



GOVERNMENT OF
WESTERN AUSTRALIA

Market-led Proposals Policy



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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. 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;
- 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);
- do not meet the Government's current priorities; or
- proposals that lack structure and sufficient supporting information.

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 MLP 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 MLP Steering Committee comprises an independent Chair and Directors General/Chief Executive Officers of the following agencies and statutory authorities:

- 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
- Western Australian Planning Commission Chairman (for all planning and land related MLPs)
- Lead Agency for the proposal
- Other key agencies as determined by the MLP 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 in Stage 1.

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 Stage 1, the MLP Steering Committee, in collaboration with relevant agencies, will determine whether the evaluation will be centrally-led (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-led 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;
- 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 agency-led 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 MLP Steering Committee (or the Lead Agency DG/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*, 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 MLP 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-led, Cabinet approval is required at each stage of the evaluation process, on the recommendation of the MLP Steering Committee.

For agency-led 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 invited to Stage 2 and the outcome of the evaluation process at the end of Stages 2 and 3 is publicly disclosed on the MLP website. 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. Only those administering the MLP Policy or involved in the assessment of a specific proposal will have access to the proponent's information.

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 One of the MLP Supplementary Guidelines, and will form part of the concept submission. The terms and conditions will apply at all stages, but will be supplemented by an Agreement [Stage 2 and/or Stage 3] as relevant.

If terms and conditions appear to be breached, the proposal assessment may be held in abeyance whilst the MLP Steering Committee considers the breach and potential actions.

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.

The MLP website provides a central resource for proponents seeking to submit an MLP to government. After completing the online self-assessment, a proponent must contact the MLP Secretariat to arrange a pre-submission meeting.

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 Resubmitting proposals

Declined proposals will not be reconsidered for a period of 18 months since lodgement, with exceptions at the discretion of the MLP Steering Committee.

2.8 MLP Policy review

Lessons will be captured and incorporated into the MLP Policy on an ongoing basis. The policy will be reviewed annually.

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.

- **Stage 1: Concept Evaluation** – The proponent is encouraged to complete the online self-assessment and attend a compulsory pre-submission meeting with the MLP Secretariat before lodging a concept proposal. Only proposals that are considered to be within the scope of the MLP Policy, align with government priorities, demonstrate a reasonable prospect of meeting the evaluation criteria and are not market standard will be invited to Stage 2.
- **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. A First Mover Advantage process (Swiss Challenge/Bid Premium) may be required if the proponent does not meet the justification for exclusive negotiation characteristics in Stage 1.
- **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-led proposal evaluation process is outlined in **Figure 1**.

For agency-led proposals, the same process applies, however, the DG/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 Priorities assessment

The Government will publish a document on the MLP website that articulates the current Western Australian Government priorities and exclusions. Problem and opportunity statements to which the Government is inviting industry to propose innovative solutions will also be published.

To assist proponents in understanding any types of proposals or solutions that Government will not consider as a priority, specific exclusions will be published to the MLP website from time to time.

Proposals will be assessed against the published priorities and problem/opportunity statements in Stage 1.

3.3 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 a 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.

3.4 Procurement pathways

Proposals will be assessed in Stage 1 to determine the procurement pathway the proposal will follow if the proposal is invited to proceed to Stage 2.

Firstly, the proponent must meet the following First Mover Advantage characteristics:

- a. the proposal is unique and not market standard;
- b. the concept or a similar proposal has not been provided to the Western Australian Government in the past two years by another proponent; and
- c. the proponent has demonstrated higher share of risk borne by proponent than the State.

Where the First Mover Advantage characteristics are not met, it is acknowledged that the outcome could be achieved by a competitor and the proposal will be referred to another relevant government process.

However, if the proposal meets the First Mover Advantage characteristics, the proposal will be further assessed to determine the appropriate procurement pathway. The proposal would be assessed against the Justification for Exclusive Negotiation characteristics below:

- a. genuine intellectual property, patents, copyrights or other exclusive rights, or due to an absence of competition for technical reasons, without which the proposal could not proceed to implementation; and/or
- b. ownership of strategic assets, contractual rights or real property placing it in a unique position to deliver the aims of the proposal, and to which other parties could not deliver; and/or
- c. bona fide sole source of supply with there being no reasonable substitute or alternative.

If the proponent demonstrates any or all of these characteristics, it is acknowledged that the outcome could not be achieved by a competitor at this time and the Government may undertake exclusive negotiations with the proponent.

