Public Private Partnership Programme

The PPP Procurement Process

A Guide for Public Sector Entities

September 2015
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1 About this Guidance

How to use this guidance

1.1 This guidance has been written by the Treasury PPP Team. It must be read in conjunction with other Public Private Partnership (PPP) guidance and applied in consultation with the Treasury PPP Team. It assumes that the Treasury’s Standard Form PPP Project Agreement will form the basis of the contract to be signed with the private sector partner.¹

1.2 This document should be read by public sector entities (referred to as procuring entities throughout this guidance document) that are considering or implementing PPP as a procurement option for a major infrastructure project; specifically, those staff involved in the development and internal approval of the project business case and procurement process.

1.3 A glossary of terms used throughout this document is available on the Treasury website.²

The New Zealand PPP model

1.4 In the New Zealand context, a PPP is a long term contract for the delivery of a service, where provision of the service requires the construction of a new asset, or enhancement of an existing asset, that is financed from external (private) sources on a non-recourse basis, and full legal ownership of the asset is retained by the Crown.

1.5 PPP procurement has been implemented in New Zealand for the primary purpose of improving the focus on, and delivery of, required service outcomes from major infrastructure assets. Whole of life services are purchased under a single long term contract with payments to the contractor based on availability and performance of the asset. The combination of assets and services required to be delivered by the private sector are referred to in this document as the ‘project’.

1.6 The PPP model seeks to improve outcomes by capturing best practice and innovation from the private sector. Lessons learnt from PPP projects can be implemented across a broader portfolio of public assets to significantly leverage the benefits of single PPP transactions. The competitive procurement process, focus on outcomes (with minimal input specifications and constraints), appropriate risk allocation and performance based payment mechanisms that put private sector capital at risk optimise the incentives and flexibility for private sector participants to deliver innovative and effective solutions.

1.7 PPP procurement is only used where it offers value for money over the life of the project, relative to conventional procurement methods. This means achieving better outcomes from a project than if it were procured using conventional methods, for the same, or lower, net present cost.

Questions and further information

1.8 General enquiries about the information contained in this guidance can be sent to ppp@treasury.govt.nz. Other guidance documents and useful information can be found at www.treasury.govt.nz/ppp.

¹ http://www.treasury.govt.nz/statesector/ppp/standard-form-ppp-project-agreement
² http://www.treasury.govt.nz/statesector/ppp/guidance/glossary
2 Overview

Introduction

2.1 This document provides an overview of the PPP procurement process. It describes the following core stages:

- The procurement planning stage, during which key strategic decisions are made (noting that many of these decisions should be made during the development of the Detailed Business Case).

- The Expression of Interest (EOI) stage, during which the procuring entity conducts an open process to short list a predetermined number of respondents to participate in the Request for Proposals (RFP) stage.

- The RFP stage, during which the short listed respondents develop proposals for delivering the project outcomes required by the procuring entity, through an interactive tender process. The procuring entity then evaluates the proposals with the objective of selecting one respondent as the preferred bidder.

- The preferred bidder stage, during which the procuring entity negotiates the project agreement with the preferred bidder and its debt providers, and resolves any critical issues identified in its proposal.

2.2 Before procuring entities commence the procurement process described in this guidance, a business case recommending PPP procurement must have been approved by Cabinet. For guidance on the Better Business Cases framework please refer to other guidance documentation prepared by the Treasury. Specific analysis required for evaluating the suitability of PPP procurement within the Better Business Cases framework is addressed in other Treasury PPP guidance.

2.3 This guidance document is designed to help procuring entities understand the stages and requirements of a well managed, focused PPP procurement process. This is critical for a number of reasons:

- Activities that occur during very early stages of the procurement process can have a major impact on later stages and the long term success of the project.

- Well drafted and complete procurement documents (especially the RFP) are essential to elicit the best possible proposals from respondents. This is particularly so for PPP projects because of the focus on outcomes and limited input specification. The procuring entity’s requirements must be clear to all participants, especially those that are new to the New Zealand market.

- The duration of a PPP project is typically between 25 and 30 years so it is critical that risks are understood and allocated appropriately through the project agreement. The procuring entity’s efforts and attention to detail during the procurement process

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3 [http://www.dpmc.govt.nz/cabinet/circulars/co15/5](http://www.dpmc.govt.nz/cabinet/circulars/co15/5)
(especially with respect to the service and works requirements) will help ensure the long term relationship with the contractor is successful and that the project delivers the required outcomes.

- The success of the PPP programme relies on strong and ongoing participation by the private sector. Procuring entities must recognise that all respondents commit significant resources to the competitive process, which are generally not recoverable. The procurement process must therefore be credible and fair to all parties in order to secure optimal private sector participation, not only in relation to the current project but also the wider New Zealand PPP programme.

**Government Rules of Sourcing**

2.4 In applying this guidance, the procuring entity must also abide by all applicable rules contained within the Government Rules of Sourcing, published by the Ministry of Business, Innovation and Employment.⁶

2.5 Rule 62 applies specifically to agencies considering PPP procurement. The procuring entity must:

- consult with the Treasury PPP Team early in the development of the project’s business case
- follow relevant Treasury guidance and instructions
- involve the Treasury PPP Team in the economic and financial assessment and advice to Ministers
- invite the Treasury PPP Team to participate in relevant project steering and working groups, and in the selection panels for all key PPP advisor appointments, and
- use the Treasury’s Standard Form PPP Project Agreement as the basis for any contract and consult with the Treasury PPP Team over any proposed modifications.

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3 Procurement Planning

Planning and Strategy

3.1 There are many planning and strategic decisions required early in the life of the project which significantly influence the procurement process and outcome of the project. Many of these matters should be addressed during the development of the Detailed Business Case, but are also discussed here because of their importance to the procurement process.

3.2 Planning and strategy decisions include:

- The outcomes required from the project, and their relative priority, which will guide and influence every aspect of project (especially the performance regime and the respondents’ proposal development).

- The combination of services that will be purchased from the contractor (this is largely focused on the decision as to whether operation of the facility should be the responsibility of the contractor or the procuring entity; i.e., the use of a Design, Build Finance and Maintain (DBFM) or Design, Build, Finance, Maintain and Operate (DBFMO) model).

