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PUBLIC PRIVATE PARTNERSHIPS LEGISLATION AND GUIDELINES

The *Local Government Amendment (Public Private Partnerships) Act 2004* (the Act) and the Local Government (General) Regulation 2005 commenced on 1 September 2005. The Act brings into effect the recommendations of the Emeritus Professor Maurice Daly, Commissioner of the Liverpool City Council Public Inquiry, in relation to Public Private Partnerships (PPPs).

As indicated in Circular 04/34, the requirements of the Act dealing with PPPs have effect from 28 June 2004.

The Act defines PPPs, requires councils to follow the procedures set out in guidelines and establishes the Local Government Project Review Committee.

The Act defines a PPP as an “arrangement between a council and a private person for the purposes of: (a) providing public infrastructure or facilities (being infrastructure or facilities in respect of which the council has an interest, liability or responsibility under the arrangement), or (b) delivering services in accordance with the arrangement, or both”.

Some arrangements are excluded from the operation of the PPP legislation under Division 7 of Part 13 the Local Government (General) Regulation 2005. The exclusions consist of normal transactions carried out by councils that are otherwise regulated by the *Local Government Act 1993* or related legislation. Some of the exclusions are: arrangements subject to the tendering requirements of section 55 of the *Local Government Act 1993*; the sale of Council property; leasing or licensing of community land and arrangements arising out of the operation of Division 6 of Part 4 of the *Environmental Planning and Assessment Act 1979*.

Any council entering into a PPP must now comply with the attached guidelines, which been prepared by the Department in consultation with the public and private sectors and the Local Government and Shires Associations of NSW. The guidelines are not intended to be onerous or require work in addition to that normally expected of a prudent organisation when entering into a complex partnership arrangement. They follow well-established practices for PPPs at the State level.

Councils are required to submit an assessment of the project to be carried out under the PPP to the Department before they enter an arrangement. The General Manager must certify that this assessment has been carried out in

accordance with the PPP guidelines. The regulations include a limited exemption from this requirement for PPP proposals that originated on or after 28 June 2002.

Councils should also be aware that they now need the Minister's approval under section 358 of the *Local Government Act 1993* to form not only corporations but any other type of entity defined in that section.

Section 55 of the *Local Government Act 1993* has also been amended so that an entity formed by a council must now invite tenders before entering into a contract under that section. However, this requirement will not apply if that contract is part of a project that has been assessed or reviewed in accordance with the PPP legislation.

The Local Government Project Review Committee comprises representatives from:

- Department of Local Government (Chair)
- NSW Treasury
- Premier's Department
- The Cabinet Office
- Department of Infrastructure, Planning and Natural Resources.

The Committee is not responsible for assessing the merits of the project as this responsibility rests with the Council. The primary concern of the Committee is to ensure that the project risks are clear and well understood by all parties.

Information sessions on the guidelines will be arranged in the near future. Councils are encouraged to attend to ensure a full understanding of the procedures to be followed.



Garry Payne
Director General



Department of Local Government

**Guidelines on the Procedures and
Processes to be followed by Local
Government in Public-Private
Partnerships**

1 September 2005

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SECTION 1 – OVERVIEW

1.1 Introduction

Local government has been investigating the delivery of infrastructure and services through public-private partnerships (PPPs). These arrangements can be complex and risky. For that reason, changes have been made to the *Local Government Act 1993* (the Act) by the *Local Government Amendment (Public-Private Partnerships) Act 2004*. The changes introduce a Part 6 in Chapter 12 of the Act with new requirements for all councils in NSW, including county councils, when entering into PPPs.

The Act provides that the Director General of the Department of Local Government (Director General) may from time to time issue guidelines requiring specified procedures and processes to be followed by councils when PPPs are being used or considered for the delivery of infrastructure and services. These Guidelines are issued for that purpose, and are intended to guide and assist councils and others in the operation of the new PPP requirements.

The Department of Local Government (DLG) is not intending, through these Guidelines, to approve or not approve projects. The intent is rather to examine whether or not the procedures and processes that are followed by councils are appropriate for the delivery of the particular project. Responsibility for projects remains with councils.

The changes took effect on 1 September 2005. However where a council resolution to enter into a PPP was made on or after 28 June 2004, and before 1 September 2005, the Act will still apply to that PPP, regardless of whether the arrangement for the formation of the PPP was entered into before the commencement date. (See Appendix 1 for transitional arrangements.)

The Act also establishes the Project Review Committee (PRC) to review council processes for significant or high risk projects before a Council can enter into a PPP. (See Appendix 2 for details on the membership of the PRC.)

1.2 Council Responsibilities

Councils have a responsibility to their communities for the prudent management of community assets and finances. Indeed, local government has responsibilities that may go beyond the responsibilities of a private sector partner or project proponent.

For example, land owned and controlled by a council is a public asset to be held, administered and used for the benefit of the public and to assist the council in providing the services and facilities it is charged to provide for the community. Similarly, all rates, charges and fees paid to and collected by a council are public assets. PPPs may entail the provision or contribution by the council of such land or funds to a project. The PPP project may itself result in or entail the private sector participant providing land or funds to the council. That land and those funds effectively become public assets to be held and administered by the council in line with its responsibilities and related prudence and management.

PPP arrangements (and any significant variation of a PPP project) should be fully considered, and be independently and rigorously appraised, *before contracts are signed or arrangements otherwise entered into and the relevant project carried out or implemented in any way*. It is the primary role and responsibility of the council concerned to ensure that this occurs and to demonstrate this in accordance with these guidelines. Compliance with these guidelines should not be an additional burden for councils. Any prudent, well-advised, well-managed and governed council should undertake the procedures required in these guidelines in any case, in order to meet its Charter and other governance and prudential obligations. These guidelines are not intended to be an onerous additional burden.

1.3 What is a Local Government Public-Private Partnership (PPP)?

A public-private partnership (PPP) is an arrangement between a council and a private person for the purposes of:

- a) Providing public infrastructure or facilities in which the council has an interest, liability or responsibility under the arrangement, and/or;
- b) Delivering services in accordance with the arrangement.

While this definition is broad, arrangements to be excluded from the definition are provided for in the Local Government (General) Regulation 2005 (the Regulation).

