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Contents

1. Introduction .................................................................................................................. 4
2. Administering the policy ............................................................................................... 5
   2.1. Evaluation principles ............................................................................................... 5
      2.1.1. Absolute discretion .......................................................................................... 5
      2.1.2. Rigorous, fair and equitable ............................................................................ 5
      2.1.3. Interactive and collaborative ......................................................................... 5
      2.1.4. Probity framework ......................................................................................... 5
      2.1.5. Other statutory approvals and processes ...................................................... 7
      2.1.6. Resourcing requirements ............................................................................. 7
3. Evaluation process ......................................................................................................... 8
   3.1. Scope Assessment ................................................................................................. 8
   3.2. Priorities Assessment ........................................................................................... 9
   3.3. Evaluation criteria ................................................................................................ 9
      3.3.1. Strategic alignment ....................................................................................... 9
      3.3.2. Public interest .............................................................................................. 10
      3.3.3. Value-for-money ......................................................................................... 10
      3.3.4. Feasible and capable of being delivered ..................................................... 12
      3.3.5. Risk ............................................................................................................. 13
   3.4. Procurement Pathway Assessment ...................................................................... 13
      3.4.1. Assessment of whether the proposal is within the MLP Policy
            [and has First Mover Advantage Characteristics] ........................................... 14
      3.4.2. Assessment of whether Government will engage in exclusive negotiations ...................................................................................................................... 14
      3.4.3. Process if Government determines not to engage in exclusive negotiations .................................................................................................................. 14
   3.5. Referral to an alternate Government process ..................................................... 15
   3.6. Roles and responsibilities ..................................................................................... 15
      3.6.1. Stage 1 – Concept Evaluation ....................................................................... 15
      3.6.2. Stage 2 – Business case evaluation ............................................................ 18
      3.6.3. Stage 3 – Negotiation of Final Binding Offer ............................................. 21
4. Appendix One Terms and Conditions ........................................................................ 24
1. Introduction

These guidelines should be read in conjunction with the Market-led Proposals (MLP) Policy. The purpose of these guidelines is to provide additional detail about the evaluation criteria, principles and the roles and responsibilities of each party.
2. Administering the policy

2.1. Evaluation principles

The following principles will guide the evaluation of MLPs by government.

2.1.1. Absolute discretion

Government reserves the absolute right to decline, accept, defer or redirect proposals to another government process at any point. This is normal for a proposal that is not in response to a competitive tendering process. The MLP process is designed to mitigate the impact of such uncertainty as much as possible through a staged process and timely communication about a proposal's prospects. If a proposal is directed to a competitive tendering process, all reasonable steps will be taken to protect the genuine intellectual property of the proponent. However, the proponent should be mindful that it participates in the MLP process set out in this policy at its own risk.

2.1.2. Rigorous, fair and equitable

The evaluation process is rigorous and the criteria set a high standard. The level of rigour is scaled to the risk, value and complexity of a proposal. This approach applies to all proposals and proponents.

The level of detail required and evaluation rigour increases progressively through the stages of the process, as the merits of a proposal are better understood. Every attempt is made to provide an open door to proponents and multiple decision points to control the cost and risk to proponents and government. Stage Agreements (negotiated at the commencement of Stages 2 and 3 of the evaluation process) can be modified to include additional milestones for large, high value, high risk or complex projects, if this assists with controlling risk or expenditure.

2.1.3. Interactive and collaborative

The MLP process becomes progressively more interactive and collaborative as proposals progress through the stages, as appropriate to the level of risk, investment and process rigour. During Stage 1, this is generally limited to a proponent clarifying aspects of the proposal to enable government to make an informed decision. This changes in Stages 2 and 3, where the level of rigour and investment justifies an ‘open book’ approach and greater flexibility and collaboration. The agreed approach and investments are detailed in binding Stage Agreements.

2.1.4. Probit framework

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.

A dedicated probity adviser will typically be appointed for large-scale projects or where probity risk is considered to be sufficient to warrant appointment. If appointed, the role of the probity adviser is to monitor and report to the Steering Committee/Lead Agency on the application of the probity principles during the assessment process. In the absence of a probity adviser this role will be undertaken by the Proposal Manager.
Maintaining impartiality

Fair and impartial treatment is a feature of each stage of the evaluation process. The process features a clear separation of duties and personnel between the assessment and approval functions.

Maintaining accountability and transparency

Accountability and transparency are related concepts. The demonstration of both is crucial to the integrity of the evaluation. Accountability requires that all participants be held accountable for their actions. The evaluation process will identify responsibilities, provide feedback mechanisms and require all activities and decision-making to be appropriately documented. Transparency refers to the preparedness to open a proposal and its processes to scrutiny, debate and possible criticism. This also involves providing reasons why an unsuccessful proposal is not suitable for further consideration wherever possible and the provision of appropriate information to relevant stakeholders. Relevant information regarding proposals under consideration Stage 2 and beyond should be publicly available to the extent appropriate.

Maintaining confidentiality

In the evaluation of MLPs there is a need for high levels of accountability and transparency. However, there is also a need for some information to be kept confidential, at least for a specified period of time. This is important to provide participants with confidence in the integrity of the process and to encourage proponents to approach government with innovative ideas by protecting intellectual property.

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 genuine 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.

Only proposals invited to Stage 2 and beyond will be publicly disclosed. Proponents will be notified and consulted when any information is disclosed. The extent and timing of disclosure will depend on the nature of the proposal.

Stage 1 Disclosure

Proposals that are not invited beyond Stage 1 will not be publicly disclosed, however those invited to Stage 2 will be publicly disclosed at the conclusion of Stage 1.

The proposal title, status within the process, the name of the proponent and a high level proposal description will be published.

Stage 2 Disclosure

Where a proposal is subject to a First Mover Advantage, the desired outcomes and/or key elements the proposal is seeking to deliver, will be published during the Stage 2 competitive tendering process.

At the conclusion of Stage 2, all proposals will be publicly disclosed, including the proposal title, status within the process, the name of the proponent, a detailed proposal description and whether the proposal is invited to participate in Stage 3, or not, will be published.
Stage 3 Disclosure

At the conclusion of Stage 3, a detailed proposal description, project summary and contractual commitment will be published.

Government reserves the right to disclose details of a proposal if a proponent has not complied with its probity requirements and the circumstances set out in Appendix One: Terms and Conditions.

Proponents are reminded of their obligations as outlined in Appendix One and 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.

If at any time a proponent is unsure of their obligations, it is recommended they discuss them with their nominated proposal manager or the MLP Secretariat.

Managing conflicts of interest

In support of the public interest, transparency and accountability, the identification, management and monitoring of conflicts of interest is required for all MLPs. Participants are required to disclose any current or past relationships or connections that may unfairly influence or be seen to unfairly influence the integrity of the evaluation process.

Obtaining value-for-money

Obtaining optimal value-for-money is a fundamental principle of government. This is achieved by fostering an environment in which proponents can make attractive, innovative proposals with confidence that they will be assessed on their merits and where value-for-money to the people of Western Australia is appropriately considered.

2.1.5. Other statutory approvals and processes

The MLP Policy cannot bypass standard government approvals, planning, environmental and other regulatory processes. The Policy also works within existing statutory frameworks governing agency and Government Trading Enterprise (GTE) activities, and allocating agency and GTE responsibility for various activities of government. Government will work with proponents to identify these requirements at the outset of each stage to ensure these processes are understood and staged appropriately.