- The desired high level risk allocation between the procuring entity and contractor.

- The maximum number of respondents to be short listed to participate in the RFP stage.

- The length of the service concession period.

- A realistic timetable for procurement process milestones, the construction phase and service commencement, ensuring that sufficient time is available for each stage (including development of the business case and necessary approvals).

3.3 Prior to the EOI stage, it is also assumed that the procuring entity has progressed the following elements of the project:

- The assembly of the project team and appointment of a Probity Auditor.

- The preliminary development of works requirements, the scope of operational and service requirements, and performance regime for the project.

- Development of the Public Sector Comparator (PSC).\(^7\)

- Land acquisition, site investigation and planning and environmental approvals.

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Timeframes

3.4 The PPP procurement process, from release of the invitation for EOI to Financial Close may take approximately 14 to 20 months, as illustrated in Figure 1. This timeframe is required to ensure that risks are allocated appropriately and the private sector respondents have developed their whole of life solutions to a level at which they can be confident delivering for a fixed price.

3.5 Compared to conventional procurement, a PPP project may appear to take longer to contractualise. However, this does not necessarily mean that it will take longer for construction to begin or for the required asset to be completed and operational. This is because under PPP procurement, detailed design development (and other time consuming activities, such as consenting) occur prior to Financial Close, significantly reducing the time between contract signing and the start of construction. Furthermore, the incentives under the PPP contract increase the likelihood that construction will be completed on (and in some cases ahead of) time.

3.6 It is important that the market is informed of the expected timetable for the project as early as practicable. This allows consortia to form and establish project teams, commit resources and, if necessary, raise investment funds. However, because of the level of private sector investment required, publicised timeframes must be robust and only subject to change in exceptional circumstances.

3.7 Indicative timeframes for each stage of the PPP procurement process are shown in Figure 1. The precise time required for each stage will depend on the nature of the project, including its complexity and the market’s familiarity with the procuring entity’s requirements. If the market is not particularly familiar with a project at the time the invitation for EOI is released, the procuring entity should allow more time in the EOI stage for market participants to form consortia.

3.8 In addition to the absolute time required for the procuring entity and the market to prepare for and engage in each stage, consideration should be given to the timetable of other projects in market at the same time (particularly if they are also being procured as a PPP) as this can affect likely private sector participation. Cabinet expectation is that the Treasury PPP Team will coordinate the sequencing and timing of projects in the New Zealand PPP Programme in order to meet the overall PPP programme objectives, avoid material conflicts in timeframes, increase overall market participation in projects, and ensure the programme is sustainable and deliverable.8

3.9 The timing of necessary Ministerial, Cabinet and other approvals must also be included in the procurement plan, bearing in mind that Cabinet Committees generally only meet when the House of Representatives is sitting.9

8 Refer note 3 above
3.10 Activities which occur during the business case phase can influence the speed and efficacy of later stages in the procurement processes. Such activities include developing and clearly articulating the requirements of the project, and carrying out market soundings to test various project parameters and advertise the project. Procuring entities should allow five to eight months for the business case phase (including obtaining Cabinet approval to procure the project as a PPP).

3.11 There will often be significant overlap between the market’s response to one stage of the process and the procuring entity’s preparations for the next stage of the process. For example, while the market is preparing EOI responses the procuring entity will be drafting its RFP documentation and schedules to the project agreement.
Figure 1: Overview of the procurement process for a PPP transaction

Expressions of Interest

- Invitation for EOI Developed
- Market Sounding
- EOI Responses Prepared
- EOI Evaluation
- Responses Short Listed
- Winners Identified

Request for Proposals

- RFP Released
- EOI Responses Submitted
- Preferred Bidder Selected
- Critical Issues Clarification
- Interactive Tender Process
- RFP Responses Prepared
- Negotiation Strategy Developed
- Project Agreement Negotiation

Preferred Bidder

- Design Development
- Operative Documents
- Financial Close

Milestones

- Invitations for EOI Released
- EOI Responses Submitted
- Respondents Short Listed
- RFP Responses Prepared
- RFP Evaluation

KEY

- Procuring entity process
- Market or interactive process
- Milestones
- Interactions within stage
4 Expressions of Interest Stage

Purpose

4.1 The EOI stage is the first step in the formal PPP procurement process. The invitation for EOI is designed to advertise the project and obtain formal expressions of interest from the market. From these expressions of interest the procuring entity evaluates each respondent’s capability to deliver the project and short lists respondents to proceed to the RFP stage. The short listed respondents should be capable of delivering the project outcomes over the contract term.

Figure 2: Expression of Interest Stage

Market Sounding

4.2 In developing the invitation for EOI, it is important that the procuring entity has an understanding of the market’s appetite for the project and how the market views key commercial and technical factors. Prior to issuing an invitation for EOI, the procuring entity should undertake a market sounding (usually as part of the development of a Detailed Business Case) to confirm the level of market interest in the project and provide an avenue through which private sector parties can comment on the proposed project structure. Further contact with the market prior to releasing the invitation for EOI is recommended if aspects of the project need further testing or if market appetite changes.

4.3 The market sounding is a critical indicator of the likelihood of successfully delivering the project on a basis that is acceptable to both the procuring entity and the private sector. The market sounding can also be used to communicate the desired outcomes for the project and draw responses from the market about participants’ views on meeting those outcomes. To the extent possible, any innovative or unique elements of the project should be highlighted during the market sounding to ascertain market appetite and feedback.

4.4 Interested parties will need time to form consortia in order to respond to invitations for EOI. Early market sounding activities allow preliminary discussions between interested parties to occur which can increase the number of potential participants and improve the quality of responses received.
4.5 Whilst market sounding is not expected to be an exhaustive process with consultation of every potential participant, it should cover a broad range of likely participants from New Zealand and overseas in order to properly gauge market interest and receive sufficient feedback.

**Development of the Invitation for EOI**

4.6 The invitation for EOI must set out the information that respondents are required to submit for evaluation purposes and the criteria by which this information will be assessed.