If the Justification for Exclusive Negotiation characteristics are not met, the MLP Steering Committee will then recommend an appropriate mechanism for a benefit to be assigned to the proponent in a market testing process in Stage 2. This process will take the following form:

1. Swiss Challenge – the Government will undertake a competitive tender process and if the proponent is initially unsuccessful in submitting the most attractive bid, it has the option to match the winning bid and implement its proposal, should it be successfully negotiated in Stage 3. The Government recognises that bidders other than the proponent are only likely to participate in a Swiss Challenge if they believe that they have a significant, differentiating advantage over the Proponent; or
2. Bid Premium – the Government will undertake an otherwise competitive tender process but the proponent will receive a bonus bid evaluation. Typically, the bonus is the addition of a premium to the technical offer. This premium will be set between 10 and 20 percentage points, with the final size of the premium within this range to be determined by the MLP Steering Committee, or a discount to its financial offer. This premium reflects the ‘first mover’ advantage of the proponent.

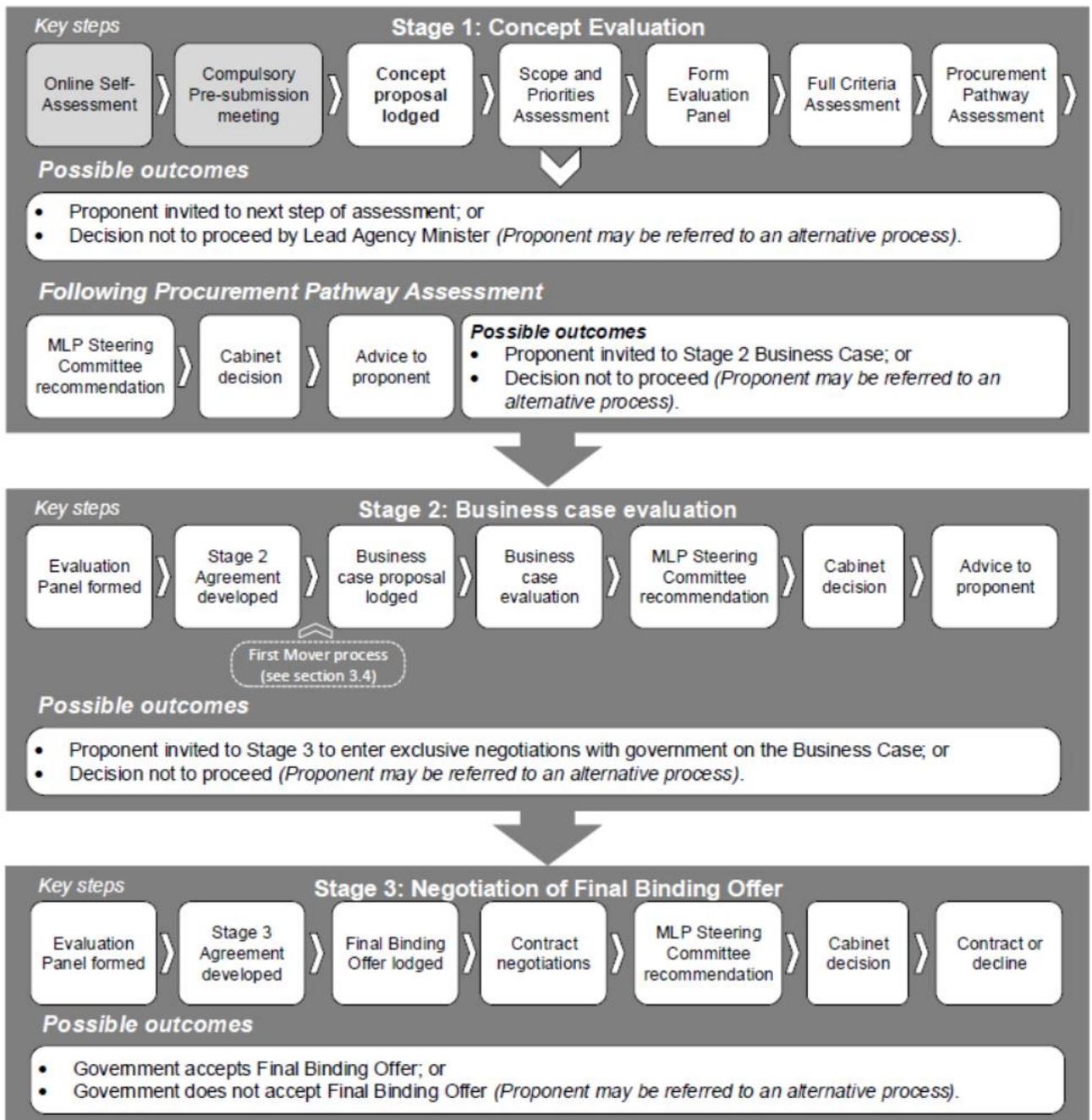
3.5 Referral to an alternate government process