Gaining approvals and meeting planning, environmental, etc conditions is the responsibility of proponents, unless otherwise agreed. This includes any Commonwealth or other third party approvals that may be required depending on the nature of the proposal (for example, Commonwealth environmental approvals, Australian Competition & Consumer Commission, Foreign Investment Review Board, etc).

The Government’s Gateway Review process, as outlined in Premier’s Circular 2016/05, may also apply to some MLP proposals.

2.1.6. Resourcing requirements

Resourcing requirements will be determined on a case-by-case basis once a concept proposal is submitted by the proponent. Proponents are required to provide sufficient resources to meet agreed evaluation requirements and timeframes. Resourcing considerations and the requirement for third party expert advice to assist the evaluation process are negotiated at each stage of the process, and incorporated into a Stage Agreement. All third party costs agreed to in Stage Agreements are borne by proponents.
3. Evaluation process

All sections of the Stage 1 Concept Submission template are adequately addressed and completed to the level commensurate with the level of detail required for the complexity of the proposal, to the satisfaction of the MLP Secretariat. Information may be presented in the form of cross-referenced addenda if preferred. The template will not be accepted until the proponent has completed a pre-submission meeting with the MLP Secretariat.

The Stage 1 Concept Proposal Template is available on the MLP website and must be lodged online to the MLP Secretariat, fully completed and signed by relevant parties.

Lodgements and queries are to be addressed to: marketledproposals@finance.wa.gov.au

3.1. Scope assessment

All submitted MLPs will undergo an initial examination to determine whether a proposal fits within, and has a reasonable chance of meeting, the MLP Policy requirements to warrant further assessment (refer to MLP Policy, sections 1.1 and 1.2).

Types of proposals that are unlikely to progress as an MLP include:

- Proposals for significant extensions/variations to existing contracts/leases, or the next stage of a staged project on the basis that the contractor is already "on-site" but cannot demonstrate an unassailable advantage.
- Proposals seeking to develop land that is not owned by government or the proponent.
- Proposals which are inconsistent with existing laws (for example, proposals over land which is an A class reserve)
- Proposals that do not contain a commercial proposition for government.
- Proposals that identify the proponent’s skills or workforce capability as the only justification for direct negotiation. A proponent with personnel holding superior expertise or experience in a particular field is not sufficient for the Government to justify bypassing an open tender, unless the claimed skills cannot be procured elsewhere in the market.
- Proposals to provide widely available goods or services to government.
- Proposals seeking only to change government policy where there is no associated project.
- Proposals for projects where the tender process has formally commenced, whether published or not.
- Proposals that lack structure and sufficient supporting evidence.
- Proposals seeking to stop or suspend another government process (for example, compulsory acquisition).
- Proposals seeking an exclusive mandate, or exclusive rights over a government asset, for a period of time so the proponent can develop a feasibility study.

Some of these examples may be considered by government, but may progress through an alternate means rather than a market-led proposals – for example, open tenders, trials, grants or other procurement processes.
Proponents with well-developed proposals who are unsure of the appropriate procurement path are encouraged to undertake an online self-assessment and contact the MLP Secretariat to arrange a meeting. This will assist with determining a path forward, or inform a proponent if a proposal is unlikely to succeed before investing further time, effort and expense.

3.2. Priorities assessment

This step will be used to determine if a proposal fits within the context of the current Government Priorities, and/or if it is in submitted in response to a published opportunity statement.

The MLP website hosts current information on Western Australian Government Priorities and may invite industry to propose innovative solutions in response to an identified opportunity or problem.

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.

3.3. Evaluation criteria

The MLP Policy sets out five evaluation criteria used by government to evaluate proposals at Stage 1 (concept evaluation) and Stage 2 (business case evaluation) of the evaluation process. This supplementary guideline provides additional information on how the criteria are defined, and how they have been applied in practice in other jurisdictions.

3.3.1. Strategic alignment

The proposal is aligned with government policy objectives and priorities.

A critical test of an MLP is strategic alignment with government priorities. Government provides a strong lead to proponents through the annual Budget, policy directions and public commitments. Proponents are advised to address government priorities when describing the public and strategic value of a proposal and align their proposals accordingly. Proponents should also consider the opportunity cost from the government investing in the proposal relative to other strategic priorities.

From time to time, government agencies set out infrastructure and service priorities in plans and strategies. As the type of proposals that meet this criterion will depend of the priorities of the Government of the day – specific examples have not been included in these guidelines. Proponents should review the Government’s Our Priorities list on the MLP website and current policies, strategies and election commitments for further direction.
3.3.2 Public interest

The proposal has significant social, environmental, economic or financial benefits for Western Australians.

Public interest is a broad yet important test for whether a proposal should be prosecuted by government, or better left to the market. The following questions are a useful guide:

- Does the proposal meet a project or service need?
- What are the benefits of what is being proposed and are they adequately defined?
- Are the benefits of value to government and the community of Western Australia?
- Are there any costs to government and the community of Western Australia from the proposal? Do the benefits outweigh any costs?
- How is the public interest advanced through government facilitating the outcomes proposed?
- Have the benefits and risks for key stakeholders been identified?

3.3.3. Value-for-money

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

Value-for-money is the overall value of the proposal to government. It is not solely about the direct financial cost or benefit, but includes the consideration of broader whole-of-government costs and benefits over the life of the proposal, such as changes to future demand for government services or supporting economic growth.

In the absence of a competitive tendering process (such as an open market sale or tender) there are a range of ways that the value of a proposal might be demonstrated including:

- independent valuation of a right or asset if sold on the open market;
- an estimate of the likely savings/costs to government of forecast changes in future demand for services;
- an open book process where the proponent provides detailed information to the Government about the business model, demonstrating a value-for-money outcome that is likely to meet or exceed that of a ‘next best alternative’ proposal; and
- competitively tendering elements of the proposal.

Examples of successful MLPs from other jurisdictions – public interest criterion

New International Cruise Terminal
The proposal will grow the cruise ship market and capture significant economic benefits associated with a dedicated mega cruise ship facility, in exchange for access to government land.

Construction and lease of a new police centre
The proposal will meet a service need, given the known expiration of the current police centre lease, and provide opportunities to drive improvement and productivity due to the site’s location and integration with existing adjacent facilities.

Construction of a new transit hall and entrance for a major train station
The proposal will consolidate four existing buildings to deliver a new transit hall and entrance to a major railway station, as well as a state-of-the-art office tower that will transform and revitalise a major transport hub.
Proponents are required to set out, in their proposal, how value-for-money could be assessed. In evaluating whether a proposal represents value-for-money, among other matters, government will consider the following factors.

**Return on investment**
As part of the open book evaluation process, particularly through Stages 2 and 3, the proposal’s commercial rationale and projections will be examined by government. Proponents are advised to consider the following questions as they determine the commercial settings for a project:

- Is the proposed return to the proponent proportionate to the proponent’s risks, and industry standards?
- Can the rate of return be justified relative to a public sector comparator (that is, an estimate of the whole-of-life costs and revenue if the proposal was delivered by government)?
- Can the rate of return be justified in terms of future costs to the economy, users of the service or infrastructure?
- How does the proposed rate of return compare to similar projects domestically and internationally?

**Whole-of-government impact**
The direct cost of a proposal is often only a portion of the real impact across government. Often government inadvertently subsidises projects in different ways – for example, staffing increases to meet new demand, increased maintenance and upgrades of public infrastructure, health consequences, etc. The costs and benefits of proposals are weighed against these effects to determine value-for-money.

