Market-led Proposals Policy

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Department of the Premier and Cabinet

Dumas House
Havelock Street West Perth
Western Australia 6005

Phone: (08) 6552 5000
Fax: (08) 6552 5001
E-mail: marketledproposals@dpc.wa.gov.au
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1. Introduction

The Western Australian Government’s Market-led Proposals (MLP) Policy is an innovative pathway for businesses and government to work together to create jobs and stimulate the economy. MLPs allow the Government to harness good ideas, private sector investment and entrepreneurship to develop projects that benefit Western Australians.

The MLP Policy provides a single clear, consistent and transparent process for parties seeking to approach government with proposals that have not been requested by government. The Policy outlines how the Government will evaluate the merits of such proposals and determine whether it is in the public interest to enter exclusive negotiations with a proponent, rather than engaging in the usual competitive process.

The MLP Policy applies to, and is to be followed by, all Western Australian Government agencies and Government Trading Enterprises (GTEs) and supersedes any current or future policies maintained by them in respect of dealing with MLPs.

Further details on the evaluation process and criteria are provided in the MLP Supplementary Guidelines.

1.1. What is a Market-led proposal?

An MLP is a proposal from the private sector to government to build and/or finance infrastructure; provide goods or services; or to purchase a government owned asset, where government has not requested the proposal (for example, through a competitive procurement or expression of interest process, etc).

MLPs always include a commercial proposition for government such as accessing government land, assets, information or networks; developing public infrastructure; or providing a good or service on behalf of government.

The focus of this policy is on proposals which justify direct negotiation. Such proposals are generally outside the normal planning and competitive procurement processes of government and will offer opportunities to deliver real value and innovation to the Government and the Western Australian community.

1.2. Exclusions from the MLP Policy

Types of proposals that will generally not be considered under the MLP Policy include those that:

- are dealt with by an existing government process that is underway;
- seek to obtain industry assistance and other grants currently available and considered through existing programs;
- relate to a project or program that government has already decided and/or announced will be released to the market;
- are not required to be subjected to a competitive procurement process; or
• have a total estimated value below the threshold that would require a competitive procurement process (as specified in Western Australian Government policy and/or legislation).

This MLP Policy is also not intended to capture proposals for private sector projects which do not have a substantial element of public value, where government’s role would primarily be the facilitation of that project rather than being a recipient of benefit from it on behalf of the public. For example, this may include major natural resource and private sector infrastructure projects which are typically facilitated by the Department of Jobs, Tourism, Science and Innovation. If such proposals are made to the MLP Secretariat they will be referred directly to the relevant government agency.

The MLP Policy does not replace applicable environmental and planning assessment processes or other regulatory requirements.

The MLP Policy is intended to be administered consistently with applicable legislation. Accordingly, in the event of inconsistency between a requirement of the MLP Policy and a legislative requirement, the MLP Policy requirement will not apply to the extent of the inconsistency. Particular questions of inconsistency and how they are to be managed may be referred to the MLP Steering Committee for consideration.
2. Administering the policy

2.1. Governance

The MLP Policy sets out a single MLP evaluation process that applies to all Western Australian Government agencies (departments and statutory authorities) and Government Trading Enterprises (GTEs).

The evaluation process works within existing statutory frameworks governing agency activities and allocating agency responsibility for various activities of government.

The MLP evaluation process is summarised in Figure 1.

2.1.1. MLP Steering Committee

The MLP Steering Committee will oversee the implementation of the MLP Policy and provide recommendations to Cabinet. The Steering Committee comprises an independent Chair and Directors General/Chief Executive Officers of the following agencies:

- Department of the Premier and Cabinet
- Department of Treasury
- Department of Finance
- Department of Jobs, Tourism, Science and Innovation
- Department of Primary Industries and Regional Development (for MLPs located outside the Perth Metropolitan area only)
- The Lead Agency for the proposal
- Other key agencies as determined by the Steering Committee

The MLP Steering Committee may establish sub-committees, such as to manage high risk/complex MLPs.

