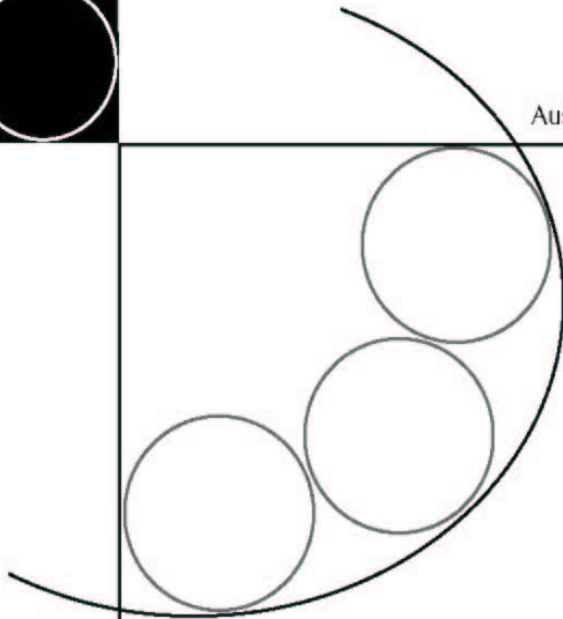


Australian Procurement and Construction Council



Discussion Paper:

***KEY ISSUES IN
PROCUREMENT
THROUGH
PUBLIC PRIVATE
PARTNERSHIPS (PPPs)***

Australian Procurement and Construction Council Inc.

Discussion Paper: Key Issues in Procurement through Public Private Partnerships (PPPs)

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This discussion paper *Key Issues in Procurement through Public Private Partnerships* seeks to assist governments achieve the PPP objective to maximise value for money from the procurement process.

This Discussion Paper addresses procurement aspects of the PPP option and does not necessarily reflect the views of the APCC or its member jurisdictions.

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1. INTRODUCTION

1.1 Background

- Most jurisdictions around Australia have recently developed policies and guidelines for Public Private Partnerships (PPPs).
- The guidelines for PPPs prepared by the Commonwealth, States and Territories are similar and are generally based on the PPP/Private Financing of Infrastructure (PFI) model developed in the United Kingdom (U.K.) during the 1990's.
- The PPP process is designed to attract private sector investment to what would otherwise be government funded and operated infrastructure and services.
- The over-arching objectives are:
 - to achieve better value for money through efficiencies of involvement of the private sector in a long-term relationship (including third party usage of facilities), payment for outputs rather than inputs (including performance incentives), and optimisation of risk allocation;
 - to improve the whole-of-life delivery of the public service through timely provision of the required service, integration, design innovation and better construction quality, and
 - to promote economic growth and local industry development, whilst effectively managing the balance of competing priorities of economic, environmental and societal issues.

1.2 PPP Guidance

Guidance material developed by the various jurisdictions has common themes, which are:

- Clear specification of project outputs, which encourage innovation.
- Assessment, identification, measurement and allocation of risk to the party best able to manage it.
- Preparation of a Public Sector Comparator setting out whole-of-life costs if the project is delivered by traditional public sector processes.
- Preparation of a business case analysing alternative private sector delivery models and benchmarking against the Public Sector Comparator.
- Specification of procedures/process (to be competitive and transparent with an emphasis on reducing transaction costs).

1.3 Critical Success Factors

The following factors are considered most critical if successful outcomes are to be achieved:

- Commitment to Project 'Up Front'. A PPP delivery should not be pursued as a way of achieving the project without having to justify the need and priority for the project, as well as demonstrating capacity to fund it. Some jurisdictions require the service to be fully justified and have budget requirements identified before the procurement method, including PPP options, is finalised. This is strongly recommended for adoption across all jurisdictions.

- **Balance Sheet Accountability.** Some jurisdictions place greater emphasis on 'Off Balance Sheet' outcomes in service delivery initiatives. While it is understood that governments are generally averse to debt, selection of procurement method is best when consideration is given to factors in addition to the accounting treatment, which may vary between jurisdictions and over time. From a procurement perspective, the commitment made for a service is both real and ongoing. The soundness of the procurement decision involves more than simply financial considerations. (It should be noted that ratings agencies factor in long-term contract commitments on the same basis as debt, and off-balance sheet outcomes are often illusory.)
- **Affordability vs Value For Money.** Some jurisdictions see PPPs as an opportunity to bring forward the service delivery initiatives. Under these circumstances, PPPs are being seen as a means of making the project affordable, possibly to the detriment of value-for-money. While governments will always retain the prerogative in this regard, the life-cycle implications should be understood.

1.4 Definitions

- **Procurement** means the whole-of-life cycle process of acquisition from third parties including goods, services and construction products, from initial concept through to the end of a services contract or the useful life of an asset, including disposal.
- **Government Procurement** is a structured series of activities necessary to satisfy a requirement for goods, assets, facilities or services, including disposal, while optimising value received for public expenditure.
- **Government Procurement through PPP** involves the private sector delivering certain services for government and creating, financing and owning any necessary new assets. In principle, government is procuring (and paying for) a service, not an asset.

