of the contract. <ul style="list-style-type: none"> • Lease. A lease to cover the agreement to occupy department or agency land for the duration of the project. • Multi-party agreement. A document or documents that recognises the rights and obligations of third parties to the transaction, typically the financier on a <i>Partnerships Victoria</i> project.

Format for responses

The required format for responses to the Project Brief should be carefully considered. To ensure that the responses are tailored to suit the assessment team requirements, it is useful to request information to be submitted in a uniform manner aligned to the selection criteria and the evaluation process to be followed. The responses will normally be structured in separate sections and may be requested to be in the form of an electronic bid template or in the form of schedules to be submitted by the bidder. The bid template or schedules may include the following:

Format for response to the Project Brief	
Heading	Contents
Schedules	Schedule 1: Bid form Schedule 2: Tolling and escalation Schedule 3: Toll adjustments Schedule 4: Financial template, including the bidders' financial model Schedule 5: Technical proposal Schedule 6: Programs Schedule 7: Site requirements Schedule 8: Commercial issues Schedule 9: Insurance Schedule 10: Quality assurance Schedule 11: Environmental Schedule 12: Performance guarantees Schedule 13: Operation and maintenance manuals

Appendix C: Probity documents

This appendix contains the following probity-related documents:

- C1: Probity plan template
- C2: Confidentiality deed (sample)
- C3: Declaration of interest (sample)
- C4: Brief for engaging a probity auditor (sample)
- C5: Probity auditor's sign-off report template.

C1: Probity plan template

The following is a list of some tasks that should be detailed in a probity plan. Production of various of the documents listed below may be necessary to establish that probity was achieved. Content of a probity plan should take account of government guideline material that may be available at the time. Refer to the Victorian Government Purchasing Board website at www.vgpb.vic.gov.au.

Probity plan template	
Task	Document
Implement brief interim probity procedures, pending government approval of a project.	Interim probity procedure
Conduct preliminary market soundings and consultation with stakeholders.	<ul style="list-style-type: none"> • consultation plan • records of discussions and correspondence
Appoint a steering committee and a project director.	<ul style="list-style-type: none"> • records of the selection and engagement process • statements of roles and powers • declarations of interest • confidentiality undertakings
Appoint a procurement team and a probity auditor.	<ul style="list-style-type: none"> • records of the selection and engagement process • statements of roles and powers • declarations of interest • confidentiality undertakings
Settle the probity plan	<ul style="list-style-type: none"> • plan endorsed by the probity auditor

Probity plan template	
Task	Document
Develop a statement of probity administrative arrangements, including: <ul style="list-style-type: none"> • levels of authority; • decision making processes; • authorised contact persons; and • storage, access to, dissemination of information and records, including bids and bid evaluation documents. 	<ul style="list-style-type: none"> • procurement team manual
Implement training and induction processes as appropriate. Create a probity culture.	<ul style="list-style-type: none"> • Records of actions taken and participation
Tape EoI briefing meetings (with agreement of all attendees) and record attendance. Prepare a summary report of the tape for bidders and post it on a website or make it available in hard copy.	<ul style="list-style-type: none"> • summary report • tape(s) • record of attendees
Many of the tasks listed below are undertaken for both Expressions of Interest and bids in response to a Project Brief. A developed probity plan would list the tasks for each, setting out procedures appropriate to the particular project.	
Include in bid documents the intended process for managing bids. Include evaluation criteria and selection processes; state how late and non-conforming bids will be dealt with and request declarations of any bidder's conflicts of interest. Maintaining the process should not hinder consideration of alternative or innovative bids. If changes in evaluation criteria through the process seem likely, redraft specifications to ensure predictable format of responses.	<ul style="list-style-type: none"> • invitation documents including <ul style="list-style-type: none"> ➢ bid acceptance process ➢ proposed bid evaluation process • timetable
Set up process for receipt, recording and acknowledgment of bids. Ensure no bids are opened prior to the close of the bid period.	<ul style="list-style-type: none"> • register of bidders • copy of letters acknowledging receipt
Set up information procedures to ensure all bidders have access to the same information and that commercial-in-confidence information is only available to those who need it; significant clarification or further detail is provided to all bidders equally; telephone queries are handled by a single designated contact; file notes are made of all conversations, etc.	<ul style="list-style-type: none"> • list of procedures • file notes • copy of letters • record of all inquiries, and responses
Confirm the receipt and currency of all conflict declarations when the identity of bidders is known.	<ul style="list-style-type: none"> • conflict declarations
Lock up documents and ensure they are kept secure at all times.	<ul style="list-style-type: none"> • list of procedures
Confirm requirements of specification and details of selection criteria. Notify bidders of any significant alternations. If there are changes, allow all bidders the (same) time and opportunity to re-submit bids.	<ul style="list-style-type: none"> • minutes of meeting(s) • copy of letters • assessment methodology for novel or non-complying bids
Assess bids in a timely manner.	<ul style="list-style-type: none"> • timetable, as amended
Document interviews with shortlisted bidders.	<ul style="list-style-type: none"> • interview questions • record of interviews