The Regulation excludes the following:

- contracting of services by council from the private sector by tender. These processes are provided for under s.55 of the Act and Part 13 of the Local Government (General) Regulation 2005;
- council business units or staff working for a private party, under a contract or a tender, on a full cost recovery (or for profit) basis;
- where council acts as a trustee for a bequest or donation of land, facility or building from a private party. Trusteeship may confer on-going responsibilities on council such as care or maintenance and operational expenses. There would usually be no disbursement of any income generated to the private party that has made the bequest or donation;
- leasing or licensing of Crown or Community land to a private person
- council sales of property (including operational land);
- any arrangement arising out of the operation of Division 6 of Part 4 of the *Environmental Planning & Assessment Act 1979*;
- the imposition by a council of a requirement under section 306 of the *Water Management Act 2000* (as applying to Council by virtue of s64 of the Act)

Notwithstanding these exclusions, in general terms, arrangements will need to comply with Chapter 12 Part 6 of the Act where the council retains an equity or an ongoing obligation in the provision of public infrastructure, facilities or services.

The definition is intended to capture the range of arrangements that include models described as Build, Own, Operate, Transfer (BOOT); Build, Operate, Transfer (BOT);

Build, Own, Operate (BOO); Design, Build, Finance, Operate (DBFO); Privately Financed Projects (PFPs) and the like.

If a council is unsure about whether or not a project is a PPP, advice should be sought from the Director General. The aim of the legislation is to ensure that complex and/or risky projects are understood and well managed so that project delivery occurs in line with expectations and so that risks are minimised through a rigorous process. Councils should not seek to avoid the legislation by attempting to circumvent the PPP definition.

(Appendix 3 describes some sections from the State Government '*Working with Government: Guidelines for Privately Financed Projects*'. Although these Guidelines relate only to one type of PPP (privately financed projects), some sections may assist councils in the preparation of documentation for local government PPPs.)

1.4 Call in Powers

The Minister for Local Government has the power to call in any PPP project for review by the Project Review Committee where a council has not complied with these Guidelines in relation to entering into the PPP or the carrying out of the project.

1.5 What must Councils provide?

A council must not enter into a PPP unless it has complied with the relevant requirements of the Act. The Act refers to the formation of a PPP through an "arrangement". An arrangement is not limited to the signing of formal contractual or legal documents. The definition of arrangement includes contracts and understandings.

Councils must provide the DLG with the information set out below:

- description of the project;
- scope of the project and projected costs;
- risk assessment of the project.

The General Manager(s) of the particular council(s) involved must certify that the assessment is prepared in accordance with the Guidelines. This will need to be attached to each submission made to the DLG and supported by a Council resolution.

The process of assessment is different for projects that are significant and/or high risk, and for projects that are neither significant nor high risk.

Significant projects and/or high risk projects, (see definitions in section 2), will be assessed for compliance with these Guidelines by the Project Review Committee at two stages:

- before the Expressions of Interest (EOI)/Market Testing Stage where councils have developed a project brief and are seeking private sector participants in the project. An assessment from the PRC that the process to this stage complies with the requirements of the Guidelines is necessary for the EOI phase to proceed; and
- at the Pre-Contract Signing Stage where the council has selected a preferred partner(s) from the EOI/Market Testing phase and has negotiated a draft contract for the carriage of the project. Council **MAY NOT** sign the contract until such time as the PRC has endorsed the process council has undertaken as complying with these guidelines.

Projects that are not significant or high risk may proceed to contract development without review by the PRC. This does not remove the obligation on councils to adopt the procedures and processes required of them in these guidelines. The same assessment is still required to be undertaken for scrutiny by the Director General or the PRC if required. A council, having negotiated an arrangement/agreement with a private party, may not proceed to sign a contract establishing a PPP entity without the prior approval of the Minister for Local Government under s.358 of the Act.

1.6 Consequences of non-compliance

A council that either:

- enters into a PPP; or
- carries out any project under a PPP,

without complying with the Act and Guidelines is in breach of the Act.

While there are no specific penalties prescribed for non-compliance with the Act or these guidelines, councils should be mindful that significant courses of action are available to remedy or restrain a breach of the Act. These include:

- orders from the Land & Environment Court to restrain or remedy the breach;
- the imposition of a surcharge, under s.435 of the Act, if a council has entered into a contract in contravention of the requirements for PPPs. Individual councillors and staff may, in limited circumstances, also be held liable in respect of any action taken in the Court;
- an investigation of a council under s.430 of the Act;
- a public inquiry into a council under s.740 of the Act; or
- legal action by the private sector partner.

The DLG will view non-compliance seriously and take appropriate action.

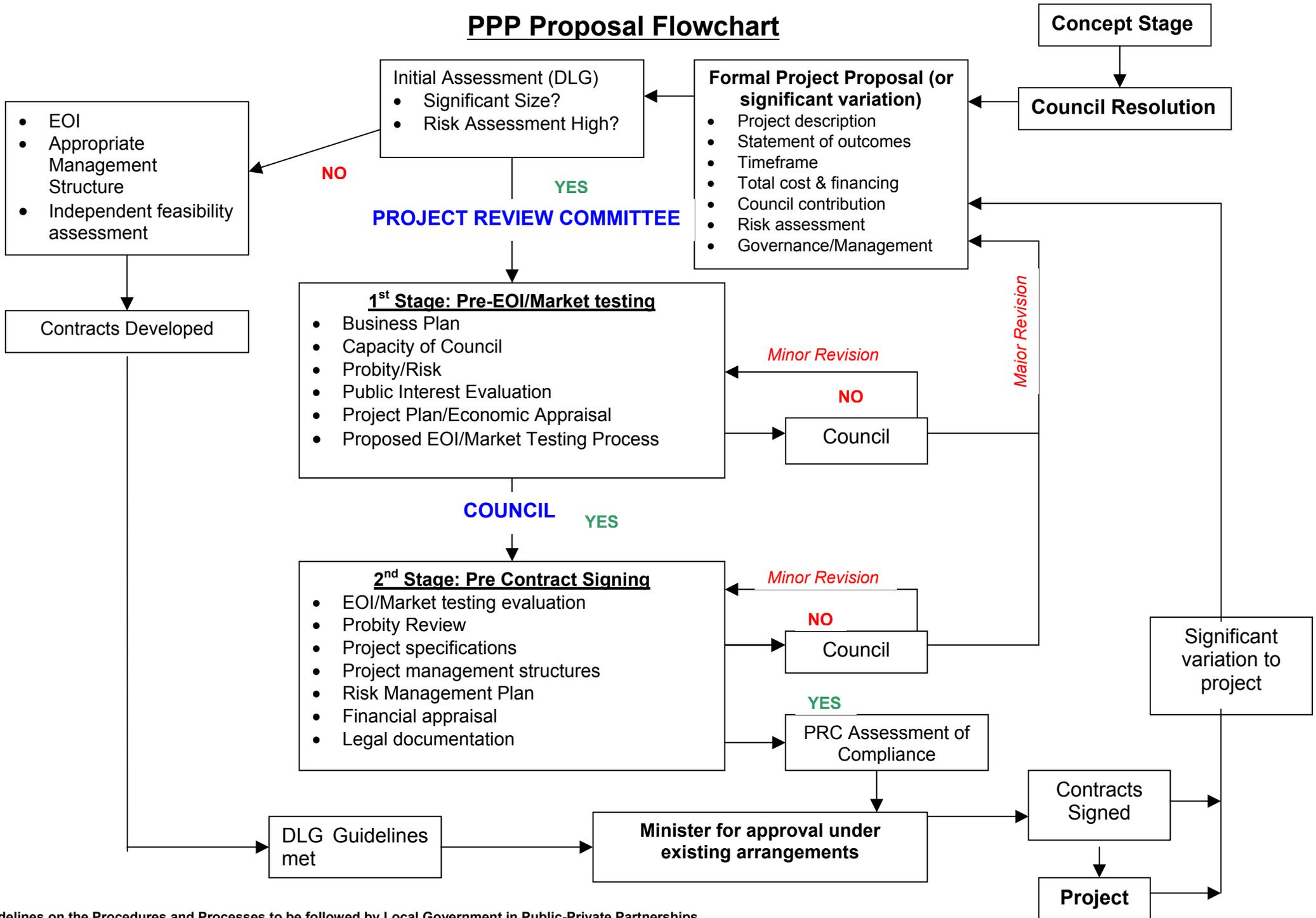
1.7 The Local Government Project Review Committee (PRC)