4.7 The invitation for EOI draws upon much of the work already done in the Detailed Business Case and during project planning and development. Although the invitation for EOI does not set out the works and service requirements for the project in detail, it must contain sufficient information to enable respondents to form a view on the capabilities required for delivery of the project and the nature of the risks associated with the project. In order to inform and provide a basis for short listing respondents, the invitation for EOI should contain all the information required to allow respondents to prepare and submit meaningful responses, including the following:

- Project context, including stating that the project will be procured as a PPP.
- Description of the EOI stage, including the purpose of the EOI and the timetable.
- The required form and content of the EOI, including the specific information being sought from respondents and the deadline for submission.
- Criteria by which the EOI will be evaluated and the maximum number of respondents that will be short listed to progress to the RFP stage.
- The scope of, and outcomes sought for, the project (i.e., the services requested from respondents) and the contract term.
- Principles by which the project will be delivered and managed, including commercial principles (e.g., contract terms and risk allocation) and relationship principles between the procuring entity and the contractor.
- Outline of the basis by which the contractor will be paid for the services in scope (the payment mechanism) and the performance regime.
- Information about the subsequent stages and timetable of the procurement process.
- General terms and conditions that respondents must abide by.
- Any other information that may be relevant, such as relevant legislation, regulations or obligations and technical details of the project.

4.8 The invitation for EOI should not require respondents to expend significant resources in preparing a response. Typically, EOI are limited to 40 A4 sides (excluding financial information and other specified annexures).
Release of the Invitation for EOI

4.9 The purpose of the invitation for EOI is to:

- formally advise the market of the project, including the assets and services that the procuring entity is seeking to purchase
- communicate to the market the proposed timeframes, evaluation criteria and hurdles to be met for the project to move forward, and
- invite interested parties with the requisite skills and experience to submit an EOI.

4.10 Cabinet usually agrees to the release of the invitation for EOI document to market at the same time as it approves the Detailed Business Case for the project and the PSC.

4.11 The procuring entity is required to publish the invitation for EOI on the Government Electronic Tenders Service (GETS) or equivalent. Further communication between respondents and the procuring entity during the EOI stage should be through a single point of contact (to be nominated in the invitation for EOI) or through arranged formal briefing sessions.

4.12 The time that respondents are given to compile their responses to the invitation for EOI may vary depending on the timelines and complexities of the project. Because respondents are not asked to provide a detailed solution at this stage, they should not require longer than one to two months to provide an adequate response to an invitation for EOI.

4.13 However, if the market is not sufficiently aware of the project from prior announcements or market soundings, additional time may be required for respondents (particularly those involving international respondent members) to form consortia and participate effectively in the process. A rule of thumb is to allow at least three months between announcing that the project has been approved for PPP procurement and releasing the invitation for EOI in order to maximise market preparedness and interest (unless the project has been advertised widely during the business case development stage).

Evaluation of EOI

4.14 The EOI stage is important as one or more respondents may be excluded from participating in the RFP stage. The procuring entity must therefore be confident that the bases on which any respondents are excluded at the EOI stage are robust and justifiable.

4.15 The procuring entity should produce an EOI evaluation plan to record the principles and processes that the procuring entity will follow to evaluate EOI. This plan should be scrutinised by the Probity Auditor and signed off by the project Governance Group.

Receipt and compliance check

4.16 The first step of the evaluation of EOI is to receive the responses and check them for compliance with the mandatory requirements, terms and conditions specified in the invitation for EOI. The procuring entity must ensure that the invitation for EOI reserves the right for the procuring entity to exclude non-compliant responses.
Due diligence

4.17 A key objective of the EOI stage is to determine each respondent’s capability to deliver the project. In PPP procurement it is especially important to test respondents’ financial capability, as the contractor is likely to bear a greater proportion of the financial risk for the project than for traditional procurement.

4.18 The purpose of due diligence is to identify any matters that could impact on the ability of a respondent, or a respondent member, to deliver the project, including achievement and maintenance of public confidence and trust. Due diligence should be undertaken by personnel or advisors with commercial, legal and financial expertise.

Assessment against qualitative criteria

4.19 Responses are evaluated and scored against a pre-defined set of criteria that are designed to test respondents’ understanding of, and capability and capacity to deliver, the project outcomes. Evaluation activities may consist of a combination of the following:

- analysis of each respondent’s financial capacity to undertake the project over the contract term, including consideration of the scale of the project in relation to forward commitments of each respondent member
- assessment and validation of each respondent’s track record in delivering similar projects, and
- evaluation of respondents’ understanding of and ability to deliver the project outcomes.

Clarification questions

4.20 It is expected that EOI will be evaluated as presented with no clarification process, however the procuring entity should reserve the right to ask respondents to clarify statements or information contained in their EOI if required. Care must be taken to ensure that these questions are for clarification purposes only and do not offer respondents an opportunity to provide new information that could be included in the evaluation.

Reference checks

4.21 Respondents should be required to provide contact details for a number of previous and existing clients to which they have provided similar services, as well as pre-authorisation for the procuring entity to contact these referees. Reference project visits may also provide useful information in considering the track record of respondent members.

Moderation

4.22 The last stage of the EOI evaluation involves moderating the assessment scores and determining the short list. The purpose of the final moderation session is to ensure that the evaluation criteria and scoring regime have been applied in a consistent and fair manner across responses and between the subject matter evaluation team(s).
Short Listed Respondents

4.23 Following the evaluation of EOI, a short list of respondents will be invited to participate in the formal bidding process, known as the RFP stage. The desired maximum number of respondents to be short listed to participate in the RFP should be determined prior to the invitation for EOI.

4.24 A short list of three respondents is usually preferred in order to bring adequate levels of competitive tension to the procurement process and ensure that if one respondent is deemed unsuitable or withdraws from the procurement process, a minimum of two respondents remain. However, only credible respondents who are capable of delivering the project outcomes should be invited to proceed to the RFP stage, even if this means short listing fewer than the desired maximum number of respondents. The decision to shortlist fewer than three respondents should be made in consultation with the Treasury PPP Team.