Probity plan template	
Task	Document
Assess probity of shortlisted bidders and their parent affiliated companies. This may include corporate information such as ownership, litigation, directors' profiles, financial security and past history.	<ul style="list-style-type: none"> referee checks ASIC records commercial records (e.g. Dun & Bradstreet or Standard & Poor's), annual returns etc.
Document any meetings for clarification or negotiation of bids.	<ul style="list-style-type: none"> meeting agenda file notes bidders' confirming letters
Ensure all bids are compared on the same basis and evaluation criteria have been followed, responses have been assessed against specific requirements of the specifications. Give reasons for the choice of the preferred bidder, and ensure these reasons are clear and defensible.	<ul style="list-style-type: none"> evaluation sheets score sheets/comparative results minutes of meetings
Document reasons for selection or rejection of bids and prepare justification statement consistent with reasons for selection.	<ul style="list-style-type: none"> file notes minutes of meetings justification statement
Receive the final report of the probity auditor before recommending that the Minister signs a contract.	<ul style="list-style-type: none"> final report of the probity auditor
Store all documents and tapes to provide a complete and accurate record of how key functions and activities were carried out, in accordance with the <i>Public Records Act 1973</i> .	<ul style="list-style-type: none"> bid file(s)

C2: Confidentiality deed (sample)

Definition

'Information' means information, documents and data stored by any means and any information made available to the Confidant⁷ in the course of his or her dealings with the Department⁸ and includes information relating to:

- (a) any intellectual property rights of the Department;
- (b) the financial position or reputation of the Department;
- (c) the internal management and structure of the Department;
- (d) the personnel, policies and strategies of the Department;
- (e) the Department's clients or suppliers

and information of the Department that has any actual or potential commercial value to the Department or to the person or corporation which supplied that information.

Non-disclosure

The Confidant will treat as secret and confidential all Information to which he or she has access or which is disclosed to him or her and will not disclose it to any third party without the prior written consent of the Department.

If the Department grants its consent, it may impose conditions on that consent. In particular, the Department may require that the Confidant obtain the execution of a deed in these terms by the person to whom the Confidant proposes to disclose the confidential information.

The obligations of the Confidant under this deed shall not be taken to have been breached where the Confidential Information is legally required to be disclosed.

Restriction on use

The Confidant will use the Confidential Information only for the purpose of his or her dealings with the Department (whether directly or indirectly).

The Confidant will not copy or reproduce the Information without the approval of the Department, will not allow any other person outside the Department access to the Information and will take all necessary precautions to prevent unauthorised access to or copying of the Information in his or her control.

⁷ The Confidant is [*insert name*]

⁸ The Department or Agency is [*insert name*]

Survival

This Deed will survive the termination or expiry of any contract between the Department and the Confidant providing for the performance of services or the provision of goods by the Confidant (whether directly or indirectly).

Production of documents

Immediately on request by the Department, the Confidant must deliver to the Department all documents in the possession or control of the Confidant containing Confidential Information.

If, at the time of such a request, the Confidant is aware that documents containing Confidential Information are beyond his or her possession or control, then the Confidant must provide full details of where the documents containing the Confidential Information are, and the identity of the person who has control of them.

Applicable law

This deed shall be governed in accordance with the law of Victoria.

Executed as a deed

SIGNED SEALED AND DELIVERED

C3: Declaration of interest (sample)

I, [insert full name]

of [insert business address]

declare that to the best of my knowledge, I do not have:

- any financial interest in the (the Subject) [name subject in issue e.g. bidders for XYZ contract];
- any relatives or friends with a financial interest in the Subject;
- any personal bias or inclination which would in any way affect my decisions in relation to the Subject;
- any personal obligation, allegiance or loyalty which would in any way affect my decisions in relation to the Subject; or
- a 'conflict of interests', except as set out below:

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9

I undertake to make a further declaration detailing any conflict, potential conflict or apparent conflict which may arise during the contract period. Should any conflict appear to compromise me, I agree to abstain from any related decision.

Signed

Dated

C4: Brief for engaging a probity auditor (sample)

Background

The engagement brief for a probity auditor should include an outline of the proposed project, including its aims, scope and reference to any feasibility study (to be attached). Background material should include the approval to proceed, summary of market research to date, functions of the successful private party, timelines and key features of the proposed contract (including its length and options to renew).

Aims

The probity auditor's task is to ensure that the process is open and fair, that is, that the bid evaluation team:

- acts within the limitations of prescribed policies, rules and guidelines;
- takes into account only relevant matters;
- applies rules consistently but not inflexibly;
- complies with express conditions set out in the bid documents; and
- makes decisions free from external influences.

In addition, the probity auditor is to confirm that the process is:

- untainted by interference by any interested party;
- conducted in compliance with any applicable Victorian Government Purchasing Board policies; and
- secure and confidential.

Process

To safeguard the integrity of the project and to ensure that the processes of selecting a private party are carried out in an open and fair way, a probity auditor is required to:

- review the request for expression of interest and proposed bid and assessment procedures from a probity perspective;
- endorse a probity plan, including the proposed process for handling bids, maintaining confidentiality and communicating with bidders. This includes details of the documentation of contacts, decisions and meetings required to confirm probity at the conclusion of the project;
- provide a training session to staff on probity principles and guidelines;
- respond to requests for advice to resolve any probity issues during the course of the project, including ways to redress any errors or omissions;
- report any act or omission in the bidding process that affects or may affect the integrity of the process; and

- review adherence to the probity plan and prepare a report for the chairperson of the project steering committee on the probity of the process.

Answerability

The probity auditor is engaged by and accountable to the Secretary (or Chief Executive) of the department or agency [*insert name*] as an independent probity auditor to the project.

Day-to-day management of the probity auditor is provided by the [*name of position*]. The probity auditor reports as required to the chairperson of the project steering committee. The probity auditor prepares a preliminary report for the [*name of position*] and presents a final report to the chairperson of the steering committee.