The PRC, established under the Act, is chaired by the Director General. The committee membership is outlined at Appendix 2. Its role is to review PPP projects against these Guidelines. It remains the responsibility of council proponents to satisfy the PRC on any matter arising from its review and there is no appeal against PRC decisions. There is no limit to the number of times a project can be referred to the PRC, nor are any fees charged to the council by the PRC. All matters considered by the PRC will be dealt with on a strictly confidential basis and, in particular, commercial confidentiality at all stages of the project will be recognised.

1.8 The Process

Requirements and procedures are summarised in the following diagram.

PPP Proposal Flowchart



SECTION 2 – Procedures and Requirements for Local Government PPP Proposals

2.1 What projects are to be reviewed by the Project Review Committee?

Significant and high risk projects must go through the two-stage PRC assessment process.

Projects that are neither significant nor high risk are not required to go to the PRC, but remain subject to restrictions on the formation of corporations or other entities except where approved by the Minister for Local Government. They must also follow the relevant processes outlined in these Guidelines.

2.1.1 Significant Projects

A significant project is defined as:

- a) any project with an estimated total cost of more than \$50 million or such other amount as may be prescribed by the regulations, or
- b) any project where the relevant council's financial contribution, or its equity position, amounts to 25% or more of the council's annual revenue that is lawfully available for spending on facilities or services of the kind to which the project relates. (Appendix 4 provides a definition of "council annual revenue" for purposes of determining the significance of a project.).

For estimating total costs, financial contributions or equity position, all elements of the project are to be taken into account. This includes land values, provision of non-monetary goods and/or services and any costs associated with the council's potential contracted liability.

Where a project is to be conducted in stages and involves a combination or series of potential contracts, the project is to be considered as one (1) project for the purposes of assessment and review. Breaking a project up into smaller parts to avoid the threshold condition is not acceptable and does not comply with the Act or Guidelines.

For example, where a PPP project proposal is on land that is in close proximity to another PPP proposal and involves the same participants to a significant degree, all such “projects” will be considered part of one project and should be presented as such in any submissions required under the Act. (Appendix 5 provides further guidance on the treatment of multi-council projects.)

2.1.2 High Risk Projects

The Act provides that where a PPP project is a high risk project, it should be referred to the Project Review Committee for review.

A project is considered to be high risk if the individual risk, or a combination of several risk aspects of the project are so significant or so large that the Director General considers that it warrants the project being examined further. The risk may be borne by or relate to:

- the council,
- its ratepayers
- its community
- the wider community generally
- the integrity and due protection of the value of the public assets held and administered by the council, or
- the public interest generally.

Such risks may be apparent in various ways, including:

- a potential loss in value of the Council’s assets;
- a potential loss in actual or prospective revenue;
- a potential increase in council’s actual or prospective expenditures, whether in terms of one-off capital amounts, or in terms of recurrent expenditures;
- the possible inability of the council to discharge its Charter obligations to provide adequate, equitable and appropriate services and facilities for the community.

Risks should be measured and assessed not just in monetary or financial terms in the risk management plan for the project. All projects are required to have a risk management plan (see section 2.2.1 - Risk Assessment below).

Subsequent to assessment by the DLG, councils will be informed as to whether their particular project proposal is a high risk project, and therefore required to be assessed by the PRC.

2.2 Initial Assessment by the Department of Local Government

It is acknowledged that, at the early stages of a project's development, it may be difficult to give precise information, particularly about financial matters. It is expected that more precise detail will only be available when a preferred partner has been identified and contract negotiations have progressed. Before formally notifying the DLG, the council will have developed the project to a stage where it has been formally approved, in principle, by a resolution of the council, and the broad concepts and principles have been formed, approved and settled. Consequently, at this Initial Assessment stage the dimensions of the project and its outcomes should be costed on the basis of expectations about responsibilities, risk management and anticipated or preferred sources of funding.

It is vital that councils determine, at an early stage, what the project will deliver, make a clear and unambiguous resolution to that effect and stick to that plan where possible.

There may be valid circumstances/reasons for a significant change in plan and therefore project outcomes/deliverables and costs. If this is the case, a new resolution should be made to reflect the change and the "new" proposal submitted to the DLG. This procedural requirement has the effect of placing a premium on full project specification as early as practicable.

As a minimum, councils are required to provide the following at the Initial Assessment stage (see appendix 9 for Initial Assessment Requirements checklist):

- project description and relationship to council's strategic and management plans including reasons why a PPP is the preferred delivery model;
- clear statement of outcomes/deliverables as agreed by a resolution of council,
- projected timeframe for project;
- estimated total project costs and sources of funding;
- preferred extent/value of council contribution to project and/or equity position;
- council annual revenue available for the type of PPP proposed;
- preferred risk assessment/management plan prepared in accordance with AS/NZS 4360:2004;
- preferred management and governance structure for the PPP entity. (See Appendix 6 for guidance on governance and management arrangements.)

The first 6 elements above can be met by short responses. The last two elements require more detail depending on the nature of the project. Items that should be considered or present in addressing these criteria are outlined below.

2.2.1 Risk Assessment

It is essential that, at an early stage in the evolution of a proposed PPP project, the council develop and put into operation an appropriate risk management plan for the project. The plan should be reviewed, updated and amended, as and when required, during the development of the project. The plan could take the form of a Risk Allocation Table which identifies risks and preferred risk allocation.