4.25 Following the short listing process, unsuccessful respondents should be notified in writing. This should be timed to occur after the procuring entity has received written confirmation of the short listed respondents’ participation in the RFP stage. Unsuccessful respondents should be given an opportunity to seek feedback from the procuring entity.

Probity and Process Deed

4.26 Prior to receiving the RFP, short listed respondents must sign a Probity and Process Deed. This deed sets out the rules and processes that respondents must follow during the RFP phase and secures commitments from all consortium members to abide by these rules and processes. Example Probity and Process Deeds can be obtained from the Treasury PPP Team.
5 Issue of Request for Proposals

Purpose

5.1 The overall purpose of the RFP stage is to select a preferred bidder for the project, with which the procuring entity will enter into negotiations. In order to select the preferred bidder, the procuring entity will need to determine which proposal, above all others, best achieves the project outcomes within the affordability threshold (the specified maximum price the procuring entity is prepared to pay for the delivery of the project, expressed in net present cost terms).

5.2 The RFP stage involves an Interactive Tender Process (ITP), designed to facilitate constructive dialogue and clarification between the procuring entity and each respondent, whilst maintaining high standards of probity and transparency. The ITP is an opportunity for respondents to gain a better understanding of the project and response requirements as set out in the RFP and to test their emerging solutions and ideas by receiving feedback from the procuring entity which is constructive, without being leading or suggestive. The ITP is discussed further in section 6.

5.3 A significant level of resource is required to develop the RFP and to manage probity and the flow of information between the procuring entity and respondents. Although the RFP development work can be initiated during the EOI stage in order to reduce total procurement lead times, this will need to be factored into the procuring entity’s resource planning and project management.

5.4 The PSC should be reviewed and finalised as part of the development of the RFP, in order to set the affordability threshold. After the issue of the RFP, the PSC and affordability threshold should be refined only if the scope of the project changes or if new information comes to light that changes the procuring entity’s estimate of the costs to deliver the project using conventional procurement methods (for example, as a result of new geotechnical information which has a significant impact on design and construction requirements). In order to maintain credibility and market confidence, and given the level of investment in initial costings, these circumstances are expected to be rare.

Figure 3: Request for Proposals Stage
Objectives for the RFP

5.5 The RFP is a fundamental document to the procurement process, as it describes the procuring entity's requirements in detail, including:

- The background, context and rationale for the project.
- The objectives for the project.
- Design requirements and constraints (with the level of detail and specificity partially dependent on the nature of the project; projects with a high operational component are generally better suited to an outcomes-focused model with minimum constraints).
- The procuring entity's preferred commercial and legal terms (including the proposed project agreement).
- The required structure and content of proposals.
- The affordability threshold and discount rate for the project.
- An overview of the RFP evaluation process and timeframes.

5.6 It is critical that the RFP contains sufficient information on all aspects of the project and must therefore be detailed and comprehensive. It is important that potential respondents have the opportunity to clarify any questions they may have on the material provided within the RFP. Responses to questions should be timely and, unless there are good reasons for treating a specific question and response as commercial–in-confidence, shared with all respondents to ensure equal access to information for all parties. These considerations should be included in the Probity and Process Deed.

Structure of the RFP

Introduction, Instructions and procurement process

5.7 Generally, the RFP should include:

- A summary of key information contained within the RFP, including the procurement rules and an indicative procurement timetable.
- An overview of the RFP objectives and structure and a detailed specification of the project outcomes.
- Details of any mandatory response requirements.
- The procuring entity's rationale for pursuing a PPP.
- The governance structure for the project, relevant stakeholders and advisors to the project (including commercial, legal, technical and probity).
- Background information and a full index of the data to be made available in the virtual data room.
- The key requirements for each element of the project scope.
- The affordability threshold, expressed in net present cost terms, together with the discount rate applicable to the project.
The procuring entity’s requirements in relation to the financing of the project and allocation, and management, of risk between the procuring entity and the private sector partner.

Any constraints placed on the delivery of the project.

**Response requirements**

5.8 This section of the RFP must clearly prescribe the nature and structure of information to be submitted by respondents in order to facilitate a comprehensive evaluation of proposals, and the basis on which that information will be evaluated.

5.9 The procuring entity will assess each respondent’s capacity and capability (both technical and financial) together with the proposed partnering approach and works and services solutions. Short listed respondents are therefore required to provide a significant amount of information in their proposals which address a number of distinct areas.

5.10 Short listed respondents invest significant resources in bidding for projects. The RFP should only require respondents to submit that information which is necessary for the procuring entity to robustly evaluate proposals and confidently appoint the preferred bidder.

5.11 The table below provides a summary of the range of areas for which responses could be required.

**Table 1: Indicative RFP Response Requirements**

<table>
<thead>
<tr>
<th>Area of Response</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Summary</td>
<td>A summary of the proposal and key value proposition</td>
</tr>
<tr>
<td>Service Solution</td>
<td>The respondent’s proposal for meeting the required service outcomes</td>
</tr>
<tr>
<td>Works Solution</td>
<td>The respondent’s proposed solution for delivering the facilities to which the service solution relates, encompassing design, construction and project management</td>
</tr>
<tr>
<td>Commercial Solution</td>
<td>The respondent’s proposal for the commercial structures and terms, including consortium details and structure, risk allocation, securities and guarantees, and acceptance of the proposed performance regime and payment mechanism</td>
</tr>
<tr>
<td>Finance Solution</td>
<td>The respondent’s proposed financing structure, certainty of financing, source of financing, financial model and insurance proposals</td>
</tr>
<tr>
<td>Partnership Approach</td>
<td>The respondent’s proposal for partnership with the procuring entity, including bringing and sharing of innovation and private sector best practice and stakeholder management</td>
</tr>
<tr>
<td>Pricing proposal</td>
<td>Confirmation of the validity of the respondent’s offer and response to taxation matters and reviewable services (if applicable). The pricing proposal must be separate from other elements of proposal documentation to enable separation of price and non-price evaluation</td>
</tr>
</tbody>
</table>
| Templates             | Specific templates and forms to be completed by each respondent, including:  
  - Debt and equity commitment letters  
  - Financial requirements and pro-formas  
  - Project agreement specified responses  
  - Project agreement derogations  
  - Insurance requirements  
  - Ultimate parent company guarantees |
Evaluation methodology

5.12 The RFP must set out how the procuring entity will evaluate proposals with the ultimate aim of identifying a preferred bidder. The evaluation criteria and evaluation approach should be determined by reference to the project outcomes to ensure that proposals focus on the areas of most interest to the procuring entity.

