

Guidelines for Assessment of Unsolicited Proposals



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South Australia acknowledges the input from other jurisdictions in the compilation of these Guidelines.

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1 Premier's Statement

The South Australian Government has a vision for the state to be *The Place Where People and Business Thrive*.

At the heart of our economic development strategy is a partnership between government, business, research and educational institutions and the community sector.

Government does not have all the ideas, and we want to work together with the private sector (businesses and not-for-profit bodies) to identify innovative approaches that will promote the economic development of the state, create jobs and deliver high quality services to the community.

In most cases traditional government procurement processes will support the best value for money solutions to meet our objectives, but we also wish to encourage good ideas to be brought forward when the private and community sector see opportunities to create jobs, improve public services and create public value that are not being addressed through normal government processes.

These guidelines formalise the government's framework for unsolicited proposals. We are committed to maintaining a clear and transparent process which gives proponents certainty that their intellectual property will be protected. This includes the following information contained in this document:

- The assessment criteria listed in Section 5 which includes:
 - Community need/government priority;
 - Uniqueness of the proposal;
 - No competing proposals;
 - Value for money;
 - Capacity and capability of the proponent.

- The Process steps listed in section 6 which includes;
 - Application and investigations;
 - Exclusive negotiations and business case;
 - Contract negotiations.

The government is committed to delivering on its economic, social and environmental priorities and maximising job creation opportunities for South Australians. It looks forward to receiving innovative ideas to meet our collective goals.

Proposals are to be lodged online at www.treasury.sa.gov.au/our-department/services/unsolicited-proposals .

2 What is an Unsolicited Proposal?

An unsolicited proposal originates from a private entity (either for profit or not-for-profit) that does not fit into existing procurement processes and is submitted without formally being requested by the government.

All requests for financial support should be raised directly with the relevant government agency.

The minimum financial thresholds to qualify as an unsolicited proposal under these Guidelines are:

- \$3 million for infrastructure projects; or
- \$1 million for non-infrastructure projects.

These thresholds refer to the value of the transaction with government rather than the total project cost.

The Unsolicited Proposals Committee (Committee) can elect to review any proposal that is below these thresholds but will generally refer them directly to the relevant agency for further consideration as part of standard government business, outside of the Unsolicited Proposals process.

3 Objectives

The following objectives will guide the government's process for considering unsolicited proposals:

- Ensuring the benefits of the project for South Australians are maximised; and
- Promoting the development of unique innovative ideas by the private and community sector to support economic development, job creation and meeting community needs;
- Ensuring an open, transparent and fair process that involves a high standard of probity and public accountability;
- Ensuring value for money for government is achieved; and
- Ensuring that the private party's Intellectual Property (IP) is respected.

4 Exclusive Negotiations

The government's default position is to request a proposal via a tender process to ensure that the best value for money solution can be competitively identified.

However, the government recognises that circumstances arise where it may be beneficial in dealing exclusively with one party.

The government may, in its absolute discretion, negotiate with a party that presents an unsolicited proposal where the government considers circumstances warrant such an approach (in accordance with the criteria contained in these guidelines).

An exclusive negotiation with a proponent will be solely limited to the proponent for the purposes of developing the specific unsolicited proposal. Moreover, exclusivity will only be granted by the state for a specified period. Proponents should nominate a preferred period of time for exclusivity which the state will consider but is not bound to.

Where the government enters into an exclusive negotiation with a proponent, it retains the right to withdraw its interest or offer at any stage with suitable notice.

Key features of an exclusive negotiation may include:

- It being granted at the government's sole discretion, subject to specific terms and conditions, having regard to the particular characteristics of the proposal;
- The proponent will be responsible for their own costs in developing and lodging the proposal;
- Maximising public value for money and minimising public risk will always be prioritised when assessing and dealing with such proposals;
- All correspondence and communication with the respondent will be kept confidential, subject to freedom of information or public accountability requirements.

The government will not be precluded from engaging with other parties during the application and investigation step of proposals. This will enable the government to ascertain whether there are competing proposals and the potential for alternative value for money propositions.

During a period of exclusive negotiation, the government will not grant similar rights to the proponent of another proposal relating to substantially the same subject matter of the negotiations.

These Guidelines do not negate or vary the need for proposals to comply with other relevant government policies including the government's Industry Participation Policy.

5 Criteria for Assessing Whether to Enter into Exclusive Negotiations

In order for the government to enter into exclusive negotiations, the proponent's proposal must satisfactorily meet the following criteria.

5.1 Community Need/Government Priority

Proponents should demonstrate how their proposal will create additional economic activity and jobs, or meet unmet community needs, and how it assists with the achievement of the government's strategic priorities.

