

Australia: Victorian Government has modified the Market-Led Proposals Process - what proponents need to know

In brief

The Victorian Treasurer Tim Pallas MP recently announced changes to the Market-Led Proposals (MLP) Guidelines to (a) remove the "uniqueness" criteria, (b) introduce a need to justify exclusive negotiations, (c) seek to align MLPs with new Government project priority areas and (d) simplify the MLP assessment process.

This new regime allows the Victoria Government to manage MLPs in a more streamlined fashion. The new process is described in the updated [MLP Guidelines](#) and [Government Priority Areas list](#).

Contents

- [Key takeaways](#)
- [In more detail](#)
- [Conclusion](#)

Key takeaways

Key changes to the MLP process include:

No.	Previous requirement	New requirement
1.	Uniqueness criteria	Changed criteria - justification for exclusive negotiations
2.	No equivalent requirement	MLPs will be considered against Government priority areas list
3.	Five stage process	Three stage (streamlined) process

Considering each in turn:

- Changed criteria - justification for exclusive negotiations:** By now requiring that proponents must justify why the MLP warrants exclusive negotiations with government, the new MLP Guidelines have effectively broadened the criteria against which projects can be assessed. Uniqueness may still justify exclusive negotiations, although other reasons could include that it would be financially beneficial to avoid a competitive tender process (for example, if the proponent has assets or skills that could not be procured through a market tender) or that no other party is capable of delivering the project other than the proponent.
- Government priority areas list:** MLPs are now assessed against new **Government priority areas**. These are not stated to be mandatory, though proponents should consider if their projects can meet at least one of these criteria to maximise the prospects of success:

Priority areas

Bushfire prevention	International education	Retail, transport distribution and logistics
Visitor economy	Health infrastructure	Social and community infrastructure and services
Digital technologies	Medical technologies and pharmaceuticals	Environment and sustainability
Creative industries		



3. **Three stage (streamlined) process:** The original five-stage assessment process has been streamlined to three stages. Practically, this is a consolidation of the existing process, as can be seen below:

New process	Old process
Pre-Stage 1 – Pre-submission meeting with DTF Assist proponent to understand process; other Departments may attend	Pre-Stage 1 As per new process
-	Stage 1 – Preliminary assessment DTF DTF can accept, reject, or put to a competitive process
Stage 1 - Filtering of Projects and DD DTF DTF can accept, reject, or put to a competitive process Limited project details published	Stage 2 – DD and Strategic Assessment DTF Same outcomes per Stage 1; "uniqueness" criteria assessed Project details published
Stage 2 – Investment Case and Negotiation of Project Same outcomes as per Stage 1	Stage 3 – Procurement preparation Same outcomes as per Stage 1
Stage 3 – Exclusive Negotiations May result in contract award	Stage 4 – Contract negotiations, value for money assessment Same outcomes as per Stage 1
-	Stage 5 – Contract Award

The new process involves the Department of Treasury and Finance from start to finish and involves the Department of Premier and Cabinet early in the process.

In more detail

1. Changed criteria against which MLPs are assessed

The new MLP Guidelines set out the assessment criteria for MLPs. Proposals must:

Key assessment criteria

- (a) Meet a key service need
- (b) Represent value for money
- (c) Be affordable/a relative budget priority
- (d) Be deliverable
- (e) Have characteristics that justify exclusive negotiation?
 - Proponent demonstrates the proposal cannot be delivered by other market participants and that there is a gain to the State by not tendering it
 - Proponent has a significant competitive advantage
 - Proponent's delivery timeframes are desirable to the Government
 - Any other relevant characteristics

In addition to the above, a proposal must meet the overarching government objectives: (a) benefitting Victorians, (b) supporting economic growth, (c) creating jobs and new skills in Victoria, and (d) ensuring transparency and fairness in the process.



With the introduction of the requirement to justify exclusive negotiations, the acceptance criteria now appear to be broader as the Government can consider more than just "uniqueness" when assessing whether exclusivity is justified. For example, there may be other financial or intangible reasons which justify exclusive negotiations, in circumstances where a particular MLP is not unique. Although the criteria has changed, the fact a project is unique may still be a reason to justify exclusive negotiations. As the change from "uniqueness" to "justification for exclusive negotiation" arguably broadens the types of MLPs which could be considered, this should make it more attractive to prospective proponents to introduce ideas to the Victorian Government. With this change, Victoria's MLP Guidelines are now distinguished from other jurisdictions which continue to adopt a uniqueness criterion.

For those familiar with the previous MLP requirements, the innovative ideas process is no longer in the Guidelines.

Due to the nature of the MLP assessment stages (see below) it is possible for proponents to continue to develop their proposal following their submission to the Victorian Government. For example, based upon feedback received from the Government during the assessment process. Not all of the criteria need to be immediately satisfied to progress through the assessment process, and only by the final stage (Stage 3) will each of the criteria need to have been firmly met to enter into an contract with the Government.

Common characteristics of previously successful MLPs include:

- the proponent owns the assets integral to the project;
- the proponent has the ability to leverage an existing arrangement with assets, or a government entity, to enhance benefits to the public;
- the proponent has the ability to self-fund the proposal;
- the MLP involving better utilisation of existing infrastructure;
- the project will provide external benefits, for example to adjacent precincts or properties;
- cost savings exceeding those which would have been obtained had the Government procured the project itself; and
- fulfillment of an existing Government need where there is no existing procurement process underway.

To the extent possible, proponents should demonstrate that their MLP meets the key characteristics described in the MLP Guidelines including by justifying exclusive negotiations (potentially through seeking to ensure that a proposal is consistent with one or more of the above characteristics). The full criteria are set out in Appendix 1 of the [MLP Guidelines](#).