5.13 The proposals are evaluated on both a qualitative and quantitative basis. The RFP should highlight the non-price attributes of proposed solutions the procuring entity wishes to evaluate.

5.14 To ensure respondents provide responses that align with the procuring entity’s required outcomes, the RFP should provide both the evaluation criteria that will be applied to evaluating proposals, and the individual weightings for each criterion. Weightings should reflect the relative importance of each criterion to the procuring entity and the objectives of the project.

5.15 The evaluation criteria should be referenced to the project outcomes and accompanied by a narrative that provides a description and rationale for the particular criteria and weighting given. The description should provide detail of specific attributes that the evaluation team will look for in proposals.

Project Agreement

5.16 This section of the RFP must include the draft project agreement for the project.

5.17 The Treasury has published a standard form PPP Project Agreement with model terms that should form the basis of the project agreement. The project agreement is split into a base agreement (covering general terms and risk allocation) and schedules (which are more project-specific and detailed). The procuring entity will be required to tailor the schedules to the individual project.

5.18 If a respondent wishes to derogate from the project agreement, it must clearly specify the derogations in a pro-forma template provided with the RFP. The RFP should inform respondents that they will be evaluated on the extent of the contractual derogations included in their response.

Works and services requirements

5.19 The works and services requirements schedules are important components of the project agreement. These schedules stipulate the minimum design, construction and service requirements that proposals must meet. How these requirements are expressed will depend, to a significant degree, on the nature of the asset and services being procured.

5.20 A procuring entity undertaking a PPP that includes substantive operations within the scope of the contract should endeavour to express their requirements as meaningful and measurable outcomes and place minimal constraints on the types of inputs that the contractor must use to deliver the services. This approach provides a greater opportunity for the private sector to innovate and deliver better service outcomes.

10 Refer note 1 above
5.21 A procuring entity that is retaining responsibility for delivering core services from the assets that are built, financed and maintained by the contractor may need to prescribe their requirements in more detail (for example, by expressing desired design principles and asset functionality requirements). However, care should still be taken to avoid placing undue constraints on the contractor’s freedom to determine the best design solution and mix of inputs to deliver the required functionality.

5.22 The procuring entity must consult with the Treasury PPP Team to determine the best approach to be taken for individual projects.
6 Development and Evaluation of Proposals

Interactive Tender Process

6.1 The ITP is a formal process of interaction between the procuring entity and respondents and is an important part of the RFP stage. It is designed to ensure that each response reflects the best possible proposal from each respondent.

6.2 The ITP provides respondents with an opportunity for meaningful interaction with representatives from the procuring entity to discuss the development of their commercial and operational approach, concepts and designs and to seek clarification and feedback to improve their understanding of the project and required outcomes. These sessions occur within a framework that ensures the principles of probity are adhered to and the integrity of the procurement process is maintained at all times.

6.3 The objective of the ITP is to elicit the strongest set of proposals for evaluation, thus ensuring the highest possible value to the procuring entity (and the respondents) from the procurement process. It recognises the significant costs that may be incurred by respondents and should assist them in preparing proposals that are focused and comprehensively address the matters of primary importance to the procuring entity.

6.4 The ITP is a forum for respondents to test ideas and ask questions of the procuring entity. However, feedback provided by the procuring entity during the ITP must not be leading or direct the development of respondents' proposals. Only respondents' final proposals should be evaluated and evaluators must be careful not to let impressions and opinions formed during the ITP unduly affect their evaluation of proposals.

6.5 The ITP should assist in reducing the risk of a protracted preferred bidder stage and facilitate the recommendation of a preferred bidder with minimal negotiation required to agree a project agreement acceptable to both parties.

Probity during the Interactive Tender Process

6.6 Notwithstanding the value of the ITP process, it does present increased risk of a probity breach. The high level of engagement and communication with each respondent increases the risk of:

- Respondents misinterpreting communications.
- Inconsistent messages being given to respondents.
- Respondents considering they have been treated unequally.
- Respondents perceiving that their commercial information, including intellectual property, has been shared with others.

6.7 These are all real risks which need to be managed through a transparent and comprehensive approach to probity. This will involve:

- Carefully planning the ITP sessions and conducting them in strict confidence to protect the intellectual property of respondents.
• Communicating to all parties participating in the ITP the sensitivity surrounding commercial-in-confidence material and intellectual property.

• Ensuring that all members of the project team participating in the ITP fully understand and adhere to their obligations to protect confidentiality and treat respondents fairly.

• Communicating to respondents the need for transparent and equitable treatment of all short listed respondents and for observing all communication and procedural protocols.

• Ensuring that terms and conditions have been developed specifically for the ITP sessions.

• Respondents agreeing to the proposed ITP before it commences and signing disclaimer and indemnity deeds.

• The procuring entity having access to appropriately qualified and skilled personnel to resource and conduct the ITP sessions.

Preparation for Evaluation of Proposals

6.8 RFP evaluation is the most resource intensive stage of the procurement process. The evaluation approach and process is similar to that undertaken at the EOI evaluation stage, except significantly longer and with more personnel undertaking detailed analysis of the proposals. Given the expected size and complexity of proposals, the procuring entity should consider:

• The capabilities of the personnel required to undertake the evaluation.

• The timeframe for, and sequencing of, evaluation activities.

• The structure of the evaluation team, including whether sub-teams are required to evaluate particular subject matter areas.

• What support may be required in terms of:
  • specialist support to conduct due diligence of aspects of the proposals
  • administrative and procedural support, and
  • support to ensure compliance with probity requirements.