1.5 Advantages & Disadvantages of PPP (Public Finance Initiative (PFI)) Procurement

1.5.1 Advantages

General advantages (or value-for-money drivers) cited for PPP (PFI) procurement include:

- **Improvement in efficiency & quality of ancillary services provided** (eg. through contestability, private sector 'know how'...diversity of management skills, integrated Facilities Management (FM) services packaging and performance measures/incentives),
- **Facilitating innovation** (eg. through focusing on outcomes and specifying requirements in performance rather than detail terms),
- **Optimising whole-of-life asset management,**
- **Greater flexibility in arrangements** (ie. better asset utilisation including staged development and/or accessing third party revenues),
- **Well structured risk sharing in a 'partnership' environment,**
- **More timely service provision** (eg. through 'bundling' delivery of smaller, otherwise unconnected projects programmed for future years. This does not mean more overall funding is available to agencies or that more projects may be undertaken than would otherwise be the case).

1.5.2 Disadvantages

General disadvantages cited for PPP (PFI) procurement include:

- **Lack of widespread acceptance from key stakeholders** (eg. especially among the workforce (ie. the unions) and general community),
- **Lack of cross-jurisdictional and cross-agency uniformity/consistency** (ie. in areas of policy, guidelines and implementation). This relates to differences in jurisdictions' procurement practices, expertise and approach taken by central agencies nominated to 'lead' respective PPP initiatives,
- **Limits future financial flexibility** (ie. due to commitments under long term contracts),
- **Heavy reliance on financial evaluation.** Value-for-money judgements depend heavily on key assumptions/inputs and modelling techniques, especially in preparing the Public Sector Comparator. Non-financial criteria risk being marginalised,
- **Reliability of performance specifications.** Sound preparation and proper interpretation of performance specifications is critical if value-for-money is to be achieved. This may be most challenging for social infrastructure, normally procured through detail specification,
- **Transaction costs and timeframes** (often said to be excessive),
- **Changing Service Needs.** There will be inevitable changes to government policies and service needs over the life of a contract. Contracts need to be drafted and interpreted to accommodate future, unknown changes.

1.6 Summary Observations

From analysis of experience in Australia to date our observations are:

- Australia has had many years of experience in the delivery of privately financed infrastructure. Many of these have been positive experiences. No doubt some would have been done differently with the benefit of hindsight.
- Current interest in PPPs in Australia is being driven by experiences in the United Kingdom. Although in the U.K. many PPPs are still in their early days, it is already apparent that these are achieving mixed results. After 8 years of PPPs, the U.K. media is generally negative about the achievements. More rigorous analysis and commentary by consultants involved in the industry presents a more positive picture.
- The public sector procurement environment in Australia is significantly different to that in the U.K. Most jurisdictions throughout Australia have been outsourcing construction and certain operating services to the private sector for a number of years. Therefore, some of the efficiencies achievable through PPPs in the Australian environment may be limited.
- Nevertheless, PPP assessment introduces a greater element of discipline in the whole-of-life evaluation of projects and the financial consequences of service delivery are therefore more visible.
- It is essential that the knowledge and expertise arising out of recent experiences with government procurement in Australia be drawn upon to work closely with treasuries and other government agencies to reinforce and enhance PPP procurement and ensure the government's objectives from PPPs are achieved.

1.7 APCC's National Leadership in Best Practice

To encourage discussion and promote improved procurement practice in PPP the APCC has released this discussion paper *Key Issues in Procurement through Public Private Partnerships*. This Discussion Paper seeks to assist governments achieve the PPP objective which is to maximise value-for-money from the procurement process.

This Discussion Paper addresses procurement aspects of the PPP option and does not necessarily reflect the views of the APCC or its member jurisdictions.

2. COMPATIBLE AND STABLE POLICY ENVIRONMENT

All jurisdictions have a number of government policies that impact on procurement practices. These may include policies regarding privatisation and/or out-sourcing of government activities, training levies or the use of the government's purchasing power to optimise economic, social and environmental outcomes in procurement. These policies may change over the life of a contract. All relevant government policies should be identified at the start of the process and factored into the selection of the procurement model and, where appropriate, the output specification.

Topics covered include:

- Government policy on privatisation
- Policies and practices for public sector projects
- Changes to policies over the life of a contract
- Policy as a driver

Government policy on privatisation can significantly restrict the number of models for consideration under a PPP procurement process. For instance, if government policy does not allow or support the transfer of public sector staff to the private sector, this position should be reflected in the business case analysis. It is unrealistic to open up stakeholder debate and prepare a business case considering potential value for money from a fully private sector service provision when government policy might only allow a serviced infrastructure model or similar outcome.

In addition, there are established policies and practices for public sector projects in all jurisdictions. These may include contributions towards industry lobby groups, contributions towards training levies, environmental sustainable development provisions and requirements for local area or indigenous employment quotas. They may also include government policies relating to purchasing power that aim to strengthen the links between public procurement and economic development to obtain best value for money and other tangible benefits.

If these environmental, social or economic measures are to be carried through into the PPP procurement model they must be clearly identified and specified in the output specification. These measures may impact upon market appetite and the potential for value for money to be generated from the PPP.