2.1.2. MLP Secretariat

The MLP Secretariat will support the MLP Steering Committee and provide a central point of contact for the receipt of MLPs. MLPs and all other communications relating to the MLP Policy should be directed to the MLP Secretariat in the first instance.
2.1.3. Lead Agency

The Lead Agency is the government agency or GTE that is considered to have the technical expertise and/or legislative mandate to inform the evaluation process and oversee implementation, should a proposal be successful.

The MLP Steering Committee will assign a Lead Agency for each proposal during the pre-qualification stage.

For proponents invited to submit a Stage 1 Proposal, the Lead Agency will nominate a proposal manager from within the agency who will be responsible for chairing evaluation panels and coordinating all further communications with the proponent throughout the evaluation process.

2.1.4. Coordination of evaluation process

During the pre-qualification review stage, the MLP Steering Committee, in collaboration with relevant agencies, will determine whether the evaluation will be centrally coordinated (by the MLP Steering Committee) or managed directly by the Lead Agency.

Proposals which meet one or more of the following thresholds will be evaluated through the centrally coordinated process:

- proposals with a value of more than:
  - $10 million for information and communications technology related proposals;
  - $50 million for all other proposals; or
  - high risk proposals below these values.

  (the above thresholds do not apply when a GTE is the Lead Agency)

- complex proposals involving more than one government body;

- where the Lead Agency and MLP Secretariat agree; or

- where requested by the relevant Minister.

For proposals that do not meet these thresholds, the evaluation process will be managed by the nominated Lead Agency in line with the process and principles outlined in this policy. All other requirements set out in this policy will apply.

The Lead Agency is required to report to the MLP Steering Committee on the outcome of all Lead Agency coordinated proposals at the end of each stage of evaluation and prior to making any public disclosures or commitments to the Proponent.

The Lead Agency will also be responsible for ensuring appropriate consultation with other relevant agencies.

Notwithstanding the above, at any stage of the evaluation process the MLP Steering Committee may determine (in consultation with the Lead Agency) that a particular proposal will be coordinated by the Lead Agency, rather than the centrally coordinated process, or vice versa.
2.1.5. Evaluation panel

An evaluation panel will be formed at the commencement of Stage 1 to evaluate proposals and provide recommendations to the Steering Committee (or the Lead Agency CEO for MLPs that are not centrally coordinated). Composition of the evaluation panel will depend on the nature of the proposal and may include technical experts from a number of relevant government agencies. The evaluation panel may also seek advice from external technical experts where required.

2.1.6. Infrastructure WA

Business cases for major infrastructure proposals that meet the definition within the *Infrastructure Western Australia Act 2019* (once enacted), will be referred to Infrastructure WA for advice, during Stage 2 of the evaluation process. This advice will be provided to Cabinet to inform the decision on whether to invite the proponent to proceed to Stage 3. The Steering Committee may also request Infrastructure WA’s advice on proposals at any other time.

2.1.7. Decision-making authority

For MLPs that are centrally coordinated, Cabinet approval is required at each stage of the evaluation process (excluding the pre-qualification review), on the recommendation of the MLP Steering Committee.

For Lead Agency coordinated proposals, the requirement for Cabinet and/or ministerial approval will depend on the internal governance arrangements and legislative requirements of the agency (which may vary depending on the value of the proposal).
2.2. **Probity**

The evaluation of proposals and all negotiations with proponents will be undertaken with the highest levels of probity consistent with the public interest. The application of established probity principles aims to assure all parties of the integrity of the decision-making process.

These include maintaining impartiality, accountability and transparency, managing potential or perceived conflicts of interest, maintaining confidentiality and obtaining value for money. Further details on the probity principles are provided in the MLP Supplementary Guidelines.

2.3 **Resource commitments and timeframes**

In order for an MLP to progress, the Government and the proponent will be required to commit resources. The staged approach to evaluation (as detailed in section 3 of this policy) seeks to balance resource input at each stage in order to minimise unnecessary expenditure.