5.2 Uniqueness of the Proposal

The proponent will need to demonstrate the unique aspects of their proposal – for example:

- Can this proposal be readily delivered by competitors? – if so, what advantage is to be gained from the government entering into exclusive negotiations with the proponent?
- Are there genuine intellectual property rights, without which the proposal could not proceed to implementation (e.g. software or technology)?
- Does the proponent have ownership of strategic assets such as contractual rights or real property that would place it in a unique position to deliver the aims of the proposal, and which other parties could not deliver? or
- Does the proponent's proposal have other demonstrably unique elements or innovative ideas that are not able to be delivered by another party within acceptable timeframes?

5.3 No Competing Proposals

The government will assess whether the subject matter of unsolicited proposal is already covered by an existing or planned procurement process.

5.4 Value for Money

The proponent should:

- Clearly identify what is being sought from government to facilitate the project;
- Demonstrate that the proposal is fairly and sustainably priced relative to comparable projects;
- Demonstrate that the proposal involves an acceptable and optimal sharing of costs and risks between the government and the proponent;
- Demonstrate that the proposal will meet acceptable commercial and industry standards.

The government will also consider whether the benefits of the proposal will outweigh the costs of any government support. The proponent should articulate what they consider to be the benefits to South Australians of the proposal.

5.5 Capacity and Capability of the Proponent

The proponent will need to demonstrate it has the capacity and capability to deliver the proposal. Information will need to be provided regarding the proponents' relevant commercial and trading history, financial capacity and its experience in delivering similar projects. The proponent must also demonstrate that it has the technical competencies to successfully deliver the project. The proponent should provide information regarding any reliance on third parties.

6 Process for Consideration of Unsolicited Proposals

Three Step Process

The formal process involves three steps.

Where the government assesses that a proposal does not meet the criteria at any step of the process, it reserves the right to go to market, end the proposal consideration process or withdraw from exclusive negotiations. If the government does go to market, it will respect any intellectual property owned by the proponent.

6.1 Step 1: Application and Investigation Step

The initial step allows a proponent to lodge an unsolicited proposal, which enables the Committee to form a view as to whether further consideration of the unsolicited proposal is warranted.

A proposal should contain details of:

- how it addresses the criteria outlined in section five of these guidelines;
- exactly what the proponent is requesting of government (i.e. land, planning assistance, access to infrastructure);
- in the case of requests for access to land, details of the land parcel and current ownership.

The preferred tool to enable land parcel identification is the Department of Planning, Transport and Infrastructure's Property Location Browser, a free online mapping tool available here: www.sa.gov.au/topics/planning-and-property/buying-a-home-or-property/researching-a-property/property-location-browser

The proposal must be lodged using the online form, available at www.treasury.sa.gov.au/our-department/services/unsolicited-proposals.

This step will not involve negotiation of the proposal. That opportunity will arise at later steps.

The Committee will seek to ensure that the first step of the process takes no more than 45 days (commencing from when the Committee has determined that sufficient information has been provided by the proponent).

To assist the proponent in clarifying whether they meet criteria in Section 5 of these guidelines prior to undertaking further work, proponents may seek a pre-lodgement meeting with at least one member of the Committee and a member of the Department of Treasury and Finance Unsolicited Proposals Team. This is meant to help the proponent develop a proposal that addresses the criteria, and identify other requirements prior to committing significant resources to the development of the proposal.

Prior to the pre-lodgement meeting, the proponent should provide a short summary of the proposal to be provided that specifies what is being requested of government, at the time of requesting the meeting.

Notwithstanding any feedback provided at, or following, the pre-lodgement meeting, the proponent may lodge an unsolicited proposal. The proponent will be notified in writing of receipt of the proposal and if a meeting occurs, a record of the meeting in writing.

In making their determination, the Committee may consult with other government agencies, seeking their input on the assessment of the proposal.

If the Committee assesses that the proposal meets the criteria and should proceed to exclusive negotiations and the development of a business case, this advice will be prepared for Cabinet's

consideration and endorsement. The Committee's assessment does not in any way bind Cabinet in assessing the merits of each proposal.

Where Cabinet endorses projects to advance to this next step, proponents will be provided with:

- Feedback (if any) that the Committee wishes to provide;
- The proposed process for further development and consideration of the policy proposal, including governance arrangements;
- Advice regarding any requirements, additional matters or limitations the government requires to be included or further developed as part of the proposal, including in relation to price, scope, quality and risk factors.

Brief details of all unsolicited proposals that progress to the next step will be published on www.treasury.sa.gov.au/our-department/services/unsolicited-proposals. Generally, the government seeks to disclose all proposals at this step. In some cases, proponents may request that proposals are not listed, if this would pose significant risks to commercial confidentiality, commercial negotiations or intellectual property.