6.9 During the evaluation of proposals, probity requirements should be increased to reflect:

• the critical nature of the decision to select a preferred bidder

• the time and effort committed by respondents in the preparation of proposals

• the confidential nature of the information that has been supplied to the procuring entity, and

• the risk, and implications, of legal challenge should a respondent perceive that it has been treated unfairly or inconsistently during the procurement process.
6.10 The evaluation process, methodology and principles are all designed to protect the integrity and fairness of the evaluation process. Above all, personnel involved in the evaluation of proposals must make sure not to discuss any details of their work or the proposals with people who are not involved in the evaluation, including non-evaluation personnel within the procuring entity.

6.11 Document storage and security needs to be managed carefully and in a manner consistent with the probity principles. The implementation of best-practice document management and confidentiality standards is vital to ensuring the integrity of the procurement process is maintained.

RFP evaluation plan

6.12 The RFP evaluation plan contains the overall approach, methodology and process that will be followed to evaluate responses to the RFP. It needs to be tightly aligned with the RFP to ensure that all information required for the evaluation is requested from respondents. Therefore, it is highly recommended that the RFP evaluation plan is developed alongside the RFP.

Evaluation of Proposals

6.13 The evaluation of proposals results in the recommendation of a preferred bidder with which to proceed to contract negotiations. It is therefore a critical step in the procurement process and the evaluation team must carry out a robust, fair and objective assessment of the proposals to determine which best achieves the project outcomes.

6.14 Proposals are checked for compliance with the RFP specifications and then undergo separate price and non-price assessment by subject matter teams. An overall evaluation panel then reviews, considers and moderates the detailed evaluation results to arrive at a preferred bidder recommendation in preparation for the negotiation stage.

Figure 4: Overview of Evaluation of Proposals
Receipt of proposals and compliance assessment

6.15 On receipt of the proposals, the procuring entity must undertake a compliance assessment, with support from legal and probity advisors as required, to determine whether each proposal complies with the mandatory requirements of the RFP. The compliance assessment includes an initial test of whether the price of the proposal is within the affordability threshold.

Clarification of proposals

6.16 The procurement process does not allow shortlisted respondents to re-submit proposals. However, the procuring entity may need to clarify some aspects of proposals for the purpose of evaluation. Any communication with respondents during the evaluation of proposals must be carefully managed to preserve the integrity of the procurement process and ensure that all respondents are treated fairly.

6.17 The sole purpose of any clarification questions submitted to a respondent must be to clarify aspects of proposals that may be unclear or incomplete, for the purpose of evaluating the proposal. All clarification questions should be phrased carefully, so as not to provide the respondent with an opportunity to resubmit or alter its proposal.

Non-price evaluation by subject matter evaluation teams

6.18 Following the compliance assessment, the procuring entity can begin the detailed evaluation of proposals against the specified criteria. Given the complexity of most projects, responsibility for conducting the initial detailed evaluation should be delegated to subject matter evaluation teams that are specialised in relevant commercial, legal, financial, construction and operational subject matter areas. Evaluation of each criterion should be undertaken by teams of appropriately qualified personnel, to ensure that a diversity of opinions is included at each stage of the evaluation. Evaluators should score each proposal individually and moderate the results as a team.

6.19 To ensure that proposals are evaluated consistently, the evaluation methodology should allow for the systematic assessment of proposals against the procuring entity’s expectations of a quality response, usually expressed in the form of criteria.

6.20 Assessments will likely include scored and non-scored assessments. Scoring allows for easy comparison across respondents but is dependent on the procuring entity being able to specify its expectations of quality (through a scoring scale) in advance. In areas where there is less certainty about what might be acceptable (e.g., derogations from the proposed project agreement) the procuring entity may undertake non-scored assessments to provide a narrative assessment of the proposal for consideration by the evaluation team.

6.21 The evaluation methods employed may vary depending on the content that is being evaluated and the overall approach that is adopted, but may include weighted scoring, binary ‘pass/fail’ assessments against a specified threshold, ranking or narrative assessment.

Price assessment

6.22 The price assessment is straightforward, as the evaluation primarily focuses on determining that the proposal has been costed reliably and is within the affordability threshold.
6.23 It is strongly recommended that the evaluation process is sequenced so that the evaluation team considers non-price attributes of the proposals before price. This will ensure evaluators’ judgements over the quality of the proposals are not influenced by price. It may be necessary for some evaluation team members to view price information (e.g., for compliance and due diligence purposes) but access to this information should be segregated where possible and tightly controlled.

6.24 The procuring entity should conduct due diligence on each financial model that is supplied with the proposal to ensure that the price is accurate and that the proposal is deliverable, including evaluation of:

- the Unitary Charge profile
- the net present value of the Unitary Charge as against the affordability threshold
- relationships between the contractor’s costs (capital and operating) in any year and the Unitary Charge
- the time horizon for repayment of capital to debt and equity providers, recognising the long term nature of the project agreement, and
- the robustness of the assumptions underpinning the operating and capital costs.

6.25 Although the respondents’ price proposals do not form part of the qualitative evaluation, they may be considered in the overall evaluation and preferred bidder recommendation in rare circumstances where the two (or more) leading non-price proposals are assessed as being equivalent, such that the evaluation team cannot recommend a preferred bidder on that basis.

**Overall evaluation**

6.26 The overall evaluation is the most critical evaluation stage and incorporates a number of important activities. The overall evaluation team should be comprised of senior staff from the procuring entity, the Treasury PPP Team, and key personnel from the subject matter evaluation teams.

6.27 Overall evaluation includes the following activities:

- Review, consideration and moderation of detailed evaluations conducted by subject matter evaluation teams.
- Selection of the preferred bidder with which to enter into contractual negotiation.
- Preparation of a negotiation brief outlining key areas for negotiation.

6.28 The first role of the overall evaluation team is to ensure that the detailed non-price evaluation has been conducted in a manner consistent with the principles and process set out in the RFP evaluation plan and that proposals have been treated fairly and consistently. During moderation, the overall evaluation team will be looking for and interrogating any outliers and inconsistencies across proposals and between subject matter evaluation teams as well as the rationale for specific scoring decisions.
6.29 As well as considering the scored assessments of each proposal, the overall evaluation team should consider:

- critical issues for negotiation
- the results of non-scored assessments, due diligence, site visits, and reference checks
- risks involved in the proposal that have not been incorporated within the scoring, and
- innovations which have the potential to lift the performance of the procuring entity’s other assets (network or system level improvements).