Where a proposal does not meet the MLP evaluation criteria, but is thought worthy of further consideration by government, Cabinet may refer the proposal to the relevant Lead Agency. This referral may occur at any stage but is most likely in Stage 1. This process also applies to agency-led 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 MLP 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 MLP 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



3.6 Stage 1: Concept evaluation

Objective of Stage 1

The objective of the Stage 1 is for government to undertake an evaluation of the proposal (at a concept level) to determine if the proposal is within the scope of the MLP Policy, aligned to Government Priorities and has a reasonable prospect of meeting the evaluation criteria, before the proponent commits significant resources in the development of a more detailed business case.

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 (centrally-led) or the Lead Agency (agency-led).

Online self-assessment

Proponents are encouraged to complete the online self-assessment on the MLP website. This checklist allows proponents to consider their proposal against the MLP Policy requirements and ensure they have adequate information to proceed. This assessment can be provided to the MLP Secretariat for the pre-submission meeting to assist that discussion.

Compulsory pre-submission meeting

Prior to lodgement and acceptance of the concept proposal, the proponent must attend a pre-submission meeting with the MLP Secretariat. This will enable the MLP Secretariat to provide advice to proponents whether the proposal has a reasonable chance of meeting MLP policy requirements before they invest in a submission. The MLP Secretariat may arrange for representatives from relevant government agencies/GTEs (including the proposed Lead Agency) to attend the meeting if required.

Concept proposal

Proponents must complete and submit the concept proposal template (provided on the MLP website) 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 2 Business Case.

Outcomes of Stage 1

The MLP Steering Committee will review the concept proposal and undertake a scope and priorities assessment (within 30 business days) to determine that the proposal is:

- within the scope of the MLP Policy;
- aligned with the Government's priorities or to a problem/opportunity statement; or
- is not considered suitable for further consideration and is either declined or redirected to an alternative government process.

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

If the policy does not meet the criteria the MLP Steering Committee will make a recommendation to the Lead Agency Minister to decline or refer to an alternate government process.

If the proposal satisfies the MLP Policy requirements, the MLP Steering Committee (for centrally-led processes) or the Lead Agency (for agency-led processes), will then undertake a full criteria and procurement pathways assessment to determine whether to:

- invite the proponent to submit a Stage 2 Business Case; and
- identify the appropriate procurement pathway (that is, First Mover Advantage or an Exclusive Negotiation process) if the proposal proceeds to Stage 2; or
- decline the proposal or redirect to an alternative government process.

Wherever possible, reasons why an unsuccessful proposal is not suitable for further consideration will be provided to the proponent. All proponents will be offered a debriefing meeting with the MLP Secretariat.

The MLP Steering Committee will provide a final recommendation to Cabinet on whether to invite the proponent to Stage 2 and a procurement pathway if the proposal is to proceed. Cabinet will review and make a decision.

Best endeavours will be made by the MLP Secretariat to advise on the outcomes of Stage 1 within 99 business days of lodging a concept proposal. If this timeframe is not met, the MLP Secretariat will communicate this to the proponent and provide timely updates. For agency-led 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 Stage 1.

3.7 Stage 2: Business case evaluation

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.

First Mover Advantage Process

Where a proposal has been assigned to a First Mover Advantage process, this will take place in Stage 2. This is a market testing process that will assist government to determine if any other parties could deliver similar outcomes to the proposal. It will take the form of a Swiss Challenge or a Bid Premium, as outlined in section 3.4.

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

While serious consideration will be given to outcomes of the market testing process, the MLP Steering Committee or Cabinet are not bound by the outcomes of this process.

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 (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 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.

3.8 Stage 3: Negotiation of final binding offer

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 WA Government

Strategic Asset Management Framework and the requirements of Infrastructure WA (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.