Proponents are advised to consider the following questions:

- Will additional investments and ongoing costs be required to meet new demand created by the proposal?
- Will the proposal result in wider costs or reduced revenue to government?
- How do these impacts and benefits affect the overall value for money of the proposal?

**Affordability**
By their nature, MLPs generally may not have been factored into the annual State Budget and forward estimates which can, at times, mean that they are unaffordable in the context of existing priorities.

Proponents are advised to consider the following questions:

- Does the proposal require government funding or finance, either up-front or over the life of the proposal?
- Does the proposal replace an existing funding commitment?
- What would be the ongoing impact on revenue over the life of the proposal?
- Does the Government have these funds available or budgeted?
- Is the opportunity cost from government investing in the proposal justified relative to other strategic priorities?
- If an alternative funding source is proposed, what are the ongoing impacts on the public, the State and government revenue?
- Can normal costs to government be offset through an alternative business model?
The Government will also consider any potential accounting impacts of the proposal. For example, some projects can involve no State funding but the project can still have an impact on the State’s balance sheet.

Examples of successful MLPs from other jurisdictions – value-for-money criterion

New International Cruise Terminal
The proponent would take the full cost and risk of the construction and operation of the project on the basis of future revenues from wharfage and terminal access fees, including revenue risk, reflecting market practice for comparable projects.

Construction and lease of a new police centre
The proposal demonstrates best value when compared against existing and alternative accommodation options that could house the police centre, while delivering unique efficiency benefits due to its location and the new purpose built building. The lease rent is in line with market analysis and reflects a true economic rent.

Construction of a new transit hall and entrance for a major train station
The proponent will build and maintain the transit hall in perpetuity and, in return, will receive stratum air rights that will enable the construction of an office tower and retail lots above and adjoining the transit hall. The office tower and retail lots will be owned in freehold by the proponent.

3.3.4. 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.

Proponents must demonstrate both the feasibility of a proposal (for example, any costs that are not to be borne by the Government are capable of being financed by debt and/or equity providers) and that their organisation has access to adequate expertise, experience, resources and an appropriate structure to deliver the proposal. This also refers to the capability and capacity of its proponent.

The proponent will be required to provide detailed corporate and financial information to enable government to undertake this assessment, such as company balance sheets, annual reports and corporate ownership structure (including international) as well as information on the proposed financing arrangements for the proposal. Depending on the scale, complexity and risks associated with the proposal, government may also require financial guarantees from the proponent.

The following questions offer guidance:

- Has the proponent undertaken the proposal before under similar conditions?
- Can the proponent provide evidence of its experience successfully delivering a similar proposal and/or working with governments in Australia or in similar jurisdictions elsewhere in the world?
- What reliance is there on third parties? Why can any third party inputs be relied upon?
- Does the financial structure of the proposal offer sufficient security to government in the event the proposal encounters difficulties during the delivery phase?
  - What is the source of project capital?
  - How much of that capital is equity and what is the source of the equity? Who are the strategic equity participants in the project?
– How much of the project capital will be debt financed? Is the source of finance credible?
– When will financial close take place? When will the final investment decision take place?
• Does the company structure offer sufficient security to government in the event the proposal encounters difficulties during the delivery phase?
  – What is the corporate ownership structure (including international) of the proponent?
  – Is there a current balance sheet?
  – How does the proponent’s balance sheet connect into the parent company (if applicable)?
  – Who would provide a parent company guarantee if required, and where would that come from?

The requirement for demonstrating financial capacity increases as proposals progress through the stages of the evaluation process. Government is unlikely to progress proposals through the MLP process where these tests are not adequately met or insufficient information is provided.

3.3.5. Risk

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

Proponents must demonstrate that the proposal involves an acceptable and optimal sharing of risks between the Government and the proponent. Proponents are advised to quantify and account for such risks through the structure of a proposal and identify proposed strategies to mitigate any risk, where possible. Proponents are advised to consider the following questions:

• What risks are to be borne by the proponent and by the Government?
• How will risks be managed/mitigated?
• Does the proposal require environmental, planning or other regulatory approvals?
  – If so, has the process been appropriately considered?
  – Does government or the proponent bear the cost and risks associated with obtaining approvals?

3.4. Procurement Pathway Assessment

Government is rigorous in its assessment of proposals to ensure any resulting in direct procurement can be demonstrated at the conclusion of the process. While a concept may be innovative and the proposal may demonstrate significant process advantages, such as design or technology, it may represent one option among a range of technologies or solutions available to government. Proposals will be assessed in Stage 1 to determine the appropriate procurement pathway the proposal will follow if the proposal is invited to proceed to Stage 2.

To incentivise the delivery of innovative solutions that meet the Government’s priorities, proposals that meet the scope of the policy, government priorities and full criteria of the policy will be assessed for their appropriate procurement pathway. This includes the potential for a First Mover Advantage or Exclusive Negotiation to be offered to a proponent that meets the criteria listed below. Those that fail to meet the relevant criteria may be referred to another relevant government process (see Section 3.5).
3.4.1. Assessment of whether the proposal is within the MLP Policy [and has First Mover Advantage Characteristics]

The proposal will be assessed as to whether it falls within the MLP Policy having regard to the following characteristics:

a) the proposal is unique and not market standard; and

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 these characteristics are not met, the Government will consider that the outcome could be achieved by a competitor and the proposal will be referred to another relevant government process (see section 3.5).

3.4.2. Assessment of whether government will engage in exclusive negotiations

If the proposal is assessed under section 3.4.1 as falling within the MLP Policy, then the proposal will be further assessed to determine whether the Government will engage in exclusive negotiations with the proponent, having regard to the following characteristics:

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.

3.4.3. Process if government determines not to engage in exclusive negotiations

If a determination is made under section 3.4.2 that the Government will not engage in exclusive negotiations with the proponent, then the MLP Steering Committee will recommend that a market testing process be conducted in Stage 2. This process will take one of the following forms:

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
3. **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.

The Evaluation panel, in consultation with relevant government subject matter experts, will design the regime and formula for a competitive tender process on a case-by-case basis. This will be referred to the MLP Steering Committee for their recommendation to Cabinet who will make the decision on the relevant process.

### 3.5. Referral to an alternate government process

Where a proposal does not fall within the scope of the MLP Policy, or is unable to demonstrate the characteristics of First Mover Advantage and/or Exclusive Negotiation, but deemed worthy of further consideration by government, the MLP 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 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 tendering 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.

### 3.6. Roles and responsibilities

The roles and responsibilities of proponents and government at each stage of the centralised MLP evaluation process are outlined below.

For MLPs coordinated by the Lead Agency, 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, delegated authority and legislative requirements of the agency.

The proposal manager will also become the central point of contact for the proponent, and will fulfil the role of the MLP Secretariat in relation to organisation and communication should a proposal move to the Full Criteria Assessment phase.