The participation of a proponent in any stage of an MLP evaluation process or in relation to any matter concerning a proposal, is at the proponent’s sole risk, cost and expense. The proponent may be required to pay the cost of any third party experts appointed by government to assist with the evaluation of the proposal, on a cost recovery basis. These costs will be agreed with the proponent prior to engaging third parties.

MLPs are evaluated with the objective of reaching key decision points within agreed timeframes.

2.4 **Disclosure**

The MLP Secretariat is responsible for coordinating the public disclosure of MLPs received under this policy.

A summary of each MLP and the outcome of the evaluation process is publicly disclosed on the MLP website at the end of Stages 1, 2 and 3. A Register of all MLPs received will also be maintained by the MLP Secretariat.

Government recognises the confidential nature of MLP submissions and will endeavour to treat them accordingly, subject to the disclosure contemplated by the MLP Policy, the terms and conditions and government’s public disclosure and accountability obligations.

While all reasonable steps will be taken to protect the intellectual property of the proponent, the proponent should be mindful that it participates in the MLP process set out in this policy at its own risk.

Proponents are advised to exercise a high degree of discretion in disclosing any information publicly throughout the process of developing a proposal and, particularly, once a proposal is lodged.
2.5 Terms and conditions

This policy, its administration and the receipt and evaluation of proposals submitted pursuant to it are subject to the terms and conditions set out in Appendix 2 of the MLP Supplementary Guidelines. The terms and conditions will apply at all stages but will be supplemented by a [Stage 1, Stage 2, Stage 3] Agreement as relevant.

The evaluation process will also be guided by the principles outlined in section 2 of the MLP Supplementary Guidelines.

2.6 Lodging enquiries, requests and proposals

All initial enquiries, requests and proposals should be lodged with the MLP Secretariat. Proponents who approach agencies outside this process in relation to an MLP will be referred to the MLP Secretariat.

Following lodgement of the pre-qualification template, the MLP Secretariat will contact the proponent to arrange a pre-qualification meeting. The MLP website provides a central resource for proponents seeking to submit an MLP to government.

After a Lead Agency proposal manager is appointed and notified to the proponent, all enquiries should be directed to the proposal manager.

The MLP Secretariat, Lead Agency proposal manager or other notified person may advise the proponent of communication protocols to be followed.

2.7 Policy review

Lessons will be captured and incorporated into the policy on an ongoing basis. The policy will be comprehensively reviewed after 12 months of operation and then at intervals not exceeding five years.
3. Evaluation process

3.1 Overview of evaluation process stages

The key stages of the evaluation process are outlined below. The level of information required from the proponent will increase at each stage of the process, but may vary depending on the nature of the proposal.

- **Pre-qualification review** – The proponent is required to complete the pre-qualification template (and attend a pre-qualification meeting) to provide a high level summary of the proposal. Only proposals considered to be within the scope of the MLP Policy and with a reasonable prospect of meeting the evaluation criteria will be invited to Stage 1.

- **Stage 1: Concept evaluation** – If invited to Stage 1, proponents submit their proposal (at a concept level) for assessment against the evaluation criteria to justify the preparation of a more detailed business case. An Expression of Interest process may be required to test the justification for direct negotiation.

- **Stage 2: Business case evaluation** – If invited to Stage 2, proponents develop their proposal into a detailed business case, in consultation with the Lead Agency, for evaluation by government.

- **Stage 3: Negotiation of Final Binding Offer** – If invited to Stage 3, outstanding issues are negotiated with a view to entering a binding agreement should government accept the offer.

The centrally coordinated proposal evaluation process is outlined in **Figure 1**.