Final report

The final report of the probity auditor is to be substantially in the form of the attached template.

Attendance

The probity auditor is required to attend:

- any group briefing sessions with potential bidders;
- staff probity meetings;
- an initial meeting of each evaluation team; and
- debriefing sessions with bidders if requested by the [*name of position*].

The probity auditor is not required to attend:

- subsequent evaluation team meetings;
- working committee sessions; or
- negotiations with bidders

unless he or she believes it is necessary, in specific circumstances, to protect the integrity of the project.

The probity auditor is given full access to necessary documentation, personnel, meetings and premises to assess the procurement team's adherence to probity principles. Intellectual property in the working papers of the probity auditor remains the property of government. Copies of the probity auditor's materials may be required during or after the audit for department or agency records.

Selection criteria

The probity auditor will:

- be available within the timeframe required;
- have demonstrable experience in purchasing and/or ethical issues;
- be able to demonstrate knowledge and understanding of Victorian Government Purchasing Board supply policies and guidelines (published at <http://www.vgpb.vic.gov.au>), and in particular, the probity processes for bidding and contracting, and bid analysis evaluation, and any key policies of the department or agency relevant to the project;
- have a high level of interpersonal skills and written and oral communication skills;
- be independent of government and of all potential bidders;
- be of good character and high ethical principles (references are required);
- have an understanding of political and commercial sensitivities;
- have a practical approach to problem-solving and commercial common sense;
- have suitable professional indemnity insurance;
- comply with the contract terms and conditions of the department or agency; and
- quote within the total cost of the service.

Information required from the probity auditor

The probity auditor should provide:

- a statement of experience, qualifications and availability of the probity auditor and other staff who may assist on the project any staff, demonstrating an ability to meet the selection criteria;
- a statement on the proposed overall approach to the assignment and why the probity auditor considers he or she is best suited for this position; and
- names and addresses of two referees for whom the probity auditor and any staff have worked on similar consultancies.

C5: Probity auditor's sign-off report template

[name]
Secretary

Department of [insert name]
[address]

Final probity audit report for [insert details]

The probity audit for [insert name of project] has been completed up to the bid selection report stage and is now considered complete.

The report covers the following issues:

- (i) description of the scope of the audit;
- (ii) statement that the probity auditor has fulfilled his or her project brief in order to express an opinion on the bid process;
- (iii) purpose for which the probity auditor's report has been prepared and those entitled to rely on it;
- (iv) brief description of the probity framework against which the report has been prepared;
- (v) statement that the audit has been conducted in accordance with this framework;
- (vi) explanatory details about the variables that affect the assurance provided;
- (vii) any qualification or limitation on the probity auditor's endorsement of the process; and
- (viii) findings in the form of an expression of opinion about whether, in all material respects and based on the probity framework, the process has been undertaken in accordance with identified probity principles covered in the probity plan.

[auditor's name]

Appendix D: Public interest test

Protecting the public interest		
Public interest element	Standard	Assessment
<p>Effectiveness</p> <p>Is the project effective in meeting government objectives?</p>	<p>List government's output/service delivery requirements for the project:</p> <ul style="list-style-type: none"> consider government's output/service delivery requirements in similar projects delivered previously, either under public procurement or another public/private partnership; and identify any minimum government standards (in quality or quantity etc.) to be met for each output/service delivery requirement identified above, whether a legislative or policy requirement. 	<ul style="list-style-type: none"> Which of the output/service delivery requirements identified in the previous column are met by the project? How effectively are the requirements met, i.e. what are the mechanisms used to achieve these requirements? Are they fully met, or are they only partly met? What are the deficiencies, i.e. which of the identified requirements, or what part of a particular requirement, does the project not meet and what are the consequences? Can this be addressed?
<p>Accountability and transparency</p> <p>Do the partnership arrangements ensure that:</p> <ul style="list-style-type: none"> the community can be well-informed about the obligations of government and the private sector partner; and that these can be oversights by the Auditor-General? 	<ul style="list-style-type: none"> Identify government's current policy on disclosure and transparency during both the bidding and negotiation stages and after contract signing. Identify legal disclosure requirements and government obligations, e.g. Freedom of Information Act. If there is no policy or there are no legal requirements, identify the disclosure requirements under previous, similar projects. Identify Auditor-General's obligations to oversee government/private party obligations. Consider any legal duties the Auditor-General may have (e.g. under specific legislation). Consider government's policy on the Auditor-General's role: are there specific compliance requirements/standards under this policy? 	<ul style="list-style-type: none"> Which of the transparency/disclosure requirements (of a legal or policy nature) identified in the previous column are met by the project? How is each requirement met (i.e. what are the mechanisms used to achieve these requirements)? Are they fully met, or are they only partly met? What are the deficiencies? That is, which of the identified requirements — or what part of a particular requirement — may not be met for the length of the project and what are the consequences? Can they be addressed, e.g. through contractual or regulatory means?