6.30 Following consideration of the subject matter evaluation reports, the overall evaluation team may seek further clarification from respondents on any identified critical issues. These critical issues are issues that would affect the procuring entity’s position and, if not addressed, would mean that a respondent could not be selected as the preferred bidder.

6.31 All critical issues will require specific negotiation and resolution before a respondent can be appointed as the preferred bidder. The procuring entity should address critical issues with all respondents that could be appointed as the preferred bidder.

6.32 The process for addressing critical issues may include:

- Raising the critical issue with the respondent (by way of clarification question and/or, where authorised by the Project Director, by arranging a face-to-face meeting).
- Meeting with the respondent to ensure that the critical issue is understood.
- Seeking confirmation from the respondent that any clarifications or adjustments to the proposal would be undertaken without adjusting the price of the proposal.
- Seeking confirmation from the respondent that the respondent members accept any clarification or adjustment to the proposal.
- Assessing the respondent’s clarification or adjustment in consultation with the relevant subject matter evaluation team that raised the critical issue.

Preferred bidder recommendation

6.33 The preferred bidder will be the respondent whose non-price proposal offers the highest level of service outcomes for the procuring entity, provided its price proposal is within the affordability threshold (subject to the rare circumstance outlined at paragraph 6.25).

6.34 The project team will not have the delegated authority to enter into contractual negotiations with a respondent. The project team must recommend, via the project Governance Group, to the person with delegated authority to enter into the project agreement (usually the Chief Executive of the procuring entity) on behalf of the procuring entity or the Crown (as applicable). The project team should also provide assurance and evidence that a robust and fair process was followed to reach the outcome.
6.35 It is possible that no proposals will be acceptable to the procuring entity. For example, if none of the respondent’s proposals are within the affordability threshold or the expected performance of each respondent is below the procuring entity’s own baseline performance. If no proposals are acceptable the procurement process may be terminated.

**Variant proposals**

6.36 Procuring entities should generally not encourage variant proposals. Respondents should submit the proposal that they believe best meets the procuring entity’s requirements. If respondents are permitted to include variant elements within their proposal, the variant elements should not be evaluated but may be considered (and potentially adopted) at the preferred bidder stage.
7 Preferred Bidder Stage

Purpose

7.1 At the completion of the RFP stage, the procuring entity will have selected the respondent which it intends to contract with to deliver the project. The purpose of the preferred bidder stage is to work with the preferred respondent to develop its proposal into a final project agreement, including resolution of any critical issues identified during the RFP stage.

7.2 It represents a critical stage in the procurement process, with many parties involved (including the procuring entity, the preferred bidder and the debt providers). Each of these parties is also likely to have separate technical, financial and legal advisers.

Figure 5: Preferred Bidder Stage

Preparation for Preferred Bidder Stage

7.3 Entering the preferred bidder stage can involve a substantial loss of bargaining power to the procuring entity due to the lack of competitive tension.

7.4 If the procuring entity has not sufficiently prepared for negotiations with the preferred bidder, this reduction in bargaining power and competitive tension could result in a worsening of terms for the Crown, and erosion of the value created through the competitive EOI and RFP stages.

7.5 The process for the submission of clarification questions by respondents and the ITP can resolve many issues that would otherwise need to be formalised during the preferred bidder stage. For this reason, the procuring entity should identify and resolve as many issues as possible prior to receiving proposals.

7.6 Preparation for the preferred bidder stage is usually conducted concurrently with the later part of evaluation of proposals. Key preparatory steps include:

- Reviewing the evaluation documentation, including analysis of the degree of lender support to individual proposals.
- Completing the internal approvals process for the selection of a preferred bidder, ensuring all probity issues are addressed.
• Compiling lists of outstanding issues which remain unresolved at the end of the evaluation phase.

• Reviewing the validity of proposals and addressing the risk of re-pricing during the preferred bidder stage in light of unresolved issues.

• Establishing the basis of appointment of the preferred bidder (in light of the project outcomes and RFP evaluation methodology).

• Drafting the preferred bidder appointment letter and the debrief strategy for unsuccessful respondents.

• Developing a detailed plan and timeline for the preferred bidder stage.

• Reconfirming the budget for project advisors (legal, commercial, financial and subject matter experts).

• Developing the negotiation strategy and the negotiation brief.

**Negotiation Strategy**

7.7 Prior to release of the preferred bidder letter, the project team should develop a negotiation strategy. The negotiation strategy is designed to reinforce the principles and objectives of the project, by:

- ensuring that the final documentation agreed properly facilitates and incentivises delivery of the outcomes sought for the project

- as far as possible, maintaining the desired allocation of risk as set out in the Detailed Business Case and RFP, and

- ensuring that the project agreement remains an outcomes-focused contract, while recognising the need for clarity and certainty.

7.8 The negotiation strategy should:

- set out the high-level approach that will be taken to negotiating an acceptable final position with the preferred bidder

- identify the parameters within which the procuring entity, through the approvals process, has delegated the authority to conclude negotiations with the preferred bidder

- as far as possible, detail the negotiation positions which the procuring entity will accept, including issues which it is willing to compromise on and those which it is not, and

- identify indicative resources and structures required for conducting the negotiations, including identifying the Principal Negotiators who are ultimately responsible for agreeing and communicating the procuring entity's negotiating position.
Appointement of Preferred Bidder

7.9 The preferred bidder stage formally begins with notification of the successful respondent. The preferred bidder letter will notify the successful respondent that the procuring entity intends to appoint that respondent as preferred bidder, subject to the resolution of any critical issues relating to the proposal. To help the preferred bidder prepare for a streamlined negotiation process, the letter should also clearly set out the procuring entity's expectations for the preferred bidder stage and the timing of each step.

7.10 The preferred bidder letter must take into account the issues identified during the evaluation of the preferred bidder's proposal, and any resolution or clarification of those issues during the critical issues resolution stage. Any ambiguity in the preferred bidder letter may lead to critical issues that have been satisfactorily addressed being reopened for negotiation during the preferred bidder stage.