Alternatively, if these measures are not carried through into the PPP procurement model, the shift from public to the private sector delivery may impact upon the achievement of the government's broader social and other objectives.

There will inevitably be changes to government policies over the life of a PPP service contract. The need or desire to give effect to government policy changes may be incompatible to a long-term contract spanning 25-30 years unless there are no-cause early termination clauses in the contract. Incorporation of such clauses clearly impact upon certainty for the private sector and may affect market interest and therefore value for money potential.

Government policy should operate as a driver in the selection of the procurement model and the provisions written into the bid documents for a PPP process. The procurement model should not dictate or influence government policy.

The success of PPPs as a sustainable future procurement option for government depends upon how efficiently and effectively PPP processes and outcomes help achieve policy objectives in addition to improving value for money.

3. COMPETENCE AND A PARTNERING FOCUS

To manage typically complex, long-term PPPs a sound process is required supported by appropriate knowledge, skills and expertise. These vary as a project evolves, from initiation through bidding, evaluation and negotiation to infrastructure provision and operation (service delivery). A suitable management structure for each project is essential, including personnel with competencies commensurate with project needs and complexity and personnel who can both set up the deal and manage it over the long term.

Topics covered include:

- Relationship management
- Core competencies
- Performance specification development
- Knowledge management

Relationship management is a key capability for government in PPP procurement, where the private sector is delivering long term, non-core services and providing associated, new infrastructure and the government is buying (and paying for) a service not an asset. The 'partnership' environment of PPPs is central to the management of the contractual relationship. Productive partnerships arise out of the attitude of the people involved in the process, not the terms of the contract.

A well-structured risk sharing arrangement with adequate supporting provisions, including flexibility to accommodate future change over the long-term lifecycle of the project should be the partnership's platform. Excessive reliance by government on payment mechanisms to achieve satisfactory performance is likely to prove insufficient. Past procurement experiences show that a hard-edged confrontational approach and a reliance on the contract to settle disputes lead to disappointing outcomes. A good working relationship based on mutual trust, respect and maturity is essential.

Contract and/or concession management staff should be included in the project team from the beginning to enhance their understanding of the project and enable them to form necessary relationships with private party counterparts prior to implementation.

Core competencies for PPP procurement should be commensurate with project needs and complexity, typically in key areas including:

- Commercial/contractual negotiation,
- Economic & financial,
- Legal,
- Process management (including stakeholder and environmental aspects),

- Contracting and procurement,
- Government policy.

A project director will need to be appointed for each project and be responsible to both drive the project and involve the appropriate skills at the required time. The project director will typically be skilled in negotiating and managing contracts with the private sector and should have direct access to a designated project champion.

The complexity and scale of PPP generally requires a multi-disciplinary team based approach to ensure all the required skills are available and effectively applied. There must be clear lines of accountability and sufficient flexibility to optimise the diversity of inputs reflecting project needs and matching the expertise of proponents.

Generally, government will require the internal capability to manage the project (including the procurement team and consultants), develop and negotiate commercial and contractual arrangements, and ensure compliance with government policies and processes. Some external, specialist skills will likely be required to supplement the core team. Where these are engaged it is essential they are appropriately qualified, experienced and available as required. They should not have conflicts of interest through connection with proponents.

Governments need to be cautious as many consultants with PPP experience advocate PPPs because of the business opportunities that they offer. Selection of specialist consultants should be separated from the decision on whether to use PPPs or not.

Performance specification development is another key capability for government. PPPs focus on specifying outcomes (ie. performance specification) rather than the means of delivery. Specifying performance (outputs/outcomes) rather than inputs facilitates proponents' innovation. Ambiguous output specifications allow the private sector party too much latitude. The specification is a key element of the Public Sector Comparator and payment mechanism, increasing opportunities to improve value for money achieved by governments through linking payments to outcome performance indicators. It is a difficult task to get the performance specification right and it is therefore important that lessons learned from parallel projects in other jurisdictions are applied.

Knowledge management is also a key capability for government, which already has substantial knowledge of procurement. Effective management and application of this with new knowledge gained from PPP procurement is essential. Best practice requires management and sharing of knowledge to promote continuous improvement in PPP procurement. Project plans should allow for knowledge of the transaction/deal, especially lessons learned, to be captured and disseminated across government (agencies and jurisdictions).

An effective, efficient mechanism for knowledge management and application used for major government procurement in the U.K. is the "Gateway Process". This is a structured process examining and confirming critical decision points from conceptual development and over the life cycle of the project. It provides a robust risk management framework ensuring government procurement is successfully delivered and learnings fed back so future projects can be managed better.

4. COMPETITIVE NEGOTIATING ENVIRONMENT

Successful outcomes from PPPs rely on competent negotiation to convert inputs from the bidding and evaluation process into manageable contracts. Effective negotiation should be guided by a strategy to ensure final agreements align outcomes with project objectives within an acceptable risk framework consistent with the adopted business case.