Protecting the public interest		
Public interest element	Standard	Assessment
<p>Affected individuals and communities</p> <p>Have those affected been able to contribute effectively at the planning stages, and are their rights protected through fair appeals processes and other conflict resolution mechanisms?</p>	<ul style="list-style-type: none"> • Identify: <ul style="list-style-type: none"> ➢ Those individuals/sectors of the community who will be affected by the project; and ➢ how they will be affected. <p>(The analysis referred to below will assist in this identification process.)</p> • Conduct: <ul style="list-style-type: none"> ➢ an appropriate public consultation process; ➢ as appropriate, an environmental impact analysis (consisting of an environmental effects statement. Identify all other requirements under environmental and planning laws and regulations); and ➢ social and regional impact analysis. • Identify relevant rights of affected individuals and communities: <ul style="list-style-type: none"> ➢ any legal requirements; ➢ current government policy requirements; and ➢ minimum requirements from previous similar projects. 	<ul style="list-style-type: none"> • Which of the identified individuals/sectors have had some form of involvement in the process? What was their level of involvement? Does it meet the identified legal and policy standards? • Where the planning stages have not been concluded by government, how does the contract/regulatory regime protect the rights identified in the previous column and/or how does it accommodate the required redress avenues? What are the mechanisms? • What are the deficiencies? That is, which of the identified requirements (or what part of a particular requirement) does the project not meet and what are the consequences? Can this be addressed, e.g. through contractual or regulatory means?

Protecting the public interest		
Public interest element	Standard	Assessment
<p>Equity</p> <p>Are there adequate arrangements to ensure that disadvantaged groups can effectively use the infrastructure or access the related service?</p>	<ul style="list-style-type: none"> • Identify disadvantaged groups who will use the infrastructure or access the related service and how they will be using it. (It may be useful to refer to the consultations/analysis.) • Identify any specific rights of the groups identified: <ul style="list-style-type: none"> ➢ at law (e.g. anti-discrimination laws); ➢ under government policies; and/or ➢ from standards agreed to in previous projects. 	<ul style="list-style-type: none"> • Which of the 'usage' rights (of a legal or policy nature) identified in the previous column are met by the project? • How is each identified right satisfied, i.e. what are the mechanisms used to provide and protect these rights? Are these rights fully or only partly met? • What are the deficiencies? That is, which of the identified rights are not provided for or protected for the duration of the project and what are the consequences? Can this be addressed (e.g. through contractual or regulatory means)?
<p>Public access</p> <p>Are there safeguards that ensure ongoing public access to essential infrastructure?</p>	<ul style="list-style-type: none"> • Identify what kind of public access is required, i.e. when the public needs access to the infrastructure and to which parts. • Are there any legal or policy access requirements? 	<ul style="list-style-type: none"> • Which of the identified access requirements are met by the project, (i.e. those of a legal or policy nature, or otherwise identified as being required by the public under the relevant project)? • How is each identified access requirement satisfied? That is, what are the mechanisms used to provide and protect these access requirements? Are these rights fully or only partly met? • What are the deficiencies? That is, which identified access requirements are not provided or protected throughout the project and what are the consequences? Can they be addressed (e.g. through contractual or regulatory means)?

Protecting the public interest		
Public interest element	Standard	Assessment
<p>Consumer rights</p> <p>Does the project provide sufficient safeguards for service recipients, particularly those for whom government has a high level of duty of care, and/or the most vulnerable?</p>	<ul style="list-style-type: none"> • Identify: <ul style="list-style-type: none"> ➢ those recipients to whom government owes a high level of duty of care (either at law, under government policy or simply on an 'as appropriate' basis); and ➢ those who are most vulnerable. (The consultations/analysis conducted previously will assist in this process.) • Do any rights or needs of these recipients need to be provided for or protected by government: <ul style="list-style-type: none"> ➢ at law (consider statutory/regulatory bodies); or ➢ under government policy? • Identify how previous similar projects protected the recipients identified above. 	<ul style="list-style-type: none"> • Which of the special needs and rights identified in the previous column are met by the project? • How are each of the identified needs and rights satisfied (i.e. what are the mechanisms used to provide for/protect these requirements)? Are these rights fully met, or are they only partly met? • What are the deficiencies? i.e. which of the identified needs or rights are not provided for or protected throughout the project and what are the consequences? Can they be addressed (e.g. through contractual or regulatory means)?
<p>Security</p> <p>Does the project provide assurance that community health and safety will be secured?</p>	<ul style="list-style-type: none"> • Identify all public health and safety standards that government is required to meet: <ul style="list-style-type: none"> ➢ at law (e.g. health and safety legislation); ➢ under government policy; or ➢ from government's political accountability to the public. 	<ul style="list-style-type: none"> • Which of the health and safety standards identified does the project meet? • How is each identified standard satisfied? That is, what are the mechanisms used to protect the public's health and safety to the identified standards? Are these standards fully or only partly met? • What are the deficiencies? That is, which of the identified standards are not provided for or protected throughout the project and what are the consequences? Can they be addressed, e.g. through contractual or regulatory means?

Protecting the public interest		
Public interest element	Standard	Assessment
<p>Privacy</p> <p>Does the project provide adequate protection of users' rights to privacy?</p>	<ul style="list-style-type: none"> • Identify the users' rights to privacy (whether at law or otherwise). • Identify government's obligations to the public: <ul style="list-style-type: none"> ➢ under law; ➢ under government policy; ➢ from government's political accountability to the public; or ➢ from any other undertaking by government to the public, to protect the rights to privacy identified above. 	<ul style="list-style-type: none"> • Which of the rights identified in the previous column are protected under the project? • How is each identified right protected? That is, what are the mechanisms used to protect the public's privacy rights and hold government accountable for its obligations? • What are the deficiencies? That is, which of the identified rights are not provided for or protected throughout the project and what are the consequences? Can they be addressed, e.g. through contractual or regulatory means?