Before risk can be appropriately treated, all potential risks must be identified and analysed. (See Appendix 7 for a list of possible risks.) For this purpose, a council should identify, and appropriately document, all actual or potential risk elements associated, or likely to be associated, with the project in accordance with AS/NZS 4360:2004 (the Australian Standard) and any subsequent or superseding standard. AS/NZS 4360:2004 provides a reference for directors, elected officials, chief executive officers, senior executives, line managers and staff when developing processes, systems and techniques for managing risks that are appropriate to the content of their organisation or their roles.

The allocation of any identified risk to the parties in the PPP proposal and mitigation strategies (treatment and control options) should also be included. The risk assessment should include sensitivity testing to identify best and worst case scenarios.

Depending on the nature of the project involved, a number of risk categories may need to be included in the risk matrix or allocation table. More general guidance for the preparation of a risk management plan appropriate to the nature and size of project involved can be obtained from the Australian Standard.

2.2.2 Management/Governance

Different projects present different challenges and require different management and governance structures. While the project management structure will ultimately be the subject of negotiation in the contract development stage, it is appropriate that councils decide, at an early stage of project formulation, a preferred management structure for the development of the proposal and its eventual delivery.

In the development phase of the proposal, (ie up to the time where contracts are signed or written understandings are effected, establishing the structure for the arrangement to carry out the project and deliver on the specified terms of the contract or understanding) councils should, at a minimum, establish the governance arrangements outlined in Appendix 6.

2.3 Pre-Expressions of Interest/Market Testing Stage

Requirements of councils at this stage build on those of the Initial Assessment.

Proponents are required to satisfy the PRC on six separate matters:

1. that a business plan has been prepared for the project;
2. the capacity of council to conduct the project (or its part of the project) has been assessed and is assured;
3. that a probity plan has been prepared for the project;
4. that a public interest evaluation has been conducted and the analysis shows a positive outcome for the community;

5. that a project plan has been prepared and includes appropriate economic appraisals of council's preferred option; and
6. evidence of an appropriate competitive process; or, where a competitive process is not proposed, the reasons for this and the alternative process proposed.

(See appendix 9 for Pre EOI Stage Assessment Requirements checklist)

2.3.1 Business Plan

Once the strategic need for the proposed project has been established, it is imperative that the council establish a business case and business plan for the delivery of the project. The business plan should contain the key elements or deliverables of the project and outline the costs (and revenues) associated with them, as understood by the council at the time.

All outcomes of the project and their associated timeframes should be clearly defined and detailed in the business plan. Any hypothetical assumptions should be outlined. These outcomes and assumptions will form the basis of any future contract(s) with the private sector. Resources and respective contributions for the project should also be fully identified. A substantial change (considered to be in the order of 20%) in the relative proportion of contributions by the respective partners or sectors involved subsequent to this will be treated as a new project.

In developing a business case, the council will need to consider the range of costs and revenues that may be entailed in the project. These costs should include:

- both direct and indirect costs, separately identified;
- both capital costs, and ongoing running costs and expenses once the project is being delivered and operational.

Project costs should be considered from a "whole of life" perspective. These costs will include, but not necessarily be limited to:

- design costs;
- the costs of land acquisitions;
- the cost of land disposals;

- land and property development costs;
- raw materials costs;
- maintenance and other ongoing operational costs;
- depreciation and/or provisions for replacement costs;
- labour costs;
- overhead costs, such as the time of council employees and others in managing the project to implementation and adoption;
- payments and fees, including expenses and allowances, to external providers and council consultants and advisers;
- loan or other financing establishment costs;
- plant and equipment costs; and so on.

The business plan should also identify and provide:

- revenue estimates and sources of revenue and/or borrowings (See Appendix 8 for guidance on financing and borrowing approvals required.)
- the skills that will be needed to deliver the project, and specify where those skills are going to be sourced; and
- the facilities and services contemplated by the project.

Any financial, market or economic analysis that supports the business case should be carried out by an independent authority(ies), organisation(s) or person(s) with relevant expertise in the context of the project.

2.3.2 Capacity of council

A key consideration is the council's capacity to undertake its share of the project. One key indicator of this is council's financial capacity as represented by its current and projected (for the life of the PPP project) balance sheet. Council responsibilities in relation to the proposal, on a year on year basis throughout the project's lifetime, should be identified, clearly itemised and costed and subsequently applied to the balance sheet. Where council does not have adequate expertise, the outside sources of that expertise should be noted.

Evidence of a clear relationship between the proposal and council's strategic and management plan should accompany the above.

The risk analysis/assessment provided at the initial assessment stage should be updated to take account of any changes during the development of the business plan.

2.3.3 Probity Plan

It is essential that the council develop a probity plan for the project early in the evolution of the project. Such a plan is needed to ensure that each aspect of the process is and is seen to be open and transparent, that conflict of interest is avoided, pecuniary interests declared and that it complies with competition laws and principles.

The probity plan may need to include documentation of the relationship between parties involved in the project. For example, where any financial, market and economic analyses are carried out by an independent authority(ies), organisation(s) or person(s) with relevant expertise, the independence of these parties from the project, council or prospective private sector bidders for the project should be certified by both the assessor or principal of the assessing organisation and the PPP project manager (see Appendix 6 on management and governance arrangements for an outline of functions of the PPP project manager).

If land must be rezoned to facilitate the project, the process to undertake the rezoning should be clearly outlined. The development application (DA) process should also be outlined, setting out how the development of the PPP arrangement will be kept separate from the DA determination process.

2.3.4 Public Interest Evaluation

The project proposal must have an overall positive effect in regard to public or community interest. Council can demonstrate this by providing evidence on each of the points below:

- a) Management Plan Objectives: the proposal must be effective in meeting council objectives as contained in the current management plan. It must be demonstrated that the provision of that particular service or facility through the agency of the PPP proposal provides better value for money than would be the case if the council were to provide that outcome exclusively from within its own resources or by a more traditional contract with the private sector.
- b) Charter Obligations: council needs to satisfy itself that undertaking delivery of the proposed project will be appropriate, having regard to the council's Charter obligations and council's functions under the Act including the provision of goods, services and facilities and the carrying out of activities that are appropriate to the current and future needs within its local community and of the wider public, subject to the Act, the regulations and the law generally.
- c) Consultation: The social, economic, employment, financial and environmental impacts of the proposal should be identified and assessed for each identifiable stakeholder group affected. Council should indicate the consultation processes it has in place that will allow participation by affected groups and provide for consideration of their views.

The community must be informed of key elements and decisions made in relation to the project. Clear accountability for project reporting to council and therefore to the community must be provided for.