#### 3.6.1. Stage 1: Concept Evaluation

**Self-Assessment (optional, recommended)**

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<th>Proponent</th>
<th>• Completes the online self-assessment to consider suitability of the proposal against the policy requirements, published Government Priorities and other relevant information.</th>
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Market-led Proposals Policy – Supplementary Guidelines (January 2020)
### Compulsory Pre-submission Meeting

| **Proponent** | • Contacts MLP Secretariat to arrange a pre-submission meeting.  
• Attends a pre-submission meeting.  
• Be prepared to investigate the merits and shortcomings of the proposal. |
| **MLP Secretariat** | • Schedules and attends pre-submission meeting.  
• Provide advice on the type of information required at Stage 1 and whether the proposal may have a reasonable chance of meeting the policy requirements before proponents invest in developing a full concept proposal. |

### Concept Proposal Lodgment

| **Proponent** | • Completes, signs and lodges the Stage 1 Concept Proposal Template online with the MLP Secretariat. |
| **MLP Secretariat** | • Initial assessment of template to ensure it includes adequate information to proceed.  
• Identify Lead Agency and other relevant government bodies.  
• Contacts relevant government bodies, MLP Steering Committee and proponent confirming receipt of the Stage 1 Concept Proposal Template.  
• Confirms lodgement acceptance with the Proponent and communicates updates on the progress of their proposal. |

### Scope Assessment

| **Proponent** | • Provides additional and technical information upon request. |
| **MLP Secretariat** | • In consultation with relevant agencies, determines whether the proposal is within the scope of the MLP Policy:  
  – makes recommendation to MLP Steering Committee to decline the proposal; or  
  – proceeds to further evaluate the proposal against the published “Our Priorities”. |
| **MLP Steering Committee** | • Considers the advice of the MLP Secretariat and other relevant agencies where there is a recommendation not to proceed and makes recommendation to the Minister of the Lead Agency to decline the proposal.  
• Provides written advice to the proponent if the decision is made not to proceed and includes government’s rationale.  
• If recommendation is to proceed, then the Steering Committee confirms the relevant process, appoints Lead Agency and Evaluation Panel. |
| **Lead Agency Minister** | • If applicable considers the advice of the MLP Steering Committee and approves the recommendation to decline the proposal.  
• If the decision is to proceed, recommendation is to proceed, advises the Steering Committee to proceed with the next step “Full Criteria Assessment”. |
## Priorities Assessment

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<th>Proponent</th>
<th>• Provides additional and technical information upon request.</th>
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| **MLP Secretariat** | • In consultation with relevant agencies, determines whether the proposal is aligned to the published Government Priorities or is provided in response to an opportunity statement.  
• Determines that the proposal does not align to current exclusions as published.  
• Makes recommendation to the MLP Steering Committee to decline the proposal; or  
  – in collaboration with relevant agencies, identifies potential Lead Agency, Proposal Manager and Evaluation Panel; and  
  – proceeds to the next step “Full Criteria Assessment”. |
| **MLP Steering Committee** | • Confirms the Lead Agency, Proposal Manager and Evaluation Panel relevant to the proposal, determines if the process will centrally-led or agency-led.  
• If applicable, considers the advice of the MLP Secretariat and other relevant agencies where there is a recommendation not to proceed and makes recommendation to Minister of the Lead Agency to decline the proposal.  
• Provides written advice to the proponent if the decision is made not to proceed and includes government’s rationale. |
| **Lead Agency Minister** | • Considers the advice of the MLP Steering Committee and either:  
  – approves the recommendation to decline the proposal, or  
  – requests the MLP Steering Committee continue the Full Criteria Assessment phase. |

## Full Criteria Assessment

| Proponent | • Provides additional and technical information upon request.  
  • Attends Stage 1 meeting with evaluation panel. |
|---|---|
| **MLP Secretariat** | • Central communication point for all parties, including sole point of contact for the Proponent.  
• Forms part of the Evaluation Panel.  
• Organises Evaluation Panel meeting with Proponent for Stage 1 meeting.  
• Should the proposal be declined, provides a debriefing session to the proponent to discuss reasons where it is appropriate. |
| **Evaluation Panel** | • Conducts the evaluation.  
• Requests additional information, as required.  
• Conducts Stage 1 meeting with the proponent.  
• Liaises with MLP Secretariat and provides recommendations to the MLP Steering Committee.  
• Where appropriate, joins the MLP Secretariat in the debriefing session for the Proponent should the proposal be declined. |
MLP Steering Committee

- Considers the advice of the MLP Secretariat and Evaluation Panel where there is a recommendation not to proceed and makes recommendation to Cabinet for decision.
- Provides written advice to the proponent if the decision is made not to proceed and includes government’s rationale.

Procurement Pathways Assessment

| Proponent | Provides additional and technical information upon request. |
| Evaluation Panel | Evaluates of the proposal against characteristics of “First Mover Advantage” and “Justification for Exclusive Negotiation” to determine appropriate procurement pathway. |
| | Makes recommendation to the MLP Steering Committee on next steps based on the findings of the Full Criteria Assessment and Procurement Pathways Assessment. |
| | Drafts Cabinet Submission for ministerial consideration. |

MLP Steering Committee

- Provides recommendation to Cabinet that government:
  - invites the proponent to submit a Stage 2 Proposal and confirms the appropriate procurement process; or
  - redirects the proponent or proposal to an alternative government process if appropriate; or
  - declines the proposal and provides government’s rationale.

Cabinet Process

| Lead Agency Minister | Considers draft Cabinet Submission and directs the MLP Steering Committee accordingly. |
| | Takes the Submission to Cabinet. |

Advice to Proponents

| MLP Steering Committee | On behalf of government: |
| | - confirms the procurement pathway and invites the proponent to attend a Stage 2 establishment meeting; or |
| | - redirects the proponent or proposal to an alternative government process if appropriate; or |
| | - declines the proposal and provides government’s rationale. |

3.6.2. Stage 2 – Business case evaluation

Establish Stage 2 Evaluation Panel

| MLP Steering Committee | Establishes the Stage 2 Evaluation Panel. |
## Establish Stage 2 Agreement

<table>
<thead>
<tr>
<th><strong>Proposal Manager</strong></th>
<th>• Organises Stage 2 establishment meeting.</th>
</tr>
</thead>
</table>
| **Evaluation Panel/ Proponent** | • Attends Stage 2 establishment meeting.  
• Develops a draft Stage 2 Agreement for MLP Steering Committee consideration, including:  
  – roles, resourcing, financial contributions, governance structure and other requirements of:  
    ▪ the proponent;  
    ▪ government, including the need for a dedicated proposal sub-committee to provide more regular oversight; and  
    ▪ third parties, possibly including:  
      ✫ an independent proposal director to chair the proposal sub-committee; and  
      ✫ experts to contribute to technical working groups or provide independent assessments.  
  – Stage 2 Proposal requirements and submission deadline.  
  – Program of Work, including open book development and evaluation mechanisms.  
  – Probity strategy.  
  – Disclosure parameters.  
  – Other relevant matters.  
• Liaises with the MLP Steering Committee and revises the draft Stage 2 Agreement, as directed. |
| **MLP Steering Committee** | • Reviews the draft Stage 2 Agreement and directs the Evaluation Panel, as required.  
• Endorses the final Stage 2 Agreement on behalf of government. |
| **Lodgment** |  |
| **Proponent** | • Lodges Stage 2 Proposal (business case) in accordance with the scope and timeframe agreed in the Stage 2 Agreement. |
### Stage 2 Evaluation