7.11 Negotiating complex and commercially sensitive terms and conditions with a single bidder can be a long and costly process and lead to poorer outcomes for the procuring entity. Deferral of substantive issues to the preferred bidder stage and the risk of re-opening issues for negotiation should be avoided wherever practicable.

7.12 The procuring entity may come under pressure from its own time constraints and from the cost concerns of respondents to leave significant elements of the project agreement to be negotiated after the appointment of the preferred bidder. However, this is likely to be counterproductive and should be resisted.

7.13 All respondents should be notified of the appointment of the preferred bidder. The procuring entity is also encouraged to make a public announcement upon reaching this milestone in the procurement process.

Negotiation of Project Agreement

7.14 The procuring entity can commence negotiations with the preferred bidder following finalisation of the internal negotiation documents and the appointment of the preferred bidder.

Negotiation plan

7.15 To assist the procuring entity in managing both the process and substance of the preferred bidder stage, the project team should develop a negotiation plan. The plan should primarily be used for internal purposes, though a revised version may be issued to the preferred bidder and its debt providers and advisors to help establish the terms of negotiation and substantive issues.

7.16 The negotiation plan also forms an important part of the audit trail for probity purposes, demonstrating the decisions taken by the procuring entity between the submission of proposals and Financial Close.

7.17 As a guide, the negotiation plan should cover a number of different subjects:

- What happens during the preferred bidder stage, including dates and milestones.
- A list of interested parties, advisors, stakeholders and the individuals involved.
- A list of outstanding issues relating to the proposal, prioritised and grouped according to whether the issue is commercial, legal, financial or technical in nature.

- The proposed work streams for the major substantive issues (which should record and cross reference issues to the proposal and other relevant documentation).

7.18 Given the critical nature of the negotiation documentation to the success of the project, the documents will need to be agreed by the project Governance Group prior to finalisation.

**Negotiation process**

7.19 The negotiation of the project agreement should progress via a series of structured engagements between the procuring entity’s and preferred bidder’s negotiation teams, led by respective Principal Negotiators. Issues to be covered in each engagement should be agreed and specified in advance.

7.20 Negotiation processes are iterative. Each engagement should progress the development of the final project agreement by seeking agreement on contentious issues. In order to facilitate this, rapid turnaround of draft contractual documentation will be required. Each party should implement efficient review, quality assurance and document version control processes to enable this.

7.21 Figure 6 illustrates an example of a structured negotiation process. It shows how the team of Principal Negotiators from the procuring entity and the preferred bidder are supported by subject matter experts and the members of the consortium respectively. Regular meetings and coordination are required to ensure that the various teams interact and share information in a timely manner.

7.22 Having the right advisors embedded within teams involved in the negotiation process is critical to an efficient and effective process. At this stage in the procurement process, many of the issues are commercial, financial or legal in nature and substantial changes to the proposal should be avoided for probity reasons. Technical advisors will be required during the negotiation to test the impact of contractual changes on service outcomes.

![Figure 6: Illustrative Negotiation Process](image-url)
Development of Preferred Bidder’s design

7.23 Respondents are not required to submit fully detailed design drawings as part of the proposals, as this would impose an unreasonable cost and time burden. It is therefore necessary that the preferred bidder undertakes further design work during the preferred bidder stage and after Financial Close, working from the design documentation included in the proposal. The level of design the preferred bidder will be required to progress during the preferred bidder stage will depend on the project.

7.24 The procuring entity has the opportunity to review the preferred bidder’s developing design documentation, both during the preferred bidder stage and following Financial Close. However, this review process must be carefully managed during the preferred bidder stage to prevent the procuring entity taking back design risk.

7.25 The preferred bidder letter will usually include pre-financial close review procedures to govern this process, based on the Review Procedures in the project agreement.

Approvals

7.26 During the preferred bidder stage, the procuring entity will need to prepare for any internal approvals, Ministerial approvals and statutory consents or delegations that it requires prior to Financial Close. The procuring entity will also be required to report back to Cabinet prior to Financial Close on the actual level of benefits contracted for compared with those outlined in the proposal previously approved by Cabinet and to report on compliance with the PSC.
8 Financial Close

8.1 Once the project agreement has been agreed by the procuring entity and the preferred bidder, the parties can, through authorised signatories, execute the project agreement (Contractual Close). Once Contractual Close has occurred, there is a separate process to determine the final price of the project (Financial Close).

Contractual Close

8.2 Contractual Close occurs when signatories from respective parties who have delegated authority acknowledge and sign the project agreement.

8.3 The final terms and conditions exclude the final price, which is determined at Financial Close, following the successful implementation of the Financial Close Adjustment Protocol.

Financial Close

8.4 Following Contractual Close, there will usually be conditions to be satisfied before the debt providers will commit finance to the project. These conditions may include the receipt of approvals from government agencies (for example, approval of the Overseas Investment Office with respect to the project).

8.5 Once these conditions are satisfied, the parties can proceed to Financial Close, in accordance with the Financial Close Adjustment Protocol. The process set out in the Financial Close Adjustment Protocol is designed to address a number of closing mechanics. In particular, this will include the final setting of interest rates, finalisation of the base case and the process by which equity partners capitalise the project SPV with their agreed equity contribution. Although the Financial Close Adjustment Protocol is implemented following Contractual Close, it must be agreed prior to Contractual Close.

8.6 The commercial and legal advisors will assist the procuring entity to negotiate and implement the Financial Close Adjustment Protocol with the preferred bidder.

Respondent Debriefings

8.7 Following conclusion of the preferred bidder stage, all unsuccessful respondents should be invited to attend individual debriefing sessions. At these sessions, the procuring entity should present to the respondent its overall assessment of the respondent’s proposal, including identification of the main advantages and disadvantages and the key reasons why that respondent was unsuccessful.

Communication

8.8 Having successfully concluded the procurement process, the procuring entity should advise the market of the outcome and announce key features of the project to the public. A copy of the project agreement (with commercially sensitive elements redacted) should be proactively released as soon as practicable.