The DLG's guidelines entitled *Management Planning for NSW Local Government* (February 2000) includes requirements for community consultation in developing council management plans. Council should comply with all appropriate and relevant steps and provisions in those guidelines. Councils must take relevant guidelines issued from time to time by the Director General of the DLG into consideration, before exercising any of their functions.

- d) Public access: public access and equity should be addressed. To do so, council should identify any community issues and any specific needs,

including groups with special needs, which must be addressed. The project plans should outline the extent to which these needs will be met.

- e) Safety and security: risk to the safety and security of people who receive the service should be minimised. Statutory health and public safety standards are to be met as a minimum.

2.3.5 Project Plan/Economic Appraisal

The project plan should effectively state the case for the council's adoption of a PPP for the provision of the particular service or facility. This should be done through the agency of an independent economic analyst, drawing on expertise appropriate to the proposal. The independent consultant must not have any conflicts of interest. Contracting and paying for such an analysis is the responsibility of the council.

More detailed guidance on the preparation of economic and financial appraisals is available from the NSW Treasury website (www.treasury.nsw.gov.au). See specifically the link on Treasury publications.

Each identifiable component of a PPP proposal should be appraised. This may require, for the purposes of analysis, that the proposal is broken up into market segments and specialist expertise contracted to conduct a market analysis for each segment. For example, a PPP proposal might involve commercial and retail space in a development that will also provide or house council facilities. For such a proposal the market and economic prospects of both the commercial space and retail space for lease and/or sale would need to be separately examined by appropriate experts.

The two critical elements of any economic/market appraisal performed should be:

- cost benefit analysis (where major benefits can be quantified); and
- cost effectiveness (where outputs are not readily measured in monetary terms).

Both elements should show a net positive in the analysis for the proposal to be viable. A sensitivity analysis on the underlying parameters and assumptions/basis of

the project should also be carried out and presented to the PRC as part of the documentation. A relatively significant change in net outcome for a small change in a project parameter is indicative of possible problems with project viability. A cash flow for council's contribution should be undertaken as part of the economic appraisal detailing the council's ability to carry loans if loans are required for the project.

Outcomes from the sensitivity analysis should be linked to and incorporated into a revised risk management plan. If the project is sensitive to change in one or more market parameters, adequate strategies to meet and manage any risk to the whole project must be presented. If these management strategies represent a significant change in the project (ie a significant departure from the business plan submitted) and if the proponents still wish to go ahead with the proposal in revised form, the business plan should be amended appropriately.

2.3.6 Proposed Expressions of Interest (EOI)/Market Testing Process

The EOI/market testing process is a key element in ensuring that the community gets the best value for its investment in a project. All local government PPP proposals, regardless of whether they originate from within the council or from an external source, are required to undertake an EOI/market testing process to identify preferred partners in the project.

Any EOI/market testing process should be on the basis of the business plan prepared by the council. Reference should be made to the Local Government (Tendering) Regulation 1999 and the DLG's Tendering Guidelines, if it is proposed to go to tender for any part of the project. It is acknowledged that PPPs require a level of direct negotiation which falls outside the Tendering Regulation/Guideline requirements. It is essential that transparency be maintained at all times in such negotiations. The publication "*Direct Negotiations with Proponents - When, Why and How*" by the Independent Commission Against Corruption (ICAC) should be consulted in this regard.

Details of the proposed EOI/market testing process are to be provided to the PRC at this assessment stage. This documentation should contain as a minimum:

- an outline of the EOI/market testing process proposed;
- the project brief (this should be equivalent to the business plan);
- steps/mechanisms in place to safeguard the intellectual property of the council and of prospective bidders;
- establishment and composition of an evaluation panel to consider bids (panel members should not have any conflicts of interest);
- the evaluation criteria and methodology to be used in assessing bids (including weightings) – these should include experience in the successful design, construction, financing and maintenance of similar projects, the experience and capacity of bidders to undertake the project and deliver the outcomes specified in the project brief (this may include control over appropriate land) and the bidder's financial capacity to meet anticipated contract obligations;
- treatment of non-conforming bids;
- a probity review of the proposed process by the probity advisor.

2.3.7 PRC Advice to Council

Once the PRC has assessed the criteria listed above, advice will be issued on whether the council can proceed to the EOI/market testing stage or whether any matters are required to be addressed first.

2.4 Pre-Contract Signing Stage

The EOI process will produce a shortlist of possible partners or, in cases where there is limited interest in the PPP proposal, a preferred partner. Where the EOI process yields a shortlist, it may be appropriate to invite those persons to submit a detailed proposal before the final selection of a preferred partner is made. In large or complex projects, it is good business practice to go through a "Detailed Proposals" phase because responses to an EOI do not always yield sufficient information for council to make a judgment on whether the proposals represent value for money.

The evaluation panel has no other role than to assess bids in the EOI process against the criteria established by the Steering Committee (and agreed to by Council by a resolution) and to then make recommendations. The panel may rank the proposals in an order determined by its assessment of the relative merits of bids. The panel should not negotiate with bidders. If more information is required of a bid the panel should inform the Steering Committee of any deficiency against the set criteria and make a recommendation as to whether this deficiency can be easily remedied or is fatal to the bid.

While the evaluation panel may make a recommendation to the project Steering Committee (and therefore council) on whether a short-list of possible partners is appropriate in the context of the project, the decision is ultimately one for the council to make.

The evaluation criteria used by the evaluation panel should be made available to short-listed bidders in preparing their further bids/submissions. Council (through its Steering Committee) may prefer, rather than to have a further formal bid process, to select the preferred partner by a negotiation process between the two (or three) best bids received as a result of the EOI process. Whatever the case, the process of refining selection should be fully documented.

Where there is limited interest elicited by the EOI process, it may be more appropriate for council to go straight to the preferred partner stage. The evaluation panel may make a recommendation to this effect.

Having identified a preferred partner, contracts for the proposal should now be negotiated between the council and the preferred partner. Following the conclusion of the negotiation process and prior to the contract being signed, the PRC will undertake its next review.

Documentation provided at this stage must include:

- a summary of the EOI process and evaluation including a completed probity review;

- the final project specifications/objectives with milestones identified, performance and reporting requirements included, timeframe for delivery and total cost. This should reflect the business plan submitted at the previous stage in terms of the main outcomes or deliverables;
- the final management structure for the PPP vehicle chosen, dispute resolution protocols, financial obligations and inputs (by source);
- the final risk management plan (updated version of that previously submitted) identifying and allocating all the risks associated with the negotiated outcome. This should include appropriate strategies to meet risks;
- a financial appraisal – independent analysis of the whole project including council’s equity position and ongoing obligation; and
- an outline summary of the draft contract specifying the project proposed and the parties named in the contract.