If the Committee recommends the proposal not be accepted, the proponent will be notified of this outcome in writing, by the Chair. This may include advice that the proposal is not suitable for further consideration on an exclusive basis, however may instead form the basis of a competitive bidding process.

6.2 Step 2: Exclusive Negotiations and Business Case

This step involves detailed consideration of the feasibility of the proposal.

During this step it is expected that the proponent will develop a detailed proposal and undertake any required public consultation necessary to address the criteria as set out in Section 5 while also addressing any issues or questions raised by the Committee.

During this step the government may seek further input from relevant agencies or a third party, request further information and arrange meetings with proponents with an aim to better understand the requirements, terms and conditions, and financial impacts and economic benefits of the proposal.

The relevant Industry Participation Plan (IPP) for the contract value should be submitted and scored by the Office of the Industry Advocate at this step to assist in determining the economic benefit to the state.

Once the assessment process of the business case is complete, advice will be prepared for Cabinet and the government will provide a response to the proponent, outlining;

- The outcome of the assessment step;
- Whether the proposal is suitable to proceed to Contract Negotiation and the appropriate justification;
- Whether the proposal is not suitable for further consideration on an exclusive basis however may still warrant a competitive bidding process;
- That the proposal is not suitable for further consideration and is now closed.

6.3 Step 3: Contract Negotiation

The contract negotiation step allows the government and the proponent to negotiate final legal and commercial terms then prepare and execute formal project documentation.

Key steps of this step may include:

1. Advise the proponent of the process and protocols for the development of the final contract;
2. Government may seek legal, financial and technical advice on finalising the unsolicited proposal;
3. Final negotiations between the government and the proponent;
4. Formal contract management documentation prepared based on the final negotiations, noting key milestones/objectives;
5. Proposal presented to Cabinet to seek Cabinet approval;
6. Advise proponent of the government's final decision.

At the conclusion of the Contract Negotiation process, the government has four options:

1. Agree to the terms included in the contractual documentation and approve formal documentation to be executed;
2. Agree to the contractual documentation, with specific alternative conditions;
3. Do not agree to the contractual documentation but pursue the proposal through an alternative arrangement, for example a competitive process (should this occur, government agencies will take appropriate steps not to disclose or use any intellectual property provided by the proponent);
4. Do not agree to the contractual documentation and conclude the unsolicited proposal assessment process.

Where an unsolicited proposal has been accepted by the government, the relevant agency should take appropriate steps to ensure that the government's obligations and relevant steps under the terms of the agreement are met. This may include collaboration with other agencies where necessary.

7 Probity Framework

Probity principles and protocols may be established when dealing with proponents to ensure:

- That decisions are made through the approved frameworks and are capable of withstanding objective and independent scrutiny;
- That decisions deliver the best outcomes for government;
- That public service integrity is maintained;
- Commercially sensitive and confidential information is protected;
- That any perceived conflict of interest, bias and/or misconduct is eliminated.

8 General Terms and Conditions

The government may take into account any other factors or considerations that it considers relevant to the assessment of an unsolicited proposal, including any that may arise as a consequence of the nature and content of the proposal, of applicable government policy or strategy and of pertaining economic, social, legal or other events or state of affairs.

8.1 No Legal Relationship

By making an unsolicited proposal, a proponent acknowledges as follows:

- No contract exists or will be implied between the state and a proponent unless and until suitable documentation is executed with the state;
- The state has no contractual or other legal obligation to the proponent with respect to the consideration, the evaluation, the acceptance or the rejection of any submission or the failure to consider, evaluate or accept any submission.

8.2 Freedom of Information

The Freedom of Information Act 1991 (FOI Act) applies to the information provided by a proponent in its submission. Proponents should note that the FOI Act allows members of the public rights of access to documents of the state and any state participants. Any information that is commercially sensitive or confidential must be marked "commercial and confidential". This special notation must not be used unless the information is genuinely confidential. Proponents should be aware that a claim of commercial sensitivity or confidentiality does not of itself exempt information from disclosure under the FOI Act.

8.3 Probity

A proponent must not offer any incentive to, or otherwise attempt to, influence any person who is either directly or indirectly involved in an assessment or negotiation process. If the state determines that a proponent has violated this condition, the state may, in its sole and absolute discretion, disqualify the relevant proponent's submission from further consideration.

8.4 Change in Circumstance

Proponents must inform the state promptly in writing of any material change to any of the information contained in the proponent's submission, and of any material change in circumstance that may affect the truth, completeness or accuracy of any information provided in, or in connection with, the submission.

8.5 Costs

All risk and costs of preparing, lodging, developing and negotiating a proposal are to be borne by the proponent.

No proponent will have any recourse against the state in relation to the state's decision to not proceed with a proposal under these Guidelines.