<table>
<thead>
<tr>
<th>Evaluation Panel</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Delivers the Program of Works outlined in the Stage 2 Agreement.</td>
<td></td>
</tr>
<tr>
<td>• Requests additional information, as required.</td>
<td></td>
</tr>
<tr>
<td>• If applicable,</td>
<td></td>
</tr>
<tr>
<td>− Considers, recommends and undertakes most appropriate option for First Mover Advantage competitive tendering process; and</td>
<td></td>
</tr>
<tr>
<td>− Develops an appropriate procurement strategy (planning, formula regime and evaluation).</td>
<td></td>
</tr>
<tr>
<td>• Liaises with, provides recommendations to, and responds to directions from the MLP Steering Committee.</td>
<td></td>
</tr>
<tr>
<td>• Drafts Cabinet Submission for ministerial consideration.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Proponent</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Participates and contributes resources as set out in the Stage 2 Agreement.</td>
<td></td>
</tr>
<tr>
<td>• Participates in First Mover Advantage competitive tendering process, if applicable.</td>
<td></td>
</tr>
<tr>
<td>• Provides additional information, as required.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>MLP Steering Committee</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Reviews recommendations from the evaluation panel/Proposal Subcommittee (if established) and provide direction, as required.</td>
<td></td>
</tr>
<tr>
<td>• If applicable, confirms the First Mover Advantage competitive tendering option and endorses the procurement strategy.</td>
<td></td>
</tr>
<tr>
<td>• Refers the Stage 2 proposal (business case) to Infrastructure WA for advice (infrastructure-related proposal above the specified threshold only).</td>
<td></td>
</tr>
<tr>
<td>• Provides recommendation to Cabinet that government:</td>
<td></td>
</tr>
<tr>
<td>− invites the proponent to attend a Stage 3 Establishment meeting and provides a list of items to be negotiated; or</td>
<td></td>
</tr>
<tr>
<td>− redirects the proponent or proposal to an alternative government process if appropriate; or</td>
<td></td>
</tr>
<tr>
<td>− declines the proposal and provides government's rationale for doing so.</td>
<td></td>
</tr>
</tbody>
</table>

### Cabinet Process

<table>
<thead>
<tr>
<th>Lead Agency Minister</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Reviews draft Cabinet Submission and directs the MLP Steering Committee accordingly.</td>
<td></td>
</tr>
<tr>
<td>• Takes the Submission to Cabinet.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Cabinet</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Decision or deferral including any additional requirements.</td>
<td></td>
</tr>
</tbody>
</table>
### Advice to Proponents

| MLP Steering Committee | • On behalf of government:  
|                         |   – invites the proponent to attend a Stage 3 establishment meeting; or  
|                         |   – redirects the proponent or proposal to an alternative government process if appropriate; or  
|                         |   – declines the proposal and provide government's rationale for doing so. |

### 3.6.3. Stage 3 – Negotiation of Final Binding Offer

*Note: Stage 3 involves negotiating the terms of the final contract, and is therefore an iterative process.*

#### Establish Stage 3 Evaluation Panel

| MLP Steering Committee | • Establishes the Stage 3 Evaluation Panel (negotiation team). |

#### Establish Stage 3 Agreement

| Proposal Manager | • Organises Stage 3 establishment meeting. |
| Negotiation Panel and Proponent | • Attends Stage 3 establishment meeting  
|                         | • Develops a draft Stage 3 Agreement for MLP Steering Committee consideration, including:  
|                         |   – Stage 3 Binding Final Offer requirements and submission deadline  
|                         |   – Standard Terms and Conditions  
|                         |   – Relevant aspects of the Stage 2 Agreement  
|                         |   – Roles, resourcing, financial contributions, governance structure and other requirements of:  
|                         |     - the Proponent;  
|                         |     - government; and  
|                         |     - third parties  
|                         |   – Program of works  
|                         |     - points for negotiation; and  
|                         |     - negotiation process  
|                         |   – Probity strategy  
|                         |   – Disclosure parameters  
|                         |   – Other relevant matters  
|                         | • Liaises with the MLP Steering Committee and revises the draft Stage 3 Agreement, as directed. |
| MLP Steering Committee | • Reviews the draft Stage 3 Agreement and directs the Evaluation Panel, as required.  
|                         | • Endorses the final Stage 3 Agreement on behalf of government. |
### Lodgment

| Proponent | • Lodges Stage 3 Binding Final Offer (including Project Definition Plan for infrastructure related proposals) as per Stage 3 Agreement. |
| Proposal Manager | • Advises the proponent, MLP Steering Committee and Evaluation Panel of receipt of binding final offer. |

### Negotiation and Review

| Negotiation Panel | • Negotiates in good faith in keeping with the Stage 3 Agreement.  
| | • Requests additional information, as required.  
| | • Liaises with, provides recommendations to and responds to directions from the MLP Steering Committee.  
| | • Drafts Cabinet Submission for ministerial consideration. |
| Proponent | • Negotiates in good faith in keeping with the Stage 3 Agreement.  
| | • Provides additional information, as required. |
| MLP Steering Committee | • Reviews recommendations from the Evaluation Panel and provides direction, as required.  
| | • Provides recommendation to Cabinet that government either:  
| |   – renegotiates specific terms;  
| |   – accepts the Binding Final Offer and proceed to contracting; or  
| |   – accepts the Binding Final Offer with conditions, which, if accepted will allow the process to proceed to contracting;  
| |   – redirects the Proponent or proposal to an alternative government process if appropriate; or  
| |   – declines the Proposal and provide a rationale for doing so. |

### Cabinet Process

| Lead Agency Minister | • Reviews draft Cabinet Submission including the Final Binding Offer and directs the MLP Steering Committee accordingly.  
| | • Takes the Submission to Cabinet. |
| Cabinet | • Reviews the Cabinet Submission including the Final Binding Offer and directs the MLP Steering Committee accordingly. |
### Advice to Proponents

<table>
<thead>
<tr>
<th>MLP Steering Committee</th>
<th>• Advises the Proponent that government has determined to:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>– accept the Final Binding Offer and proceed to implementation;</td>
</tr>
<tr>
<td></td>
<td>– accept the Binding Final Offer with conditions, which, if accepted will allow the proposal to proceed to implementation;</td>
</tr>
<tr>
<td></td>
<td>– redirect the Proponent or proposal to an alternative government process; or</td>
</tr>
<tr>
<td></td>
<td>– decline the Proposal and provide the rationale for doing so.</td>
</tr>
</tbody>
</table>
4. Appendix One Terms and Conditions

1. Application to Process
   (a) These Terms and Conditions apply generally to the Process, for the duration of the Process.
   (b) The State reserves the right to impose additional or amended terms and conditions throughout the Process.
   (c) These Terms and Conditions are to be read together with process terms and conditions (if any) set out in any Stage Agreement.
   (d) Where there is an inconsistency between a provision of a Stage Agreement and a provision of these Terms and Conditions, the provision of the Stage Agreement will take precedence.
   (e) The State’s rights under these Terms and Conditions are in addition to and without limitation of the State’s rights set out in the MLP Policy.
   (f) 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.

2. General
   (a) Capitalised terms used in these Terms and Conditions are defined in the Glossary of these Terms and Conditions.
   (b) Unless otherwise directed or agreed by the State, all communications by or on behalf of the Proponent with the State, including any notices required to be provided by the Proponent under these Terms and Conditions, shall be provided by the Lead Proponent Member.
   (c) No entity may participate in the Process unless that entity is a Proponent Member or an Associate of a Proponent Member.
   (d) Where a Proponent consists of more than one Proponent Member, the obligations and liabilities of those Proponent Members under these Terms and Conditions apply to each of those Proponent Members jointly and severally.
   (e) Following receipt of a written notice from the Proponent that there is a material error or discrepancy in any Disclosed Information, or if the State otherwise discovers an ambiguity, discrepancy or inconsistency in any Disclosed Information, the State in its sole and absolute discretion will direct the Proponent in writing as to how to resolve the ambiguity, discrepancy or inconsistency.
   (f) No rule of interpretation applies to the disadvantage of the State on the basis that the State put forward these Terms and Conditions.
   (g) Unless the context indicates a contrary intention, in these Terms and Conditions:
      (1) “includes” in any form is not a word of limitation;
      (2) the meaning of “or” will be that of the inclusive “or”, meaning one, some or all of a number of possibilities;
      (3) if any of these Terms and Conditions purport to exclude liability for a particular matter, such exclusion only operates to the extent permitted by law; and
      (4) a reference to a “clause” is to a clause of these Terms and Conditions.
3. Application of Terms and Conditions

3.1 Proponent Members

(a) By submitting a Proposal, each Proponent Member agrees to comply with:

(1) the MLP Policy; and

(2) these Terms and Conditions and any additional terms and conditions imposed by the State during the Process, for the duration of the Process.