For Lead Agency coordinated proposals, the same process applies, however, the CEO of the Lead Agency will fulfil the role of the MLP Steering Committee and the requirement for Cabinet and/or ministerial approval will depend on the internal governance arrangements and legislative requirements of the agency. This section and the remainder of this policy and the MLP Supplementary Guidelines should be read subject to this paragraph.
3.2. Evaluation criteria

The following evaluation criteria will be used by government to evaluate proposals. Government may also take into account any other factors it considers relevant to the evaluation of an MLP.

1. **Strategic Alignment**
   The proposal is aligned with government policy objectives and priorities.

2. **Public Interest**
   The proposal has significant social, environmental, economic or financial benefits for Western Australians.

3. **Value for money**
   The proposal represents value for money for Western Australians and is affordable in the context of budget priorities.

4. **Feasible and capable of being delivered**
   The proposal is feasible (including financially) and the proponent has the financial and technical capacity, capability and experience to deliver the outcome successfully. Detailed due diligence on the proponent (including any parent and subsidiary companies) and the proposed financial and corporate structure of the proposal will be undertaken in evaluating this criterion.

5. **Risk**
   Any financial, reputational and/or security risks to government from the proposal are acceptable and there is an appropriate allocation of risk between the proponent and government.

6. **Justification for exclusive negotiation**
   The proposal delivers outcomes that are not likely to be obtained using standard competitive processes and within acceptable timeframes and therefore justifies exclusive negotiations with government.

Where a proposal has been assessed as meeting criteria 1–5 sufficiently, but questions remain about whether exclusive negotiation is justified, government may choose to test the market through an Expression of Interest process. This process is outlined in Section 3.5.
3.3 Referral to a Government led process

Where a proposal does not meet the MLP evaluation criteria but is thought worthy of further consideration by government, the Steering Committee (or Cabinet) may refer the proposal to the relevant Lead Agency. This referral may occur at any stage but is most likely in the pre-qualification review or in Stage 1. This process also applies to Lead Agency coordinated proposals.

The Lead Agency will decide whether or not to further develop the proposal as part of its ongoing operations or progress it through a standard competitive process. The Steering Committee will require the Lead Agency to report back on any decisions or action taken in regard to the referral within three months or such other timeframe agreed by the Steering Committee.

The legal rights of a proponent in respect of any intellectual property held by it in connection with a proposal will be observed.
Figure 1: MLP evaluation process
3.4 Pre-qualification review

Proponent role:

- Completes pre-qualification template and lodges with the MLP Secretariat.
- Attends a pre-qualification meeting with the MLP Secretariat and relevant agencies/GTEs.

Government role:

- Receives the pre-qualification template and determines if sufficient information has been provided.
- Assigns a Lead Agency to the proposal.
- Determines if the evaluation process will be led by the MLP Steering Committee or the Lead Agency.
- Reviews the proposal and determines whether to invite the proponent to submit a Stage 1 Proposal, or if there is a more suitable alternative government process.

Objective of pre-qualification review

The objective of the pre-qualification review is for government to consider a high level summary of the proposal to determine if the proposal is within the scope of the MLP Policy and has a reasonable prospect of meeting the evaluation criteria, before the proponent commits significant resources.

The MLP Steering Committee will also nominate a Lead Agency for the proposal and determine if the evaluation process will be led by the MLP Steering Committee or the Lead Agency.

Pre-qualification template

Proponents must complete and submit the pre-qualification template (provided in the MLP Supplementary Guidelines) to the MLP Secretariat to commence the evaluation process.

Government may seek additional information from a proponent prior to making a determination on whether to invite the proponent to submit a Stage 1 Proposal.
Pre-qualification meeting

Following lodgement of the completed pre-qualification template, the proponent must attend a pre-qualification meeting with the MLP Secretariat to inform the review. The MLP Secretariat will arrange for representatives from relevant government agencies/GTEs (including the proposed Lead Agency) to attend the meeting.

Outcomes of pre-qualification review

The MLP Steering Committee will review the pre-qualification template and determine the responsible Lead Agency for the proposal and whether the evaluation process will be centrally coordinated or led by the Lead Agency (based on the thresholds outlined in Section 2.1 of this policy).