Topics covered include:

- Competent public sector negotiators
- Competitive tension
- Professional documentation
- Provision for future flexibility
- Contracting with operating companies

The process requires competent public sector negotiators. Successful outcomes from commercial negotiations for PPPs have historically proven challenging for government, which has generally lacked the appropriate, 'in-house' expertise. In contrast, the private sector, with generally greater expertise in commercial negotiations of this type, has achieved broadly more favourable contractual outcomes in many PFI/PPP projects.

Government has often incurred large transaction costs through engagement of legal and other consultants in an endeavour to re-dress this imbalance. Greater availability of appropriate government procurement expertise across both agencies and jurisdictions may assist to reduce negotiation costs and improve overall government outcomes.

For successful results the public sector negotiator must recognise the inputs required from the private sector (ie. the commercial issues) and establish a negotiation strategy and framework to optimise the outcomes for the government and the project.

Competitive tension is the key to a successful outcome. This may require a period to stir up market interest and an awareness of conflicting pressures on prospective bidders.

A competitive environment needs to be maintained as long as possible. At the point that a preferred bidder is selected and publicly 'announced' competition effectively ceases, significantly reducing the government's negotiating power.

Maximising value-for-money depends upon equitable negotiation of unresolved issues. Negotiations should not be an opportunity for the private partner to simply 'shift the ground' to its advantage by, for example, introducing new issues late in the process when the public sector may be under pressure to close the deal, or a different set of parameters required by its financier for financial close.

Consideration can be given to means of extending competition in the process possibly by having two or three bidders develop their proposals further before final selections are made. Alternatively, the selection of a second preferred bidder can help maintain competitive tension.

Professional documentation contributes to better outcomes. It is clearly prudent to take more time up front so that the best experience available within government can be used in the preparation of the bid documentation including the output specification. The more issues that are covered in the bid documentation the fewer the items that will be subject to negotiation with a reduced need for time consuming and costly negotiations after the project has been bid. The bid documentation needs to be clear and set out non-negotiable clauses (as appropriate), but with sufficient flexibility for adjustment to cater for private sector innovation in project delivery. Ideally, the process should be managed so that the private sector parties bid final, or near final, contract documents.

Significant interaction with short-listed bidders in a competitive environment will be required to achieve this.

Provision for future flexibility in the contract presents a real challenge. It is inevitable that both service needs and government policies will change over the life of the contract. The contract may need to include incentives for the service provider to continue to adopt best practice in service delivery over the contract period. Effective ongoing management of the contract will be needed to deliver the balance between policing the contractor's performance and retaining a pro-active professional relationship.

Contracting with operating companies, as the principal contractor, may contribute to better long-term outcomes. Currently, the lead bidders for most projects in Australia are the recognised construction companies, which typically have only a short-term interest in the project. It may be desirable to stir up specialist service providers to consider taking a greater role in fronting PPP bids.

5. EFFECTIVE STAKEHOLDER INVOLVEMENT

Smooth progression of a PPP project relies on effective stakeholder management. More broadly, this is essential if the PPP approach is to gain wider acceptance as a common form of procurement. Transparency, disclosure and effective communication of the process and outcomes, including structured consultation throughout are key mechanisms in effective stakeholder management.

Topics covered include:

- Identifying key stakeholders
- Effectively engaging stakeholders
- Stakeholder Management Plan
- Local industry participation & development
- Transparency and disclosure

Care is required when identifying key stakeholders to ensure all relevant groups and individuals are included and appropriate individuals (ie. those truly representative of groups) are selected as participants. Internal stakeholders generally include government agencies with approval, licensing and/or regulatory roles and policy interests. External stakeholders may include local government, utility authorities, affected landholders, community interest groups, industry groups, suppliers of goods and services, media and the general community.

Effectively engaging stakeholders, both internal and external, is a key ingredient for smooth project implementation. Early consultation will enable sufficient time for stakeholders to express views/concerns and for government to properly respond. Consistency and clarity in communication (and the messages communicated) are essential. Consultation methods should be appropriate for the stakeholder types and size, complexity and sensitivity of the project involved.

A Stakeholder Management Plan should be prepared for each PPP addressing key issues such as:

- project communications (including dealings with proponents),
- agency/council consultation,
- community involvement/liaison (ie. through specific, identified stakeholder groups/individuals),
- general/public information dissemination and feedback,
- complaints lodgement/handling,
- employee/subcontractor training on implementation of Stakeholder Management Plan.

Local industry participation and development generates substantial benefits through investment, recruitment, and skill development and transfer. PPPs should seek to optimise these benefits through buying Australian/New Zealand (A/NZ) sourced goods and services and maximising opportunities for local service providers to compete for government business, on a value for money basis.

Transparency and disclosure underpin effective stakeholder management.

Transparency throughout the procurement process will reinforce certainty of outcome as milestones are met. It will also assist in demonstrating probity at work, overcoming potentially adverse stakeholder reaction or concerns and winning support for the project.

Disclosure of key details regarding PPP deals is common generally through publication of audited contract summaries which are also tabled in Parliament. If community backing is to be secured for PPP projects the contracts will need to withstand public scrutiny.