Appendix E: Risk matrix

Risk category	Description	Consequence	Mitigation	Preferred allocation
Site risks				
Existing structure (refurbishment/ extensions)	risk that existing structures are inadequate to support new improvements	additional construction time and cost	private party will pass to builder which relies on expert engineering reports	private party
Site conditions	risk that unanticipated adverse ground conditions are discovered which cause construction costs to increase and/or cause construction delays	additional construction time and cost	private party will pass to builder which relies on expert testing and due diligence	private party
Approvals	risk that necessary approvals may not be obtained or may be obtained only subject to unanticipated conditions which have adverse cost consequences or cause prolonged delay	delay in works commencement or completion and cost increases	prior to beginning the tender process government may seek a planning scheme amendment or environmental impact assessment taking risk of a route diversion or special measures to protect environmental values; for example in the case of linear infrastructure (road, rail, pipeline); during the tender process by means of a Project Development Agreement both government and the private party may achieve a measure of pre-contractual certainty allowing an early start to the approval process and a sharing of costs	private party possibly up to a specific cost amount unless government assumes because of complexity or sensitivity

Risk category	Description	Consequence	Mitigation	Preferred allocation
Environmental (1)	risk that the project site is contaminated requiring significant expense to remediate	clean-up costs and delay	reliance on expert reports and insurance	private party will generally assume the risk although because of the time and cost implications of full due diligence for each bidder, some risk sharing may be a cost effective solution particularly using a regime for allocation of cost consequences such as a Material Adverse Effect regime
Environmental (2)	risk that prior to financial close offsite pollution has been caused from a government preferred site (any site) to adjacent land	clean-up liability	government to commission reports; Government should also have greatest knowledge of past uses of its site	government may assume responsibility by way of indemnity or obligation to compensate for unidentified off site pollution pre financial close where the site is a preferred government site
Environmental (3)	risk that prior to financial close (in case of a non-government site) or after financial close (any site) offsite pollution is caused to adjacent land	clean up liability	private party can manage site activity	the private party will be in control of activities on the site post financial close and will be required to assume risk of offsite pollution caused by those activities; also it will take risk of offsite pollution from any site which is not a government preferred site (even if it occurs pre-completion)

Risk category	Description	Consequence	Mitigation	Preferred allocation
Clean-up and rehabilitation	risk that the use of the project site over the contract term has resulted in a significant clean up or rehabilitation obligation to make the site fit for future anticipated use	financial liability on residual owner	private party able to manage the use of the asset and attend to its maintenance and refurbishment; government may require sinking funds if it is to resume the site and its use is liable to result in significant clean up/rehabilitation cost	private party to take risk (whether government is to resume or not) and must demonstrate financial capacity or support to deliver the site in the state required by government
Native title	risk of costs and delays in negotiating indigenous land use agreements where project site may be subject to native title or risk injunction and/or invalidity of approvals	delay and cost	search of registers and enquiry if appropriate and take expert advice	government will usually take risk on government preferred sites as it generally has a better understanding of procedures, has special powers of acquisition and use of native title land for infrastructure and is usually in best position to manage this risk; government is also in better position to negotiate where policy discourages use of compulsory acquisition power
Cultural heritage	the risk of costs and delays associated with archaeological and cultural heritage discoveries	delay and cost	search of registers and enquiry if appropriate and take expert advice	government will generally take risk on government preferred site as it generally has a better understanding of procedures, and is usually in best position to manage this risk otherwise private party takes responsibility

Risk category	Description	Consequence	Mitigation	Preferred allocation
Availability of site	risk that tenure/access to a selected site which is not presently owned by government or private party cannot be negotiated	delay and cost	bidders obligation to secure access prior to contract signing	private party, as it makes the decision to bid on a non preferred site
Design, construction and commissioning risk				
Design	the risk that the design of the facility is incapable of delivering the services at anticipated cost	long term increase in recurrent costs - possible long term inadequacy of service	private party may pass risk to builder/architects and other subcontractors while maintaining primary liability; Government has the right to abate service charge payments where the risk eventuates and results in a lack of service - it may ultimately result in termination where the problem cannot be suitably remedied	private party will be responsible except where an express government mandated change has caused the design defect
Construction	the risk that events occur during construction which prevent the facility being delivered on time and on cost	delay and cost	private party generally will enter into a fixed term, fixed price building contract to pass the risk to a builder with the experience and resources to construct so as to satisfy the private party's obligations under the contract	private party will be liable unless the event is one for which relief as to time or cost or both is specifically granted under the contract, such as force majeure or government intervention

Risk category	Description	Consequence	Mitigation	Preferred allocation
Commissioning	the risk that either the physical or the operational commissioning tests which are required to be completed for the provision of services to commence, cannot be successfully completed	for the private party and its financiers - delayed/lost revenue for government - delayed service commencement	no payment by government until all physical and operational commissioning tests have been successfully completed	private party, although government will assume an obligation to cooperate and facilitate prompt public sector attendance on commissioning tests
Sponsor and financial				
Interest rates pre-completion	the risk that prior to completion interest rates may move adversely thereby undermining bid pricing	increased project cost	interest rate hedging may occur including under Project Development Agreement	government may assume or share
Sponsor risk	the risk that the private party is unable to provide the required services or becomes insolvent or is later found to be an improper person for involvement in the provision of these services or financial demands on the private party or its sponsors exceed its or their financial capacity causing corporate failure	cessation of service to government and possible loss of investment for equity providers	ensure project is financially remote from external financial liabilities, ensure adequacy of finances under loan facilities or sponsor commitments supported by performance guarantees; also through the use of non financial evaluation criteria and due diligence on private parties (and their sponsors)	government
Financing unavailable	the risk that when debt and/or equity is required by the private party for the project it is not available then and in the amounts and on the conditions anticipated	no funding to progress or complete construction	government requires all bids to have fully documented financial commitments with minimal and easily achievable conditionality	private party