(b) In consideration of the Proponent Members agreeing to be bound by these Terms and Conditions the State will, subject to the rights set out in clause 4, receive and consider the Proposal.

3.2 Proponent Members’ Associates

(a) In these Terms and Conditions, references to a Proponent Member include each of its Associates.

(b) Each Proponent Member must endeavour to ensure that each of its Associates complies with these Terms and Conditions as if it was a Proponent Member.

4. Rights

4.1 Directions

Each Proponent Member acknowledges that the State may give a direction or requirement under these Terms and Conditions.

4.2 Discretions

By submitting a Proposal, each Proponent Member acknowledges and agrees that the State reserves the right in its absolute discretion and at any time to:

(a) cancel, terminate, suspend or change the Process, or any aspect of the Process or to take such other action as the State considers, in its absolute discretion, appropriate in relation to the Process;

(b) require additional information from any Proponent Member, in which case the Proponent Member must provide such information within a reasonable time of the State’s request;

(c) provide details of the Proposal to its officers, consultants, advisers and other State government agencies;

(d) refuse to consider or evaluate the Proposal, cease negotiations with the Proponent or terminate the Proponent’s participation in the Process at any time, including if:

(1) any Proponent Member or Associate breaches the MLP Policy or these Terms and Conditions, including if the breach occurred prior to the lodgement of its Proposal;

(2) any Proponent Member fails to meet a direction or requirement of the State under the MLP Policy or these Terms and Conditions;

(3) the Proposal is materially incomplete or fails to satisfactorily address the requirements of the MLP Policy; or

(4) the State and the Proponent do not enter into a Stage Agreement on terms, and within a time, satisfactory to the State;
(e) where the Proponent consists of more than one Proponent Member, hold meetings or workshops or discussions with, or seek information from, one or more Proponent Members at any time during the Process with or without notifying the other Proponent Members;

(f) reject the Proposal outright or accept or continue to evaluate (as the case may be) only part of a Proposal and reject the remaining parts;

(g) elect not to further re-evaluate the Proposal if it fails to satisfy any evaluation criteria set out in the MLP Policy or other relevant evaluation criteria;

(h) evaluate and accept the Proposal regardless of whether the Proponent has complied with the MLP Policy or these Terms and Conditions;

(i) change any evaluation criteria in the MLP Policy upon giving reasonable notice to the Proponent;

(j) in evaluating the Proposal and during the Process, have regard to:
   (1) the State’s knowledge and previous experience and dealings with any of the Proponent Members;
   (2) without limiting clause 4.2(j)(1), information about the past or current performance of the Proponent or any Proponent Member under any other contract, arrangement or dealing between the Proponent or Proponent Member and a Government Party;
   (3) information concerning any Proponent Member which is in the public domain or which is obtained by the State through investigations; and
   (4) additional information provided by the Proponent in response to a request by the State;

(k) change the identity of the entity or person executing any final contract on behalf the State;

(l) discuss and negotiate with the Proponent any matter arising out of the Proposal, and take such discussions and negotiations into account in its evaluation; and

(m) publish the names of the Proponent Members;

(n) waive any requirement or obligation under the MLP Policy.

The State is not required to give notice or reasons for the exercise of any of its rights in accordance with this clause 4.2.

4.3 Consent

Whenever the consent of the State is required under the MLP Policy or these Terms and Conditions, that consent may be given or withheld by the State in the State’s absolute discretion and may be given subject to such conditions as the State may determine.

4.4 No Claim

Each Proponent Member releases the State and its Associates from all Liability in relation to the Process and no Proponent Member will make a Claim against the State or any of its Associates arising out of the exercise or any failure of the State to exercise or perform any rights, obligations or duties under the MLP Policy, these Terms and Conditions or otherwise in connection with the Process. This clause 4.4 may be pleaded by the State and its Associates as a bar to any proceedings commenced by a Proponent Member against the State or the relevant Associate in relation to the Process.
For the avoidance of doubt, this release does not apply to liability of the State under a Stage Agreement.

5. No legal relationship

Each Proponent Member acknowledges and agrees that:

(a) consideration of the Proposal does not constitute any representation that the State will enter into any final contract;
(b) other than the contract that arises as a consequence of clause 3.1, or any final contract that may be entered into by the State and a Proponent:
   (1) no contract exists or will arise between the State and the Proponent in respect of the Process; and
   (2) neither the State nor any Proponent Member intend to create a legal relationship; and
(c) other than as they expressly provide and subject to any Stage Agreement, these Terms and Conditions set out the entire agreement between the parties in respect of the terms and conditions for the Process.

6. Information from the State

6.1 No details

The State is not required, and does not intend, to release any details regarding the evaluation process for the Proposal other than as contained in the MLP Policy.

7. Enquiries and clarification

7.1 Enquiries

(a) The Proponent must submit any enquiries or clarification questions regarding the Process:
   (1) to the State’s Representative or any probity adviser (as appropriate) in accordance with section 2.6 of the MLP Policy; or

(b) Other than in accordance with this clause, a Proponent Member may not directly contact the State to discuss any aspect of the Process (including its Proposal).

7.2 State requests for clarification

The State may:

(a) request written clarification;
(b) conduct clarification meetings; or
(c) request further information in clarification workshops, with or from the Proponent as part of the evaluation process. The Proponent will be notified if clarification is required and the nature of the clarification being sought.

7.3 Proponent requests for clarification

(a) The decision of whether to respond to any request for clarification from the Proponent and the content of any response is at the absolute discretion of the State.

8. Proponent’s representations, acknowledgements and warranties

8.1 Acknowledgements

Each Proponent Member acknowledges and agrees that:

(a) the Process is being conducted solely for the State’s benefit;
(b) the State will rely on the representations and warranties given by Proponent Members in clause 8.2 of these Terms and Conditions, in evaluating the Proposal;
(c) it will not rely on any oral advice, representation or information given or furnished by or on behalf of the State or the State’s Associates with respect to the Process or any Disclosed Information;

(d) it is making an independent assessment of the Disclosed Information and that:

(1) it will carry out, and rely solely on, its own investigation and analyses in relation to the Disclosed Information;

(2) it will verify all information on which it intends to rely to its own satisfaction; and

(3) it will not rely on any of the Disclosed Information (provided that this does not prevent a party from agreeing to give warranties in any final contract document);

(e) in no circumstances will the State or any of its Associates be liable to a Proponent Member whether in contract, tort (including negligence, misrepresentation or breach of warranty), under statute or otherwise for any costs, losses, expenses or damages incurred or suffered by the Proponent Member as a result of or arising from:

(1) any incompleteness or inadequacy of, or any inaccuracy or error in, or omission from; or

(2) any use of, or reliance by, the Proponent Member upon, any Disclosed Information;

(f) the MLP Policy and the Proposal will not form any part of the final contract except to the extent expressly incorporated in any final contract;

(g) the Proponent Member participates in the Process at its own cost and risk; and

(h) except in the State’s absolute discretion or as otherwise provided in a Stage Agreement, no payment will be made by the State or any of its Associates to the Proponent for any costs, losses, expenses or damages incurred by the Proponent in preparing and submitting the Proposal, or otherwise incurred in respect of:

(1) preparing for and attending any interview, meeting or workshop conducted pursuant to the Process;

(2) otherwise participating in the Process, in accordance with the terms of the MLP Policy; or

(3) as a consequence of the exercise of the State’s rights in accordance with clause 4.