6. ROBUST PUBLIC SECTOR COMPARATOR

The Public Sector Comparator identifies and quantifies the delivery requirements for the project on the assumption it will be procured as a capital works project, where the asset is designed and developed by public sector processes. The feasibility of a potential PPP project is determined from a business case analysis of the net present cost of achieving the outcomes of a performance specification through a conventional procurement approach (the PUBLIC SECTOR COMPARATOR) relative to PPP bids for a range of achievable delivery models. These forecasts, together with non-financial considerations are used to provide an estimate of the value for money which may be achieved under each PPP option.

Topics covered include:

- Reliable raw data
- Public sector reference case
- Financial modelling

Reliable raw data on best practice in public sector procurement and a hands-on understanding of how the data can be accurately interpreted are essential to ensure the integrity and robustness of each option modelled.

There is not likely to be a single conventional public sector procurement model for such an analysis. Current public sector procurement in Australia is far removed from the old-style “public sector construction” agencies. Most public sector construction procurement is through the private sector today. Similarly, most of the governments’ asset management and maintenance functions are out-sourced taking advantage of economies of scale across the public sector.

Due to industry reforms and other improvements in capital procurement achieved by government in Australia over the past decade it is not appropriate to simply translate potential savings achieved in other jurisdictions (for example the U.K., where average savings of 17% are reported) into the Australian construction and operating environment without proper justification.

A public sector reference case needs to be built to properly define requirements and to properly estimate costs for a PUBLIC SECTOR COMPARATOR. It is necessary to gain a level of understanding of the form of asset that may need to be built for the service to be delivered.

This properly requires interpretation of the performance specification into costed concept designs and realistic whole-of-life costs to be calculated. The reliability of the PUBLIC SECTOR COMPARATOR and bids received is dependent upon the quality and clarity of the performance specification. Failure to understand 'normal' government procurement may translate into a poorly drafted performance specification stifling innovation and inadvertently limiting scope to maximise value-for-money achievable. Appropriately experienced agencies should be closely involved in developing both the performance specification and PUBLIC SECTOR COMPARATOR.

The financial modelling undertaken as part of the PUBLIC SECTOR COMPARATOR process needs to be carefully managed. While consultant expertise may be required to develop the financial models for a PUBLIC SECTOR COMPARATOR, it is important they work closely with agencies appropriately experienced in 'normal' government procurement to ensure the PUBLIC SECTOR COMPARATOR is not homogenised and pricing information is not too 'broad brush', and that it reflects current and expected best practice form and means of 'normal' government procurement, including reasonably foreseeable efficiencies the public sector could achieve.

Key assumptions forming the basis of the Public Sector Comparator model must be relevant to the Australian context, supportable and have a high degree of rigour. The model should be sufficiently transparent to enable differentiation between impacts of social, environmental and economic objectives for the project.

It is important for governments not to compare "old" or "traditional" service deliveries in Government with "new" or innovative service delivery through the private sector. Comparisons should be between "best practice" and innovative public sector delivery and equivalent private sector models.

7. OPTIMUM RISK ALLOCATION

Appropriate risk management, especially identifying and valuing risk, and optimising risk allocation underpins value-for-money achieved through PPP procurement. Risk management is continuous throughout a project's dynamic lifecycle and needs to take account of government commitments, expectations and post-concession (contract) interests.

Topics covered include:

- Risk analysis
- Common risk categories
- The risk matrix
- Valuation of risk
- Optimising risk allocation

A full risk analysis should be undertaken for each PPP on a case-by-case basis, drawing upon government's substantial experience with risk management in 'normal' capital procurement and cognisant of the scope offered by PPP generally for rational 're-balancing' of risk allocation. The specific opportunities to achieve this will develop as the PPP market deepens and matures. For example, where government contracts for service outcomes rather than physical infrastructure, risks associated with constructing and owning the infrastructure may appropriately be transferred to the private sector, which may integrate design, construction, operation and maintenance to minimise whole-of-life cost.

Appropriate risk allocation relies on a sound risk management process. It starts at the strategic planning stage of the project and generally involves:

- establishing the project's context,
- identifying risks,
- assessing/analysing risks,
- planning responses to risks including allocation,
- documenting the planned responses in a Risk Management Plan, including a Risk Matrix,
- implementation the Risk Management Plan, including monitoring and review.

Common risk categories include Site, Design / Construction / Commissioning, Sponsor, Financial, Operating, Market, Network / Interface, Industrial Relations, Legislation / Sovereign, Asset Ownership and Force Majeure. Each may have many sub-sets, which will vary with each project.

The risk matrix is a common tool for identifying, describing and assigning a preferred allocation of risks. The matrix may serve as a 'checklist' during negotiations to ensure all risks are appropriately addressed and afterwards as a useful summary of the agreed risk allocation in the contract. The matrix also enables risks which change in nature through the project's lifecycle and those which are affected by flexibility and/or 'symmetrical' provisions in the contract (ie. to cater for Governments' changing operational needs over the long term) to be accommodated and highlighted.