Risk category	Description	Consequence	Mitigation	Preferred allocation
Further finance	the risk that by reason of a change in law, policy or other event additional funding is needed to rebuild, alter, re-equip etc. the facility which cannot be obtained by the private party	no funding available to complete further works required by government	private party must assume best endeavours obligation to fund at agreed rate of return with option on government to pay by way of uplift in the services charge over the balance of the term or by a separate capital expenditure payment; Government to satisfy itself as to likelihood of this need arising, its likely criticality if it does arise, and as to financial capacity of private party to provide required funds and (if appropriate) budget allocation if government itself is required to fund it	government takes the risk that private finance is unavailable
Change in ownership	the risk that a change in ownership or control of the private party results in a weakening in its financial standing or support or other detriment to the project	government assurance of the financial robustness of the private party may be diminished and, depending on the type of project, probity and other non financial risks may arise from a change in ownership or control which may be unacceptable to government	government requirement for its consent prior to any change in control. N.B. private party will seek to limit this control to circumstances where substantive issues are of concern such as financial capacity and probity	government risk as to the adverse consequence of a change if it occurs; private party risk that its commercial objectives may be inhibited by a restrictive requirement for government consent to a change
Refinancing benefit	the risk (upside) that at completion or other stage in project development the project finances can be restructured to materially reduce the project's finance costs	a beneficial change in the financing cost structure of the project	government will assure itself that likely benefit has been factored into competitive bids to avoid the risk that the private party will be allowed to earn super profits from the project	private party to benefit; government will share in limited circumstances (essentially, in symmetrical risk allocation and super profits)

Risk category	Description	Consequence	Mitigation	Preferred allocation
Tax changes	the risk that before or after completion the tax impost on the private party, its assets or on the project, will change	a negative effect on the private party's financial returns and in extreme cases, it may undermine the financial structure of the project so that it cannot proceed in that form	the financial returns of the private party should be sufficient to withstand such change; with respect to specific infrastructure taxation particularly that relating to transactions with government, the private party should obtain a private tax ruling	private party
Operating				
Inputs	the risk that required inputs cost more than anticipated, are of inadequate quality or are unavailable in required quantities	cost increases and in some cases adverse effect on quality of service output	private party may manage through long term supply contracts where quality/quantity can be assured; private party can address to some extent in its facility design	private party unless government controls inputs eg water catchment
Maintenance and Refurbishment	the risk that design and/or construction quality is inadequate resulting in higher than anticipated maintenance and refurbishment costs	cost increases where private party has assumed whole of life obligation and adverse effect on delivery of contracted services and, in core services model, a corresponding adverse effect on government ability to deliver core services	private party to manage through long term subcontracts with suitably qualified and resourced sub-contractors and through formal or informal consultation processes with government	private party
Changes in output specification outside agreed specification range	risk that Government's output requirements are changed after contract signing whether pre or post commissioning	a change in output requirements prior to commissioning may necessitate a design change with capital cost consequences depending on the significance of the change and its proximity to completion; a change after completion may have a capital cost consequence or a change in recurrent costs only; for example where an increase in output requirements can be accommodated within existing facility capacity	government can mitigate this risk to an extent by minimising the chance of its specifications changing and, to the extent they must change, ensuring the design is likely to accommodate it at least expense; this will involve considerable time and effort in specifying the outputs up front and planning likely output requirements over the term	government

Risk category	Description	Consequence	Mitigation	Preferred allocation
Operator failure	risk that a subcontract operator may fail financially or may fail to provide contracted services to specification	the failure may result in service unavailability, an inability for government to deliver core services and, in each case, a need to make alternate arrangements for service delivery with corresponding cost consequences	government will carry out due diligence on principal subcontractors for probity and financial capacity and commission a legal review of the major subcontracts including the guarantees or other assurances taken by the private party; if failure does occur the private party may replace the operator or government may require operator replacement	private party is fully and primarily liable for all obligations to government irrespective of whether it has passed the risk to a subcontractor
Technical obsolescence or innovation	risk of the contracted service and its method of delivery not keeping pace, from a technological perspective, with competition and/or public requirements	private party's revenue may fall below projections either via loss of demand (user pays model) payment abatement (availability model) and/or operating costs increasing; for government - consequence will be failure to receive contracted service at appropriate quantity/quality including adverse effect on core service delivery in core service model	private party may arrange contingency/reserve fund to meet upgrade costs subject to government agreement as to funding the reserve and control of reserve funds upon default; also monitoring obligations in the contract and work on detailed, well-researched output specifications (government) and design solution (private party)	private party except where contingency is anticipated and government agrees to share risk possibly by funding a reserve
Market				
General economic downturn	in a user pays model, the risk of a reduction in economic activity affecting demand for the contracted service	revenue below projections	where government is the primary off-taker the private party will seek an availability payment element; otherwise the private party will ensure robust financial structure and sponsor/financier support	private party except to the extent that government has committed to an availability payment element or agreed to provide redress for impact of government subsidised competition
Competition	in a user pays model the risk of alternate suppliers of the contracted service competing for customers	revenue below projections arising from a need to reduce the price and/or from a reduction in overall demand, because of increased competition	private party to review likely competition for service and barriers to entry	private party except to the extent that government has committed to an availability payment element or agreed to provide redress for impact of government subsidised competition