The MLP Steering Committee (for centrally coordinated processes) or the Lead Agency (for Lead Agency led processes), will then make a determination on whether to invite the proponent to submit a Stage 1 Proposal. The following matters will be considered:

- whether the proposal is within the scope of the MLP Policy (or if there is a more appropriate alternative government process); and
- whether the proposal has a reasonable prospect of meeting the evaluation criteria.

Wherever possible, reasons why an unsuccessful proposal is not suitable for further consideration will be provided to the proponent.

The MLP Steering Committee will advise Cabinet (for noting only) of each MLP formally received and whether or not the proponent has been invited to submit a Stage 1 Proposal for evaluation.

Best endeavours will be made by the MLP Secretariat to advise on the outcomes of the pre-qualification review within three months of lodging a proposal. If this timeframe is not met, the MLP Secretariat will communicate this to the proponent and provide timely updates. For Lead Agency coordinated proposals, timeframes will be managed between the Lead Agency and the proponent.

The proponent has the option to withdraw from the process at any time within the pre-qualification review stage.
3.5 Stage 1 – Concept evaluation

Proponent role:

- Enters into a Stage 1 Agreement, as necessary.
- Submits a Stage 1 Proposal addressing the evaluation criteria and responds to requests for further information.

Government role:

- Establishes an Evaluation Panel of suitably qualified people to negotiate the Stage 1 Agreement and evaluate the proposal (at a concept level).
- Receives the Stage 1 Proposal and determines if sufficient information has been provided.
- Determines if the proposal will proceed to Stage 2, and if declined, determines if it should be progressed through a suitable alternative government process.

Objective of Stage 1

The objective of Stage 1 is to undertake an evaluation of the proposal (at a concept level) to determine whether the proposal meets the evaluation criteria sufficiently to warrant development of a more detailed business case.

Stage 1 Agreement

Proponents may be required to enter a legally binding Stage 1 Agreement at the commencement of Stage 1 where there are considerations directly relevant to the proposal that are not sufficiently addressed in the terms and conditions.

Outcomes of Stage 1

The outcome of the evaluation panel’s assessment is provided to the MLP Steering Committee which will make a recommendation to Cabinet to determine whether the proposal:

- should be invited to proceed to Stage 2; or
- is not considered suitable for further consideration and is either declined or redirected to an alternative government process.

Wherever possible, reasons why an unsuccessful proposal is not suitable for further consideration will be provided to the proponent.
**Additional justification for exclusive negotiation test**

Where a proposal has been assessed as meeting the evaluation criteria sufficiently to progress to Stage 2, but questions remain about whether exclusive negotiation is justified, the MLP Steering Committee may choose to test the market through an Expression of Interest (EOI) process. The EOI process could test the whole proposal or a portion of the proposal as required. This test assists government to determine if any other parties could deliver similar outcomes, within acceptable timeframes and offer comparable value as to what has been proposed.

The EOI process will involve public release of the proposed outcomes and/or key elements that a proposal is seeking to deliver. The proponent will be advised prior to an EOI process being undertaken.

At the conclusion of the EOI process the evaluation panel will consider any responses and update the evaluation outcome, where necessary, for consideration by the MLP Steering Committee and Cabinet.

The purpose of the EOI process is to test whether any other parties could deliver similar outcomes, within acceptable timeframes and offer comparable value as to what has been proposed. While serious consideration will be given to outcomes of the EOI process, the MLP Steering Committee or Cabinet are not bound by the outcomes of the EOI process.

Timeframes for this stage will be considered in the Stage 1 Agreement.

The proponent has the option to withdraw from the process at any time within Stage 1.
### 3.6 Stage 2 – Business case evaluation

**Proponent role:**

- Enters into a Stage 2 Agreement.

- Attends an establishment meeting and participates in proposal development workshops as required.

- Prepares and submits a detailed business case for the proposal in a form agreed in the Stage 2 Agreement which addresses each of the evaluation criteria. This may include draft commercial terms for government’s consideration.