Valuation of risk is a key element of risk management. Valuation of risk impacts on costs and revenues over the lifecycle of a project and is a key input to the Public Sector Comparator Valuations are generally based on expected costs under 'normal' government procurement. It is essential pricing frameworks and assumptions used are reasonable, transparent and consistent with both current and expected best practice in government procurement to avoid mis-pricing. Where a risk cannot be sensibly quantified it should be addressed through qualitative assessment.

There may be a tendency in public sector agencies to over-value risk. Where this occurs the Government could pay more than necessary for a risk that may never eventuate or may be relatively inexpensive to remedy if the risk is realised.

Economic and social infrastructure may each require different risk treatment due to differences in key drivers of financial outcomes. Economic infrastructure is usually exposed to genuine market risk, being generally reliant on third party revenues whereas social infrastructure is generally reliant on payments (revenue) from government as the main user. For economic infrastructure the key driver is revenue linked risks and for social infrastructure, cost linked risks.

Government's aim is to maximise value for money from each PPP by optimising risk allocation, on a whole-of-life basis, rather than maximising risk transfer to the private sector. Ideally, Government should retain those risks it can manage more effectively than the private sector and make realistic decisions about transferring and thus paying for risk that are rare events. Inappropriately transferred risk may cost governments a premium and/or jeopardise long-term sustainability of a project. Risks outside the control of either party may be shared.

8. CONSISTENCY, CLARITY AND CERTAINTY

PPP guidelines, key process documents and contracts have common core themes and elements. Standardisation, within practical limits, will enable more effective building and sharing of knowledge, expediting transactions, reducing costs and providing a consistent platform for continuous improvement of process and documentation. Improvements in this area will also have the effect of deepening the market, as standardised, simplified documentation and a more efficient process may encourage more bidders to make the commitment to participate. The end result can be more competitive pricing thus improved value for money for the Government.

Topics covered include:

- Duplication and “re-inventing of the wheel”
- Standardisation
- Guidance documents
- Cross jurisdictional support

There is a significant amount of duplication and “re-inventing of the wheel” across jurisdictions. In some cases this also occurs within jurisdictions as agencies forge their own pathway in the procurement aspects of the PPP process.

This issue is further exacerbated where a ‘host’ agency may appoint a project manager without any previous procurement experience (or inappropriate experience) to manage the process for a new project. In these circumstances the government agency is continually in a learning curve. In contrast, consultants and private sector proponents will always put forward some of their most experienced practitioners and are inevitably better placed to protect their interests in the process ahead of the interests of the government.

Standardisation where appropriate, and sharing of knowledge between agencies and across jurisdictions has much to offer.

The aim should be to reduce transaction costs, maximise value-for-money and enhance the professionalism of the government’s involvement by improving the consistency, quality (best practices) and expediency of the process. Measures, such as identification of common items, adoption of standard core clauses for contract documentation, drafting of measurable outcomes, approaches to linking payments to outcome performance indicators and a consistent presentation of documents can all assist in this regard.

While there are always dangers with template contracts, and careful drafting will be needed to eliminate discrepancies, effort should be made to improve consistency and certainty.

Guidance documents can be used effectively to accommodate continuous improvement and gain leverage from progress/lessons learned in other jurisdictions.

These guidance documents can cover, for instance, business case and output specification requirements and the form of financial models expected from the process. By working together, agencies can ensure electronic copies of the required documentation are made available and intellectual property issues addressed to maximise opportunities for the public sector to take advantage of the work it has purchased.

Cross-jurisdictional support can also assist by offering independent reviews at critical decision points over the project’s procurement and life-cycle. This will facilitate shared learning, ongoing process improvement, reinforce the robustness of the business case and help maintain alignment of a project’s objectives with intended outcomes, throughout the procurement process and project life-cycle.

9. PROBITY

Government aims to maximise value for money through a competitive bidding process, with probity a key consideration. Probity at all levels must be maintained throughout a PPP to ensure the integrity of the procurement process and that participants are not compromised. A transparent, competitive process, which provides a fair opportunity for all prospective proponents to be assessed in a competitive environment, is essential. Accountability will also require transparency, disclosure and effective communication of the process and outcomes.

Topics covered include:

- Transparency
- Accountability
- Disclosure
- Confidentiality and protection of Intellectual Property
- Preventing conflicts of interest
- Probity Plan and Probity Auditor

Transparency is primarily achieved through effective, open and ongoing communication of the project objectives, parameters and procurement process. This in turn helps articulate probity protocols, demonstrate probity implementation and overcome potential criticism, objections and associated delays.

Accountability in a PPP process is achieved primarily through established frameworks of agency responsibility to government, consistent with other forms of procurement. Also accountability is emphasised through the establishment of independent review mechanisms. An example is the State Contract Control Board (SCCB) in NSW, which is responsible for issues associated with probity, National Competition Policy (NCP) and the Australia and New Zealand Government Procurement Agreement (ANZGPA). Another example is the Independent Commission Against Corruption (ICAC) in NSW, which may examine complaints about potentially corrupt conduct in the procurement process. Similar measures apply in other jurisdictions.

Also, government generally operates under codes of practice to establish ethical principles and standards of behaviour for all parties involved. These apply to all procurement actions from calling for Expressions of Interest (EoI) through to project completion. An example is the NSW Government's Code of Practice and Code of Tendering for NSW Government Procurement, together with the Code of Practice and Code of Tendering for the Construction Industry.