Risk category	Description	Consequence	Mitigation	Preferred allocation
Demographic change	the risk of a demographic/socio-economic change affecting demand for contracted service	revenue below projections	private party to review likely competition for service, barriers to entry	private party except to the extent that government has committed to an availability payment element
Inflation	risk that value of payments received during the term is eroded by inflation	diminution in real returns of the private party	private party seeks an appropriate mechanism to maintain real value eg via linkage to CPI; government concern to ensure its payments do not overcompensate for inflation and to avoid any double payment for after costs adjustments eg on changes in policy/law	private party takes risk on the methodology adopted to maintain value; government shares to the extent of agreed indexation
Network and interface				
Withdrawal of support network	the risk that, where the facility relies on a complementary government network, that support is withdrawn or varied adversely affecting the project	negative patronage and revenue consequences	private party will seek financial redress against change which unfairly discriminates against the project particularly on a user pays project where revenue is directly affected; under an availability model private party will seek to avoid abatement if government 'prevention' is cause of unavailability	government where the change discriminates against the project
Changes in competitive network	the risk that an existing network is extended/changed/re-priced so as to increase competition for the facility	negative patronage and revenue consequences	private party will seek financial redress against change which unfairly discriminates against the project by government subsidising competition (existing or new)	Private party except to the extent that government provides redress for appropriate, discriminatory changes

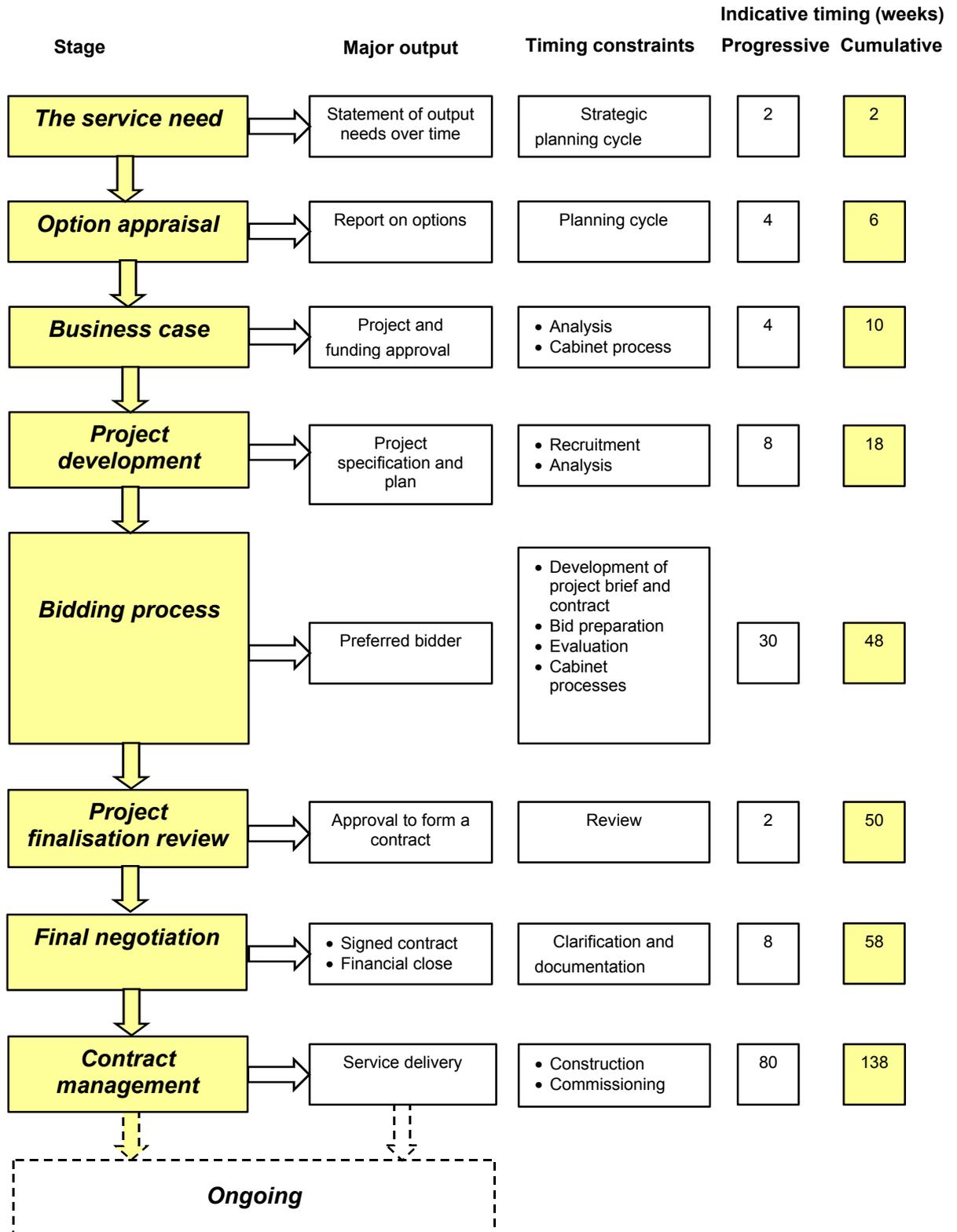
Risk category	Description	Consequence	Mitigation	Preferred allocation
Interface (1)	the risk that the delivery of core services in a way which is not specified/anticipated in the contract adversely affects the delivery of contracted services	adverse effect on delivery of contracted service, potential for default by private party and possible need for government to make other arrangements for service provision	government manages core service activities allowing it to influence the materialisation of interface risk and its consequences; other mitigants include an upfront assessment (by both government and the private party) of the likely interface issues, continual review and monitoring and development of a communications strategy in respect of delivery of the two related services; government will also specify in the contract the extent of core services and the way in which they will be delivered so that only manifest and adverse changes and deficiencies can trigger this risk	Private party except to the extent that government provides redress for appropriate, discriminatory changes
Interface (2)	the risk that the delivery of contracted services adversely affects the delivery of core services in a manner not specified/anticipated in the contract	adverse effect on delivery of cores service, default by private party and possible need for government to make other arrangements for core service provision	private party manages contracted service activities	private party
Industrial relations				
Industrial relations and civil commotion	risk of strikes, industrial action or civil commotion causing delay and cost to the project	cost and time delay	private party or its sub-contractors manage project delivery and operations	private party
Sovereign				
Approvals	the risk that additional approvals required during the course of the project cannot be obtained	further project development or change in business operation may be prevented	private party to anticipate requirements	private party unless government has initiated the change requiring approval