8.2 Representations and warranties

By submitting a Proposal each Proponent Member represents and warrants that:

(a) it has examined all information and documents which are relevant to the Process;

(b) the Proposal and any subsequent information submitted to the State pursuant to the MLP Policy or the Process:

(1) are based on its own independent assessment and investigations, interpretations, deductions, information and determinations; and

(2) are to the best of its knowledge and belief complete and accurate;
(c) it has examined all information relevant to the risks, contingencies and other circumstances having an effect on its Proposal which is obtainable by the making of reasonable enquiries, which enquiries the Proponent Member has made;

(d) it has not paid or received and will not pay or receive any secret commission in respect of the Process;

(e) it has not entered and will not enter into any unlawful arrangements with any other person in respect of the Process;

(f) it has not sought and will not seek to influence any decision in respect of the Proposal or the Process by improper means;

(g) any information provided to the State during any interview, meeting or workshop or otherwise submitted to the State pursuant to its Proposal or the Process, is accurate; and

(h) it did not place any reliance upon the completeness, accuracy, adequacy or correctness of any Disclosed Information.

9. Status of Proposal and Proponent

9.1 Material changes

(a) The Proponent must notify the State promptly, in writing, of any:

(1) material change to any:

   (a) of the information contained in its Proposal;

   (b) additional information submitted to the State pursuant to its Proposal or the Process; and

(c) information submitted to the State in any interview, meeting or workshop conducted pursuant to the Process;

(2) event which may affect or have an impact on the financial position or capacity of any Proponent Member; or

(3) circumstances which may affect the truth, completeness or accuracy of any of the information provided in, or in connection with, the Proposal.

(b) On receipt of any written notification pursuant to clause 9.1(a), the State reserves the right to assess the change and to terminate the Proponent’s further participation in the Process, or to invite the Proponent to amend its Proposal accordingly.

9.2 Status of Proponent Members

(a) If, after lodgement of its Proposal:

(1) there is a change in the structure of a Proponent Member or there is otherwise a change in Control of a Proponent Member; or

(2) the Proponent replaces, adds or removes a Proponent Member, the Proponent must:

   (a) promptly notify the State;

   (b) provide the State with sufficient details of the change and any additional information reasonably requested by the State; and

   (c) provide evidence to the State that the new Proponent Member has agreed to be bound by these Terms and Conditions.
(b) On receipt of such notification the State will assess any change and reserves the right to accept the change and impose such conditions as it thinks fit in connection with accepting the change or terminate the Proponent's further participation in the Process.

9.3 No requirements to return

Each Proponent Member agrees that the State will not be required to return the Proposal or any documents, materials, articles and information lodged by the Proponent as part of, or in support of, the Proposal.

10. Disclosure by Proponent

10.1 Disclosed Information

Each Proponent Member must in relation to Disclosed Information which the State denotes as confidential or which the Proponent knows or ought to know is confidential:

(a) keep the Disclosed Information confidential, save:

(1) to the extent it is proven to be necessary to comply with any applicable law, legally binding order of any court or Government Party, or the rules of a stock exchange;

(2) where the Proponent Member can demonstrate that the information is already in the public domain (other than due to a breach of its obligations under the Process);

(3) where agreed to or required by the State, and then only in accordance with clause 10(g);

(b) not use, copy, reproduce or distribute any Disclosed Information except as required for the purposes of participating in the Process and then only to the minimum extent reasonably necessary;

(c) immediately notify the State if it becomes aware of a suspected or actual unauthorised disclosure, copying or use of Disclosed Information;

(d) not make a media release or other public announcement or statement in relation to the Process without the prior written consent of the State; and

(e) ensure that each party to whom it discloses Disclosed Information, including any Recipient, complies with the obligations in clauses 10.1(a) to (d) of these Terms and Conditions (Recipient Obligations).

10.2 Survives Termination

The obligations in clause 10 continue after termination of the Proponent Member’s participation in the Process.


11.1 State’s Public Disclosure Obligations

Each Proponent Member agrees to:

(a) the disclosure by any person to the State or the State’s Associates of information concerning a Proposal, the Proponent or a Proponent Member for the purpose of the State exercising its rights set out in the MLP Policy or at law;

(b) the State and its Associates disclosing any aspect of the Proposal or any other information provided by the Proponent to the State during the Process, including the term and conditions of any final contract, to enable the State to meet public disclosure obligations the State may have:

(1) under any current or future legislation;

(2) under any current or future policy of the State;
(3) in the course of official duties of the Minister of the State;
(4) to satisfy requirements of parliamentary accountability;
(5) in annual reports of the State; or
(6) to satisfy any other recognised public requirement;
(c) the State and its Associates publicly publishing or disclosing (on the Internet or otherwise) information in relation to the Process, the Proposal or the details of the Proponent and Proponent Members, including the terms and conditions of any final contract; and
(d) without limiting clauses 11(a), (b) or (c), the State publishing or releasing, as part of a competitive tendering process, details of proposed outcomes or key elements that the State considers the Proposal is seeking to deliver.

11.2 State Licence
Each Proponent Member agrees to grant the State and the State’s Associates an irrevocable, perpetual, royalty free, non-exclusive licence to disclose, copy, use, adapt, modify, sublicense or reproduce the whole or any portion of the Proposal for the purposes of evaluation and clarification of the Proposal for the finalisation of any final contract.

11.3 Freedom of Information Act
Each Proponent Member acknowledges that the FOI Act applies to the information provided by the Proponent in its Proposal or as otherwise submitted by the Proponent to the State pursuant to the Process and that:
(a) the FOI Act allows members of the public rights of access to the State’s documents and the State’s Associates’ documents;
(b) all or part of the information provided by the Proponent may be disclosed to third parties if there is a requirement to do so under the provisions of the FOI Act;
(c) any information that the Proponent considers is commercially sensitive or confidential must be marked “commercial and confidential”. The Proponent Members acknowledge that this special notation must not be used unless the information is genuinely confidential. Marking information as “commercial and confidential” will not necessarily prevent disclosure of the information in accordance with the FOI Act. Any decision to release information will be determined by the requirements of the FOI Act; and
(d) save to the extent expressly permitted under the FOI Act, no Proponent Member will be able to commence any action or make any claim against the State or the State’s Associates for the release of any information by the State under the FOI Act (including any information submitted by any Proponent Members to the State pursuant to the Process).

12. Probity
12.1 Inducement
(a) A Proponent Member must not offer any incentive to, or otherwise attempt to, influence any of the persons who are either directly or indirectly involved in the Process, or in the entry into any subsequent contract.
(b) Without limiting clause 12.1(a), the Proponent must not:

(1) without the prior written consent of the State (as applicable), directly or indirectly approach or communicate with any officer or employee of the State having any connection or involvement with the Process, with respect to:

(a) an offer of employment; or

(b) availability of employment with the Proponent or any related entity; or

(2) directly or indirectly offer a bribe, gift or inducement to any officer or employee of the State in connection with the Process.