See appendix 9 for the Pre Contract Signing Stage Assessment Requirements checklist)

The PRC may seek further information on any matter related to the selection process or the development of the draft contract and may request a copy of the draft contract. Council should maintain a complete record of all matters leading to the draft contract. The material submitted to the PRC should be commensurate with the degree of risk associated with the project. The PRC does not expect voluminous submissions, but rather, reference to key documents which have been prepared in the normal course of the PPP development. It is recognised that “one size does not fit all”.

A positive assessment from the PRC about project procedures and process will be required before council may resolve to and subsequently sign the contract.

2.5 Variations: what is a ‘significant’ variation to a proposal?

If, during the course of implementing the project (including the period before the relevant contractual or legal documents are signed) there is a proposed variation to the project, the council should immediately notify the Director General.

A significant variation in terms of these Guidelines, occurs where there is a change to the project outcomes and/or a change in the relative proportion of contributions by the respective partners in the order of 20%.

Where the Director General determines that the variation is significant, the council will be notified that an assessment of the project as varied or proposed to be varied is required.

A variation to a project is significant when its risk profile, as determined in the compilation of the risk management plan, changes. There may be a number of reasons for changes in profile including:

- changes in the physical scope of the project;
- major changes in the cost of the project, either allied with a change in scope or not;
- a change in or departure from the original allocation of risk between parties;
- changes in the financial structure of the project;
- changes in the private sector partner.

This list is not exhaustive. The risk management plan for any proposal will determine the parameters of interest on which any such assessment will be made. This will need to be determined on a case-by-case basis.

SECTION 3 – CORRESPONDENCE CONTACTS

All correspondence to and communications with the Director General of the DLG and the Project Review Committee in relation to a proposed PPP project, should be made through the DLG's Head Office in Nowra. Preferably, they should be in writing. No direct contact should be made with other Committee members.

The address of that Office is:

PPP Co-ordinator

Level 2

5 O'Keefe Ave

NOWRA NSW 2540

The postal address of the Office is:

Locked Bag 3015

NOWRA NSW 2540

The telephone number is:

(02) 4428 4100

The facsimile number is:

(02) 4428 4199

Email:

dlg@dlg.nsw.gov.au

APPENDICES

Appendix 1: Transitional Arrangements

The Act and Guidelines apply to any PPP that a council resolved to enter into after 28 June 2004.

Where a project proposal originated (council resolved to investigate or develop a proposal) on or after 28 June 2002, and the council has not by 1 September 2005 resolved to enter a PPP arrangement, the council will be subject to a review commensurate with the stage they are at in the process set out in these guidelines. For example if the EOI is complete and all other documentation is finalised, then the council's project would be referred to the Project Review Committee for the Pre Contract Signing Stage review.

Appendix 2: Local Government Project Review Committee Membership

The Local Government Project Review Committee (PRC) is established by section 400J(1) of the Act.

The PRC consists of members who are appointed by virtue of the Act, and other members who may be appointed by the Director General of the Department of Local Government.

Five persons are appointed by the section as ex officio members. These are:

1. The Director General of the Department of Local Government (or an officer of the Department who is nominated by the Director General) – the Director General (or that nominee, as the case may be) is the Chairperson of the Committee.
2. The Secretary of the Treasury (or an officer of the Treasury nominated by the Secretary).
3. The Director-General of the Premier's Department (or an officer of the Premier's Department nominated by that Director-General).
4. The Director-General of The Cabinet Office of NSW (or an officer nominated by that Director-General).
5. The Director-General of the Department of Infrastructure, Planning and Natural Resources (or an officer of that Department nominated by that Director-General).

To these five persons may be added such other person or persons as the Director General of the Department of Local Government may appoint for the purposes of enabling the Project Review Committee to exercise its functions.

Appendix 3: Useful sections of State Government “*Working with Government: Guidelines for Privately Financed Projects*”

The NSW Government’s current policies and procedures on private financing of public infrastructure are contained in a document called *Working with Government: Guidelines for Privately Financed Projects* (WWG), issued November 2001. These Guidelines relate to privately financed projects (PFPs), which are only one type of a broader spectrum of PPPs. Other types of PPPs that are not PFPs are covered by the NSW Government Procurement Guidelines. The WWG Guidelines define a “PPP” as a general term covering any contracted relationship between the public and private sectors to produce an asset or deliver a service. PFPs, as a specific form of PPP, involve the creation of an asset through private sector financing and ownership control for a concession period, usually long term.

Although the State Government guidelines only deal with PFPs, they contain some sections which may assist councils in preparing their documentation for local government PPPs. The WWG Guidelines document is accessible via the NSW Treasury Working with Government website, www.treasury.nsw.gov.au/wwg.

The following sections of the WWG Guidelines may be particularly useful:

- Chapter 2 provides some guidance in identifying characteristics of projects that may be suitable for procurement as a PFP.
- Chapter 3, section 3.4 provides some guidance on what to include in a typical call for Expressions of Interest.
- Chapter 4 provides some guidance on possible elements of a typical PPP project management structure.
- Chapter 5 provides a relatively comprehensive list of possible risks that may occur in a PFP, and for which allocation of risk between the public and private sectors will need to be addressed in contractual documents for the project.
- Chapter 6 provides some guidance on key items to watch out for in developing and negotiating a contract, as these are likely to affect the allocation of risk between the public and private participants in a privately financed project.

Appendix 4: Definition of Council Annual Revenue

Annual revenue is broadly defined as that income from all sources that is available under the council's lawful discretion to use for the nature of the project involved.

There are various provisions in the Act and other legislation that prevent or restrict a council from expending moneys collected by it for any purposes other than that for which it was specifically collected.

Restrictions of that nature are contained in section 409(3) of the Act. This section requires that:

- (a) money that has been received as a result of the levying of a special rate or charge may not be used otherwise than for the purpose for which the rate or charge was levied, and
- (b) money that is subject to the provisions of the Act or any other Act (being provisions that state that the money may be used only for a specific purpose) may be used only for that purpose, and
- (c) money that has been received from the Government or from a public authority by way of a specific purpose advance or grant may not, except with the consent of the Government or public authority, be used otherwise than for that specific purpose.

Examples of moneys that are restricted and are excluded from the definition of annual revenue are:

- specific purpose grants and capital contributions from sources such as developers that are tied to specific outcomes. This includes contributions from developers for water supply, sewerage and drainage works under s.64 of the Act and contributions/payments pursuant to s.94 of the *Environmental Planning and Assessment Act 1979*;
- special rates made by councils under s.495 of the Act;
- special variation revenue (s.508(2) and s.508A of the Act), where also specifically tied to projects or outcomes and therefore non-discretionary. (In some cases a special variation may be granted for general or council financial

purposes rather than for a specific project. As this funding may be considered to be discretionary it may be included in the calculation of annual revenue.)