Risk category	Description	Consequence	Mitigation	Preferred allocation
Changes in law/policy (1)	the risk of a change in law/policy of the State Government only, which could not be anticipated at contract signing and which is directed specifically and exclusively at the project or the services and which has adverse capital expenditure or operating cost consequences for the private party	a material increase in the private party's operating costs and/or a requirement to carry out capital works to comply with the change	government may mitigate its liability for such change by monitoring and limiting (where appropriate) changes which may have these effects or consequence on the project and via mechanisms in the contract allowing compensation only above a pre-agreed 'Significant Amount'; also requiring the private party to effect the change in such a manner that the financial effect on government is minimised and, if payment is required, that payment is made in a way and a time best suited to government (eg, pay on a progressive scale); also (in a user pays model) having in place a regulatory regime which allows pass through to end users	Government: although the parties may share the financial consequences of capital cost increases in an agreed way, for example by the private party meeting a percentage of the cost up to a specific limit and government meeting any excess
Changes in law/policy (2)	in some cases, the risk of a change in law/policy (at whatever level of government it occurs) which could not be anticipated at contract signing which is general (i.e. not project specific) in its application and which causes a marked increase in capital costs and/or has substantial operating cost consequences for the private party	requirement on the private party to fund and carry out capital works or meet a marked increase in operating costs to comply with the change	government mitigates by excluding changes such as tax changes or changes for which the private party is compensated under a CPI adjustment or similar and only allowing compensation above a pre-agreed Significant Amount; also, again mechanisms could be used to minimise and manage financial impact on government and (where appropriate) a regulatory regime to allow pass-through to end users	Government: although the parties may share the financial consequences of capital cost increases in an agreed way for example by the private party meeting a percentage of the cost up to a specific limit and government meeting any excess
Regulation	where there is a statutory regulator involved there are pricing or other changes imposed on the private party which do not reflect its investment expectations	cost or revenue effects	private party to assess regulatory system and may make appropriate representations	private party

Risk category	Description	Consequence	Mitigation	Preferred allocation
Force majeure	the risk that inability to meet contracted service delivery (pre or post completion) is caused by reason of force majeure events	loss or damage to the asset, service discontinuity for government (may include inability to deliver core service) and loss of revenue or delay in revenue commencement for private party	Private party given relief from consequences of service discontinuity; if uninsurable, private party may establish reserve funding; Government to establish contingency for alternate service delivery; if insurable, private party must ensure availability of insurance proceeds towards repair of asset and service resumption and government is to be given the benefit of insurance for service disruption costs	private party takes the risk of loss or damage to the asset and loss of revenue, government takes some risk of service discontinuity both as to contracted service and core service subject to insurance availability and will need to arrange alternative service provision the cost of which will be met from redirected service payments and (if insurable) any shortfall made up from insurance proceeds
Asset ownership	the risk that design life of the facility proves to be shorter than anticipated accelerating refurbishment expense	cost of upgrade	private party may have recourse to designer, builder or their insurers	private party, but in certain high technology projects costs may be anticipated and shared
Technical obsolescence				

Risk category	Description	Consequence	Mitigation	Preferred allocation
Default and termination	risk of 'loss' of the facility or other assets upon the premature termination of lease or other project contracts upon breach and without adequate payment	loss of investment of private party; possible service disruption for government	private party (and its debt financiers) will be given cure rights (time and opportunity) to remedy defaults which may lead to termination including under tripartite deed with financiers; also only serious breaches to lead to termination; if termination occurs pre completion government may (but need not) make payment for value in the project on a cost to complete basis; if it occurs post completion the private party will receive fair market value less all amounts due to government; government will require step in rights to ensure access and service continuity until ownership/control issues are resolved	private party will take the risk of loss of value on termination
Residual value on transfer to government	the risk that on expiry or earlier termination of the services contract the asset does not have the value originally estimated by government at which the private party agreed to transfer it to government	capital costs incurred to upgrade the asset to the agreed value and useful life or asset demolished or removed	government will impose on the private party maintenance and refurbishment obligations, ensure an acceptable maintenance contractor is responsible for the work, commission regular surveys and inspections; it may also direct funds from the project into dedicated controlled sinking fund accounts to accumulate funds sufficient to bring the asset to agreed condition and/or (if required) obtain performance bonds to ensure the liability is satisfied	government

Appendix F: Indicative project timeline



Appendix G: Glossary

The published *Practitioners' Guide* will include a Glossary.