Disclosure of contracts is now required in many jurisdictions. This will often cover key details regarding PPP deals, generally through publication of a contract summary audited by the Auditor-General and tabled in Parliament soon after the contract becoming effective.

Confidentiality and protection of Intellectual Property (IP) are key probity considerations. Key considerations include identification, establishing ownership, ensuring effective competition (including dealing with unsolicited proposals), protective measures, transfer of ownership and valuation. Proponents, government and third parties may all have IP interests in a PPP. These may arise in discussions around projects and/or in the formal bid process. A consistent approach is essential to appropriately managing IP.

Preventing conflicts of interest is another key probity consideration. Conflicts of interest may threaten the integrity of a procurement process, compromise its participants and discredit its outcomes. Such conflicts may arise at an individual or corporate level. Common examples include one party involved in more than one bidding consortium or a single consultant providing advice to both the government and a bidder. Measures should be implemented to prevent conflicts of interest and to identify and deal with any occurrence as early as possible in the procurement process.

A comprehensive Probity Plan should be prepared for each PPP and a suitable Probity Auditor appointed for large, complex and unusually sensitive projects. By adopting a clear probity approach, all parties may be assured of the integrity of the overall procurement process.

10. STATUS OF PPP POLICY & GUIDELINES NATIONALLY

Development of PPP policy & guidelines nationally varies in terms of focus and detail. The more current and extensive are generally PPP/PFI focused, whereas the earlier and less detailed tend to focus on procurement/purchasing more broadly.

All jurisdictions appear to recognise the changing nature (and needs) of procurement dealings with the private sector, albeit some appear to address this more fully than others. The influential effect of the *Partnerships Victoria* documentation is evident in all subsequent documentation produced in other jurisdictions.

Common themes include Value for Money (balancing economic, social and environmental objectives), Competition, Innovation, Risk Management, Probity, Transparency, Accountability and Local Industry Development.

The current position regarding PPP policy and guidelines in the various jurisdictions around Australia is broadly as follows:

New South Wales:

- ❑ *Working with Government – Guidelines for Privately Financed Projects* – released November 2001.
- ❑ PFI focuses on projects of value \$20m (total contract value).
- ❑ Less emphasis on 'driving' economic development.
- ❑ More emphasis on social infrastructure – reinforcing links to agencies' strategic planning, normal budget process and *State Infrastructure Strategic Plan*.
- ❑ Announces NSW Infrastructure Council – similar body not apparent in other jurisdictions.
- ❑ Approvals process appears protracted compared with some other jurisdictions.
- ❑ Treasury responsible for financial/commercial advice to Government / agencies, through the newly established *Private Projects Branch (PPB)*.
- ❑ The Premier's Department is responsible for *Working with Government – Guidelines for Privately Financed Projects Policy, State Infrastructure Strategic Plan* & coordinating responses to unsolicited proposals.

Victoria:

- ❑ *Partnerships Victoria* – released June 2000. Policy plus extensive implementation guidelines.
- ❑ PV focuses on projects of value \$10m (total contract value).
- ❑ Emphasises maximisation of the level of infrastructure spending through responsible use of private & public resources.

- ❑ Emphasises industry development, investment, recruitment and skill development & transfer.
- ❑ Encourages use of standardised approaches wherever possible to minimise transaction time & costs.
- ❑ Emphasises “*vigorous deployment*” of Partnerships Victoria policy where it is likely to deliver better value for money than traditional delivery methods.
- ❑ Treasury responsible for management of *Partnerships Victoria*.

Queensland:

- ❑ *Public Private Partnership Policy* – achieving value for money in public infrastructure and services delivery – released September 2001.
- ❑ PPP Guidance Material - released in September 2002.
- ❑ PPP focuses on projects with a net present value (over the contract life) exceeding \$50m or a capital value exceeding \$30m.
- ❑ Emphasises industry development, investment, recruitment and skill development & transfer.
- ❑ Encourages use of standardised approaches wherever possible to minimise transaction time & costs.
- ❑ Encourages unsolicited proposals – to be assessed for priority against existing planning frameworks.
- ❑ Approvals process appears less onerous than in some other jurisdictions.
- ❑ Value for money assessment includes consideration of affordability.
- ❑ Department of State Development (Infrastructure Partnership Taskforce) responsible for Policy framework.
- ❑ Treasury responsible for financial/commercial advice to Government/agencies.

Tasmania:

- ❑ *Private Sector Participation in Public Infrastructure Provision – Policy Statement & Guiding Principles* – released July 2000.
- ❑ Focuses on projects with a value of \$5m or greater.
- ❑ Focus on new & replacement infrastructure provision & development of local industry.
- ❑ 10 Guiding Principles – targeting similar outcomes to other states.
- ❑ Approach to risk allocation appears arguably more ‘aggressive’ than in other jurisdictions ie. “*Risks such as those associated with design, construction, financing and operation / maintenance should generally be borne explicitly by the private sector (Policy document p4)*”.
- ❑ Contemplates changing project management team (or its composition) for different phases of the project based on project “size”. Whereas in other jurisdictions this team appears to remain largely constant.
- ❑ Finance lease arrangements prohibited – must be classified by the Audit Office as operating arrangements *before* contracts signed
- ❑ Expedient approval process – Budget Committee of Cabinet approves business case/plan before market testing. Thereafter responsible Minister has the delegated power to approve...but subject to perceived size/complexity significant risk exposure/direct impact on Consolidated Fund.
- ❑ Department of Treasury & Finance responsible for management.