Councils in regional NSW are usually water supply and/or sewerage authorities. Revenues from these operations, and also domestic waste management, are held in restricted funds available only for activities related to the provision of that particular service under section 409 of the Act. While internal borrowing may be allowed for a short time, subject to Ministerial approval, repayment must be made on a commercial basis (s.410 of the Act). Annual revenue would exclude these restricted funds, unless the PPP project was specifically related to the particular service eg water fund is available for a water filtration plant project, domestic waste management fund is available for a waste processing/recycling facility etc.

For the purposes of determining a “significance” threshold for water supply and sewerage projects conducted through PPP arrangements, annual revenue would include the restricted revenue from the relevant fund (where the council is the local utility in the case of water supply or sewerage). Section 504 of the Act prohibits councils from applying ordinary rates to the cost of providing waste management services so, in the case of a domestic waste related PPP project, annual revenue would be limited to the domestic waste related management fund, untied grants, unrestricted fees and charges and income from investments and leases.

Appendix 5: Treatment of Multi-Council Projects

Where a project proposal involves a number of councils, but the estimated total cost of the project does not exceed \$50 million (or other relevant prescribed amount), the following criteria will be considered or taken into account in assessing the significance of the project in terms of council annual revenue:

1. The project is to be treated as a single project and one joint submission or assessment is to be provided to the Director General.
2. As part of that joint submission, however, each council involved in the project is to provide an assessment in respect of its own part of the project. That assessment should include relevant information and details as to the annual revenue of that council that is lawfully available to it for spending on facilities or services of the kind to which the project relates, as if that project were a project to be carried out by that council alone.
3. If any one council reaches the 25% threshold for its part of the project then the whole project will be considered significant and will be subsequently referred to the Project Review Committee for review.

As for single council projects, the project may be referred to the Project Review Committee for review if the Director General is of the opinion that the project has a high risk.

The following high risk assessment principles will be applied to multi-council projects:

1. Each council involved in the project is to provide a risk profile and assessment for their part of the project;
2. If any one council's risk assessment identifies their part of the proposal as high risk then the whole project will be deemed as high risk and will be required to undergo the review processes of the PRC;

3. If no single council's part of the project is significant or high risk, then the whole project will be assessed (by the Department on the basis of the information provided) for cumulative risk;
4. If the cumulative risk is identified as being high then the project will be deemed high risk and will need to undergo the review processes of the PRC;
5. If cumulative risk is not high then the councils can develop the proposal to pre-contract stage (in line with the requirements specified in these guidelines) at which stage the approval of the Minister for Local Government under s.358 of the Act should be sought if necessary.

Appendix 6: Governance & Management Arrangements for PPPs

Management and governance structures: The attached figure shows an example of a project management structure. The actual structure used by a council would need to take into account the specific requirements of the PPP. The appropriate structures and processes will depend on (among other things) the type and complexity of the project and the stakeholders involved.

A Steering Committee: for the development of each specific PPP proposal and the eventual negotiation of contracts. The Steering Committee should be accountable to the council.

The Steering Committee may wish to establish, for its benefit, a number of advisory committees to deal with specialised project issues such as technical/design, financial, legal and economic feasibility matters. Such a committee structure, while recommended for significant projects, is not mandatory.

A probity adviser for the project: This position should be established at the start of the process of project development to ensure its transparency, integrity and accountability. The position should be independent of and external to council. The probity adviser should report to the Steering Committee.

The probity adviser will ensure that all those submitting tenders or expressions of interest are given an equal opportunity, that the bid assessment procedures result in a fair and unbiased consideration of all bids, and that confidential material is duly protected. In general terms, probity means, for the whole project, the adoption and implementation of values of integrity, fairness and honesty. The probity adviser will also address and advise as to conflicts of interest as and when they arise, with the probity process producing accountability of decision making at all levels.

A project manager: with the appropriate expertise and skills to manage the project development phase and to interact with the private sector on operational aspects of any PPP proposal. This position is a council appointment but need not be a council officer. The position is accountable to the Steering Committee and the council.

A project control group: to be responsible for the timely development and quality performance of the project. The group should manage all aspects of project development including project specifications, financial/economic appraisals and establishing relevant benchmarks. This group may include councillors and/or council staff, contracted external experts and community representatives. The project director would chair this group.

An evaluation panel: to manage the expressions of interest phase of any project through to the selection of a preferred private sector partner. This panel would have the responsibility of assessing EOIs received and making recommendations to the Steering Committee on potential partners in the project. Members of this panel must not have any conflict of interest in the project.

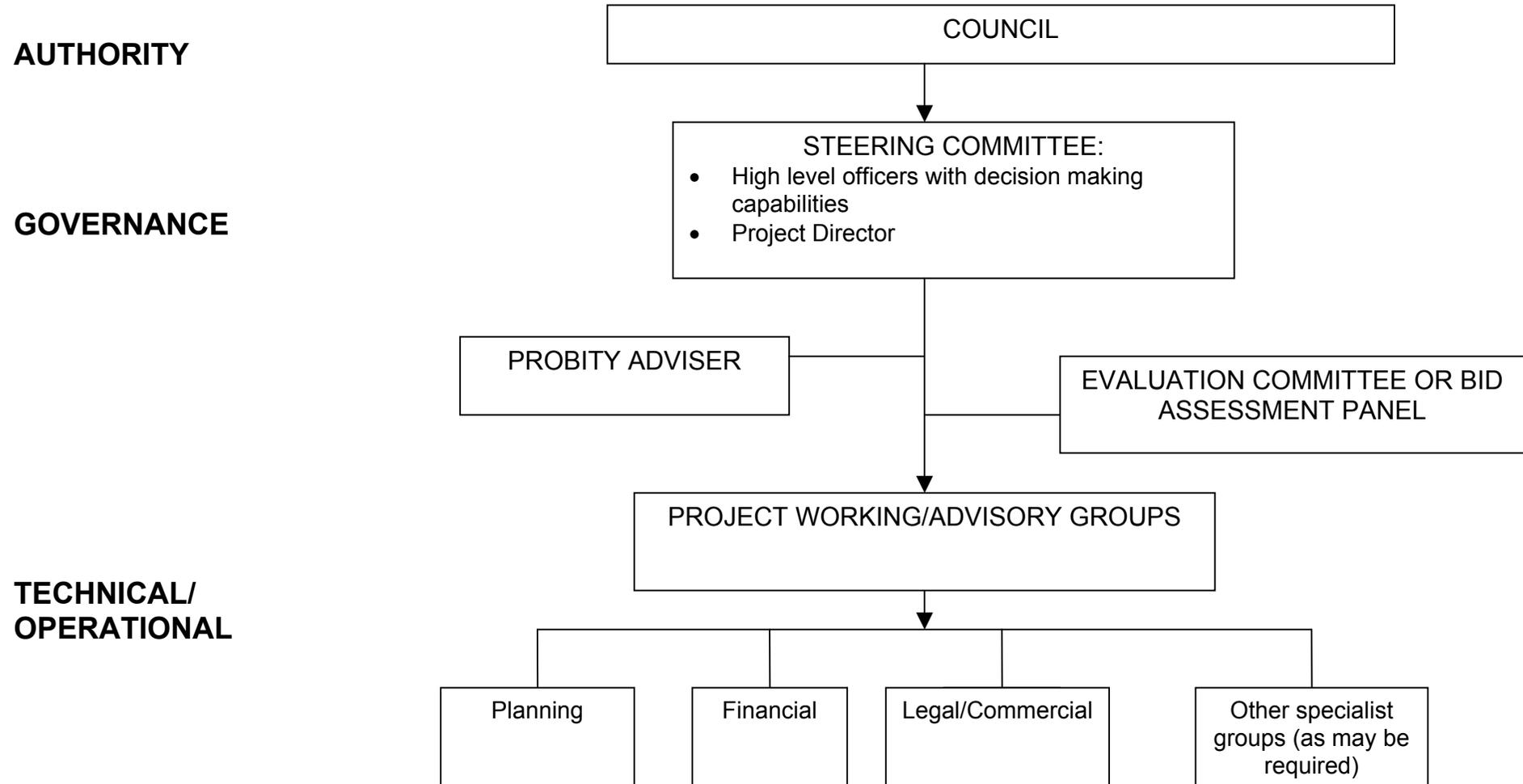
Management Board: for the carriage of the project. The board is a project vehicle with clearly specified responsibilities for the delivery of specified outcomes.