8.6 Reliance on Information

By lodging a submission, the proponent warrants and represents to the state that the information contained in its submission is true, accurate and complete as at the date on which it is lodged, and may be relied upon by the state in its assessment.

8.7 Conflict of Interest

The proponents shall:

- Declare any actual or potential conflict of interest of any proponent participant;
- Comply with all laws in force in South Australia, including the *Australian Competition and Consumer Act 2010*;
- Not make any news releases or responses to media enquiries and questions pertaining to this process without the state's written approval.

8.8 Other Rights

The state reserves the right, in its sole and absolute discretion, at any time during the process to:

- Require additional information from a proponent;
- Perform security and/or financial checks and procedures in relation to each proponent and each party with an interest in the proponent;
- Change its requirements, including, at any stage, adding to or amending the information, terms, procedures, evaluation process and protocols set out in these Guidelines;
- Change the basis on which proponents may, or are required to, participate in the process;
- Publish the names of proponents;
- Clarify any aspect of a proposal;
- Discontinue negotiations at any time with any proponent;
- Subsequently initiate any other procurement process for the same or similar requirements;
- Seek the advice of external consultants to assist the state in the evaluation or review of responses;
- Make enquiries of any person, company, organisation or consortium to ascertain information about the proposal, the proponent and any matter related to the response;
- Revert or change to public sector delivery of the project; or
- Allow a proponent to change its submission.

8.9 Acceptance of a Proposal

The state is not obliged to accept any proposal.

No acceptance of a response nor any invitation to negotiate or to make an offer will be effective to constitute a contract or to create any legitimate expectation on the part of the proponent unless a formal written contract is executed by both parties.

8.10 No Contract or Estoppel

No contracts, contractual rights, estoppels or expectations, express or implied, shall arise, or be deemed to arise, out of the process set out in these Guidelines.

8.11 Committee

The current composition of the Committee can be found at www.treasury.sa.gov.au/our-department/services/unsolicited-proposals.

9 Appendix 1 – Unsolicited Proposals Process Flowchart

Application and Investigation

Application and Investigation	
Proponent	Government
<p>Actions</p> <ul style="list-style-type: none"> Submit proposal electronically through online form at: www.treasury.sa.gov.au/our-department/services/unsolicited-proposals. 	<p>Outcomes</p> <ul style="list-style-type: none"> Proceed with proposal and enter into exclusive negotiation. OR Not suitable for further consideration and is now closed. OR Proposal may form the basis of a competitive bidding process. OR Low risk proposals may be referred to relevant agencies
<p>Government</p> <ul style="list-style-type: none"> Initial meeting with at least one Unsolicited Proposals Committee member and a member of the Unsolicited Proposals Team. Determine if sufficient information has been provided by the proponent. Committee to evaluate proposal against the Assessment Criteria. Committee to engage relevant agencies where necessary. Advise Cabinet whether the proposal meets the assessment criteria and whether to proceed to the next step. Advise proponent of decision. 	

Exclusive Negotiations and Business Case

Exclusive Negotiations and Business Case	
Proponent	Government
<p>Actions</p> <ul style="list-style-type: none"> Submit detailed proposal including business case. Provide additional information as requested. Be available to meet and liaise with the government. 	<p>Outcomes</p> <ul style="list-style-type: none"> Proceed with proposal and enter into exclusive negotiation to negotiate final legal and commercial terms. OR Not suitable for further consideration and is now closed. OR Proposal may form the basis of a competitive bidding process.
<p>Government</p> <ul style="list-style-type: none"> Brief details of the proposal published on website. Develop key terms and information requirements of the arrangement. Advise proponent of process, governance arrangements, limitations (price, scope, risk) for strategic negotiations. Assess the business case and feasibility. Request any additional information from the proponent. Prepare a detailed report to Cabinet advising of the detailed proposal. Advise proponent of outcome. 	

Contract Negotiation

Contract Negotiation	
Proponent	Government
<p>Actions</p> <ul style="list-style-type: none"> Negotiate legal and commercial terms. 	<p>Outcomes</p> <ul style="list-style-type: none"> Parties accept the final binding offer. OR Parties accept the final binding offer with specific conditions. OR Do not accept the final binding offer but pursue the unsolicited proposal through an alternative arrangement, e.g. competitive tender process. OR Do not accept the final binding offer and conclude the assessment.
<p>Government</p> <ul style="list-style-type: none"> Develop process and protocols with proponent for negotiations. Complete comprehensive assessment of the final binding offer and execute formal project documentation. Proposal presented to Cabinet for approval. Advise proponent of government's final decision. 	

*Note: The government retains the right to terminate exclusive negotiations in order to either go to market, or to withdraw its interest or offer at any stage with notice.