(c) The Proponent will not breach clause 12.1(b)(1) where it communicates with an officer or employee of the State who, of his or her own volition, approaches or communicates with the Proponent in response to a general advertisement by the Proponent for employees, provided that the Proponent notifies the State immediately after such communication first occurs and then complies with clause 12.1(b)(1) of these Terms and Conditions in relation to that officer or employee.

12.2 Probity checks

Without limiting the State’s rights pursuant to clause 4, each Proponent Member consents to the State undertaking probity checks in respect of the Proponent Member which may include:

(a) investigations into commercial structure, business and credit history;

(b) prior contract compliance in respect of other projects;

(c) police checks or any checks for any criminal records or pending charges; and

(d) research into any relevant activity that is, or might reasonably be expected to be, the subject of regulatory investigation.

12.3 Conflict of interest

Each Proponent Member must:

(a) disclose in the Proposal any circumstances, arrangements or understandings which constitute, or may reasonably be considered to constitute, an actual or potential conflict of interest with the Proponent Member’s obligations under the Process (including in respect to any final contract);

(b) provide details of its proposed strategy for managing any actual or potential conflict of interest disclosed in the Proposal pursuant to clause 12.3(a);

(c) not place itself in a position which may, or will give rise to a conflict of interest, or a potential conflict of interest during the Process; and

(d) otherwise notify the State promptly, in writing, on becoming aware of any actual or perceived circumstances, arrangements or understandings which constitute, or may reasonably be considered to constitute, an actual or potential conflict of interest with the Proponent Member’s obligations under the Process (including in respect to any final contract).

To the extent that the State directs a Proponent Member to take particular action in respect to a conflict of interest, the Proponent Member must comply with such a direction. If a Proponent Member is unable or unwilling to comply with any such direction, the State may terminate the Process.
13. Collusion

A Proponent Member must not engage in any collusive tendering, anti-competitive conduct or any other similar conduct with any person in relation to the Proposal or the Process.

14. Miscellaneous

14.1 Waiver

Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power, or remedy under the Process by the State or any of its Associates does not preclude, or operate as an estoppel of any form of, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided under the Process or provided by law.

14.2 No fettering

Each Proponent Member acknowledges and agrees that nothing contained or implied in the MLP Policy, the Process or any final contract will be construed or interpreted as unlawfully restricting, or otherwise unlawfully affecting the unfettered discretion of the State to exercise any of its executive or statutory powers or functions under any law.

14.3 Severability

If any of these Terms and Conditions or any part of them is inconsistent with any law, it will be severed from the Terms and Conditions to the extent of the inconsistency without invalidating or otherwise affecting the enforceability of the remaining Terms and Conditions.

14.4 Representatives

(a) Any matter which may be done by the State may be done by an authorised officer of the State (including the State’s Representative).

(b) Any notice to be issued under the MLP Policy or the Process may be given by the State’s Representative.

14.5 Replacement of State’s Representative

The State may, at any time, and from time to time, replace the State’s Representative. The State will notify the Proponent of the identity and contact details of the replacement State’s Representative.

Glossary

In the Terms and Conditions, unless the context otherwise requires, the following terms have the meaning given to them.

Associates means, any officer, employee, agent, consultant, contractor, nominee, licensee or adviser of:

(a) the State, including any other Government Party; or

(b) a Proponent Member including any Related Body Corporate of a Proponent Member.

Claim means any proceeding, cause of action, action, demand or suit (including by way of contribution or indemnity).

Control means:

(a) control or influence of, or having the capacity to control or influence the composition of the board (or if the entity is a trust, the appointment of a trustee of that trust), or decision making, directly or indirectly;

(b) being in a position to cast, or control the casting of, 20 per cent or more of the maximum number of votes that may be cast at a general meeting (or if the entity is a trust, a meeting of unit holders); or
(c) having a relevant interest (as defined in section 608 of the Corporations Act) in 20 per cent or more of the securities (as defined in the Corporations Act), of an entity (whether alone or together with any associate (as that term is defined in the Corporations Act)). Corporations Act means the Corporations Act 2001 (Cth).

**Disclosed** Information means the following information (of whatever nature, including written, graphical, electronic, oral, or in any other form) which is either directly or indirectly disclosed to, or otherwise obtained by or on behalf of, a Proponent in respect of or in connection with the Process:

(a) any oral advice, representations or information given or furnished by or on behalf of the State or the State’s Associates during the Process;

(b) all material disclosed in presentations or briefings by or on behalf of the State or an Associate of the State in connection with the Process;

(c) all discussions and negotiations between the State and any Associate of the State (on the one hand) and any Proponent Member or any Associate of the Proponent Member (on the other hand) relating to the Process; and

(d) any other information which a Proponent Member or an Associate of a Proponent Member knows or ought reasonably to know is confidential to the State or an Associate of the State or should be treated as such.


**Government** means the Western Australian Government.

**Government Party** means any governmental, semi-governmental or local government authority, minister, department, statutory corporation, instrumentality or government-owned corporation.

**Lead Proponent Member** means the Proponent Member identified as the Lead Proponent Member in the Proposal.

**Liability** means any debt, obligation, cost (including legal costs), expense, loss, damage, compensation, charge or liability of any kind, including those that are prospective or contingent and those the amount of which is not ascertained or ascertainable.

**Loss** includes any cost, expense, damage or liability whether direct, indirect or consequential (including pure economic loss), present or future, ascertained, unascertained, actual, prospective or contingent or any fine or penalty.

**MLP Policy** means the Government of Western Australia’s Market-led Proposals Policy as issued from time to time and includes the Market-led Proposals Supplementary Guidelines as issued in association with it from time to time.

**MLP Policy Document** means the document entitled Market-led Proposals Policy, issued by the Government of Western Australia, as amended or replaced from time to time.

**Process** means the receipt and review or evaluation (as the case may be) of the Proposal in accordance with the MLP Policy.

**Proponent** means all of the Proponent Members acting as a group in participating in the Process.
Proponent Member means each of the following, in their individual capacity:

(a) the Lead Proponent Member;

(b) each person identified as a Proponent Member in the Proposal; and

(c) any other person that is added as a Proponent Member from time to time.

Proposal means the market-led proposal lodged by the Proponent and includes the pre-qualification template lodged by the Proponent as referred to in section 3.4 of the MLP Policy Document.

Recipient means:

(a) the Lead Proponent Member;

(b) each other Proponent Member; and

(c) any other person to whom a Proponent Member discloses the Disclosed Information

Recipient Obligations has the meaning given in clause 10.1.

Related Body Corporate has the meaning given to it in the Corporations Act.

Stage Agreement means any of a Stage 1 Agreement referred to in section 3.5 of the MLP Policy Document, a Stage 2 Agreement referred to in section 3.6 of the MLP Policy Document or a Stage 3 Agreement referred to in section 3.7 of the MLP Policy Document.

State means the Crown in the right of the State of Western Australia and includes a department established under the Public Sector Management Act 1994 (WA), a Minister of the Crown, whether body corporate or otherwise, and any agency, authority or instrumentality of the State.

References to the State include references to the Lead Agency (within the meaning given to that term in section 2.1.3 of the MLP Policy Document) in respect of the Proposal.

State’s Representative means the person specified in section 2.6 of the MLP Policy or any replacement person notified by the State under clause 14.5.

Terms and Conditions or these Terms and Conditions means the terms and conditions of the Process as set out in this Appendix One and includes any additional terms and conditions imposed by the State in writing during the Process.