Western Australia:

- ❑ *Project Evaluation Guidelines* – released May 2000. Current approach appears based on these very extensive guidelines (approximately 230 pages), the purpose of which appears to be generally to “...*encourage agencies to evaluate all investment decisions using a consistent and rigorous analytical approach.*”
- ❑ Focus mainly on justification of the investment decision rather than procurement methodology/process and/or financing method. However all of the items dealt with and evaluation tools provided appear relevant and useful for working with PPP.

- It is understood the Department of Treasury & Finance is currently finalising guidelines on PPP for Government endorsement prior to agency/private sector circulation for comment & feedback (from information on the Web).

South Australia:

- *Partnership SA - Private Sector Participation in the Provision of Public Services – Guidelines for the Private Sector* - effective date September 2002.
- Focus is on net benefit to Government, optimisation of management of risk, ensuring a competitive bidding process and probity.
- Guidelines acknowledge (and draw upon) work completed in other jurisdictions, particularly the U.K. and Victoria.
- A PPP Unit has been established in the Department of Treasury and Finance to facilitate private sector participation in infrastructure development. Agencies are required to consult with the PPP Unit in regard to all PPP projects.
- There is no specific dollar value trigger for a PPP project.
- The Department for Administrative and Information Services (DAIS - Services SA) provides a central policy and advisory role to Government for asset and risk management of Government's built assets.

Australian Capital Territory:

- *ACT Government Purchasing Policy and Principles Guideline* – released November 2000.
- Relates more to general purchasing than infrastructure procurement. However ACT procurement based on principles broadly similar to those underpinning PPP in other jurisdictions.
- ACT Treasury responsible for management, through the ACT Government Procurement Board.

Northern Territory:

- *Northern Territory Procurement Policy & Strategies* – released June 2000.
- Policies & guidelines appear to relate more to general purchasing than infrastructure procurement. However procurement of “works” appears to be included. No apparent policy and/or guidelines like States' PPP policies/guidelines. However the *Northern Territory's* procurement based on principles broadly similar to those underpinning PPP in other jurisdictions.
- In a recent public address to the Australian Council for Infrastructure Development (1/12/2001) the *Northern Territory's* Chief Minister indicated she has asked the Treasury, Department of Business, Industry & Resource Development & the Office of Territory Development to advise on what the *Northern Territory* needs to do to enter the PPP national market. However there does not appear to be any further information on the web.
- *Northern Territory* Treasury responsible for management, through the Procurement Review Board.

Commonwealth Government:

- *Commonwealth Policy Principles for the use of Private Financing (PF Principles)* – released October 2001. Understood to be the first in a set of documents to be developed for further guidance in the use of private financing (from information on the Web).
- Establishes “policy principles and processes for the use of private financing by Commonwealth departments and agencies...”

- ❑ Generally, privately financed projects with asset replacement valued below \$20m may be authorised by CEOs. Where such projects exceed this value &/or have the potential to limit or impact an agency's future activity or the Government's fiscal position the approval of the Minister for Finance & Administration is required irrespective of project value. For projects valued above \$50m the full Government must be consulted.
- ❑ The 3 core principles are Value for Money, Transparency & Accountability. The issues involved with each and approaches taken appear similar to those identified and discussed in PPP documents produced by other jurisdictions.
- ❑ There is arguably greater focus on tax implications of projects in the assessment process/phase than is apparent in other jurisdictions.
- ❑ Department of Finance & Administration – Private Financing Unit – responsible for management.

Commonwealth – Department of Defence:

- ❑ *Private Financing Manual* – released February 2001.
- ❑ Broadly similar to guidelines produced by some state government jurisdictions, especially Victoria & NSW.
- ❑ Notable special provisions are:
 - As a minimum the ability to deploy and sustain Australian Defence Force elements and execute an operation is not to be prejudiced. As a general rule, the effectiveness of the Australian Defence Force should be enhanced by the involvement of the private sector.
 - The role of delivering combative force is specifically excluded.
- ❑ Organisational Effectiveness Branch responsible for management.

Department of Public Works and Services
New South Wales

Building Commission
Victoria

Procurement Branch, Department of Treasury and Finance
Victoria

Department of Public Works
Queensland

Department for Administrative and Information Services
South Australia

Department of Housing and Works
Western Australia

State Supply Commission
Western Australia

Department of Treasury and Finance
Western Australia

Department of Infrastructure, Planning and Environment
Northern Territory

Department of Finance and Administration
Commonwealth

Department of Treasury
Australian Capital Territory

Ministry of Economic Development
New Zealand