It should comprise representation from the partners involved in the project in proportion to their relative (financial) contribution. Where council's financial inputs are less than that of its private sector partner(s), care should be taken to appropriately protect council's minority interest.

Reporting: mechanisms need to be put into place and implemented to report all aspects of the PPP. Prospective private sector participants need to be made aware of such procedures, and indeed of the general nature of the obligations and responsibilities of the council in respect of the project, particularly where they may be different from those applicable in the private sector.

Resolutions/Delegations: all council decisions must be made by resolution of the council. In limited circumstances, meetings may be closed to members of the public. Any decision by a council in relation to the formation of a PPP may only be made by resolution of the council.

**Appendix 6 – Figure 1:
ILLUSTRATIVE PROJECT MANAGEMENT STRUCTURE**



Appendix 7: Risk Elements

Risks associated with the site: if the project involves the development of land or facilities including, but not limited to, control or ownership, environmental issues, acquiring the requisite approvals, heritage or other claims on the site.

Design, construction and commissioning risks: these would normally reflect the risk that the facility or structure is unable to deliver the required outcomes at the cost and in the time frame anticipated in the PPP agreement.

Risks associated with the private sector partner: includes its financial position and its effect on the project, technical capacity to deliver contracted outcomes, ability to manage the operations and delivery of services or outcomes associated with the project and its complexity. Also should include the potential effect of any ownership changes and any probity matters discovered after the execution of the contract and subsequent to any change in ownership or principals.

Financial risks: includes the availability of funds, the conditions attaching to any loans and/or debt, prospects for re-financing the project should it become necessary, taxation matters and interest rates.

Operational risks: issues such as the possible escalation in input costs, projected maintenance/refurbishment costs being adversely affected by design and construction quality, specifications not met for outputs/outcomes, failure (financial or technical) of subcontractors, and products remaining contemporary/competitive in technology terms are matters for consideration in this context.

Market risks: including general economic downturn, the effects of competition or downturn in any market segment the project relies on in any way, demographic issues and their effect on demand for services/facilities to be provided by the project and any inflationary consequences.

Network/interface risks: issues include the effect of withdrawal or varying (either in provision or price) of a complementary or support network/service, and the interaction between any core service of council/government and contracted services under the agreement.

Industrial relations risk: the possible effects on the project of strikes or other forms of industrial action.

Legislative/government or sovereign risk: to include any risks associated with the approvals process for any development and exposure to changes in law or regulations that may affect the project.

Risks associated with asset ownership: accounting for the possibility/probability of technical obsolescence of any facility or part thereof, losses due to termination of any agreements inherent in the project or of a breach of contract not adequately compensated for financially and the value of any asset transferred to council being less than anticipated.

Force majeure: the risk that the inability to meet contracted outcomes is caused by major external events either pre or post completion.

Chapter 5 of the NSW State Government *Working with Government: Guidelines for Privately Financed Projects* provides a more extensive list of possible risks that may occur in a privately financed project.

Appendix 8: Financing and Borrowing approvals

Where some of the funds are to be borrowed, the council will need to establish an appropriate case for such borrowings, given the need for the council to comply with the provisions of Part 12 of Chapter 15 (see section 621 and following sections) of the Act.

The approval of the Minister for Local Government may be needed under sections 622 and 624 of the Act.

Section 410(3) of the Act will also need to be complied with, and appropriate approvals obtained from the Minister for Local Government, in respect of any internal loans, that is to say the movement of moneys out of a restricted fund, such as a water or sewerage fund.

Where some of the council sourced funds are to be raised by way of increased rates or charges over and above those allowed under the rate pegging provisions of the Act, approval from the Minister for Local Government for a special rate variation will also be needed pursuant to Part 2 of Chapter 15 of the Act.

Appendix 9: Review Requirements Checklist

Initial Assessment requirements	Y/N
General Manager's certification	
Project description	
Evidence of project's relationship to strategic & management plan	
Reasons PPP is preferred delivery model	
Statement of outcomes/deliverables	
Projected project timeframe	
Estimate of total project costs	
Extent of council contribution to or equity position in project	
Outline of funding sources	
Calculation of 'council annual revenue'	
Risk assessment/management in accordance with AS/NZS 4360:2004	
Proposed management & governance structure for PPP	

Pre EOI requirements	Y/N
Business plan	
Assessment of council's capacity to conduct project	
Probity plan	
Public interest evaluation	
Project plan	
Updated risk management plan	
Evidence of appropriate competitive process (EOI)	

Pre Contract Signing Stage requirements	Y/N
Summary of the EOI process undertaken	
Results of evaluation of bids	
Final project specifications/objectives	
Final management structure for chosen PPP vehicle	
Final risk management plan	
Financial appraisal	
Outline summary of draft contract	