**Government role:**

- Establishes the Stage 2 Evaluation Panel and negotiates the Stage 2 Agreement.

- Considers the engagement of a specialist Project Director and the establishment of a dedicated sub-committee as required.

- Facilitates an establishment meeting and any proposal development workshops. Where appropriate, government may establish commercial/technical teams to guide and liaise with the proponent.

- Refers business cases for infrastructure related proposals (above the specified threshold) to Infrastructure WA, once it is established, for advice.

- Undertakes evaluation of the business case for the proposal against the evaluation criteria.

**Objective of Stage 2**

The objective of Stage 2 is for the proponent to develop a detailed business case for the proposal. This will allow government to make an informed decision on the merits of the proposal and whether to enter into exclusive negotiations with the proponent. The development and evaluation of a business case may require a degree of preliminary negotiation on key issues, subject to the nature of the proposal.

**Stage 2 Agreement**

The proponent is required to enter a legally binding Stage 2 Agreement with government at the commencement of Stage 2, confirming the requirements of the business case and any other relevant considerations.
Outcomes of Stage 2

The outcome of the evaluation panel's assessment is provided to the MLP Steering Committee which will make a recommendation to Cabinet to determine whether the proposal:

- should be invited to proceed to Stage 3. Commercial terms are largely agreed by the Government and the proponent, and will form the basis of a Final Binding Offer and Stage 3 Negotiations; or

- is not considered suitable for further consideration and is either declined or redirected to an alternative government process.

Wherever possible, reasons why an unsuccessful proposal is not suitable for further consideration will be provided to the proponent.

For infrastructure related proposals, the proponent’s business case must be prepared in accordance with the requirements of Infrastructure WA (once established, and where relevant) and the WA Government Strategic Asset Management Framework. As outlined in section 2.1, infrastructure related proposals above the specified threshold will also be referred to Infrastructure WA, once it is established, at this stage of the process for advice to inform Cabinet’s decision.

Timeframes for this stage will be considered in the Stage 2 Agreement.
3.7 Stage 3 – Negotiation of Final binding offer

Proponent role:
- Enters into a Stage 3 Agreement.
- Participates in the negotiation process.
- Lodges a Final Binding Offer, including appropriate legal and commercial terms.

Government role:
- Establishes a negotiation team and negotiates a Stage 3 Agreement.
- Commits appropriately qualified resources to complete negotiations on the proposal, including legal, financial and technical advice where appropriate.
- Undertakes a comprehensive evaluation of the Final Binding Offer.
- Defines the appropriate Contract Management arrangements to monitor and ensure contracted outcomes are delivered.

Objectives of Stage 3

The objective of Stage 3 is to finalise all outstanding issues with a view to entering into a binding agreement.

Stage 3 Agreement

The proponent is required to enter a legally binding Stage 3 Agreement with government at the commencement of Stage 3. The agreement will include all relevant elements from the Stage 2 Agreement and a schedule of items to be negotiated.

Final Binding Offer Evaluation and Negotiation

The Government negotiation team will negotiate a Final Binding Offer with the proponent on the proposal outlined in the business case.

Outcomes of Stage 3

The MLP Steering Committee will consider the Final Binding Offer to confirm that the proposal continues to meet the evaluation criteria and is affordable in the context of budget priorities.

The MLP Steering Committee will make a final recommendation to Cabinet to determine whether the Final Binding Offer should be accepted or declined.

Wherever possible, reasons why an unsuccessful proposal is not suitable for further consideration will be provided to the proponent.
For infrastructure related proposals seeking government funding, a Project Definition Plan (PDP) must be prepared by the proponent in accordance with the Strategic Asset Management Framework and the requirements of Infrastructure WA (once established, and where relevant). The PDP will refine and confirm the costs, schedule and risk mitigation strategy for the project as well as the procurement and financing arrangements.

Timeframes for this stage will be considered in the Stage 3 Agreement.