2. New Government Priority Areas list

With the introduction of the new [Government priority areas](#) (listed above), the Victorian Government is issuing early guidance to proponents of the types of projects which are more likely to succeed throughout the process. The priority areas appear to be geared towards:

- countering the effects of COVID (eg visitor economy, creative industries, international education, health infrastructure);
- filling gaps in existing service provision (eg health infrastructure, social and community infrastructure and services);
- improving State productivity and efficiency (eg digital technologies, retail, transport and distribution logistics, environment and sustainability); and
- addressing the environment (bushfire prevention, environment and sustainability).

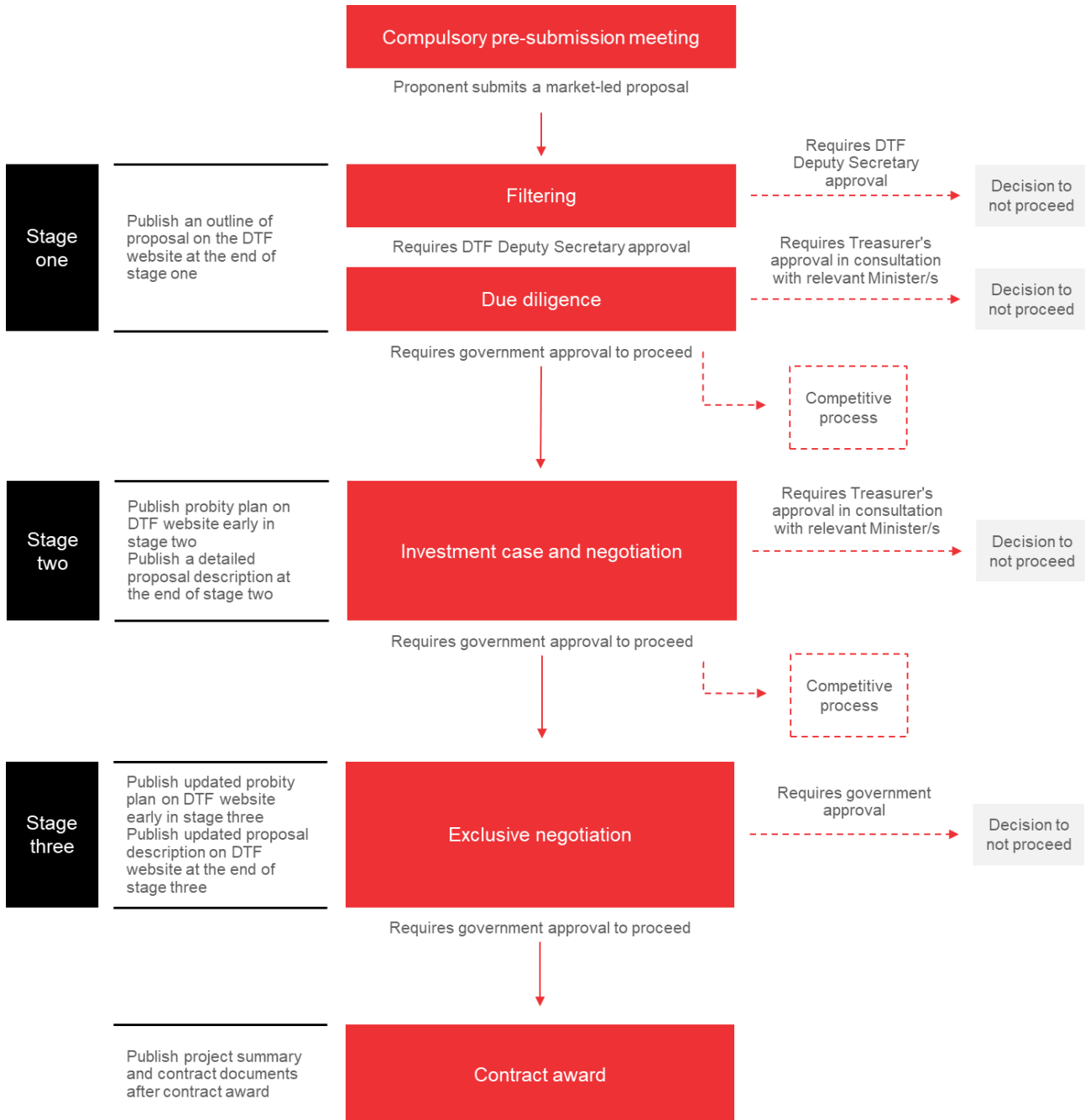
The Government has not stated that these priority areas are mandatory for a MLP to succeed. Rather it has indicated that the priority areas are to encourage proposals in sectors where there is a strong need and to show that such projects are likely to be aligned with Government priorities (helping proponents to achieve criteria (a) described above).

Interestingly, of the four successful MLPs accepted by the Government to date, only one (the Victorian Police Centre) would arguably cleanly fit into a new Government priority area. The other three were primarily transport projects; arguably only one of which might meet one of the new Government priority areas. Accordingly, the introduction of the Government priority areas may indicate the Victorian Government intends to depart from the existing transport-focus of the MLPs regime and to reorient the process towards smaller-scale infrastructure proposals (for example, social infrastructure, though notably excluding social housing).



3. New Three-Stage MLP Assessment Process

As summarised above, the previous five-stage assessment process has been streamlined into the following three stages:



The pre-submission stage allows the proponent to better understand the process and ask questions about the level of detail required when submitting a MLP.

Stage 1 involves:

- filtering the proposals to ensure those without any credible basis to proceed are removed. This now involves the Department of Premier and Cabinet, which may ensure that proposals which pass Stage 1 are more likely to meet with Government approval given that they have already been sighted by the Victorian Government Cabinet.
- due diligence (DD) on the proposal, where the Department of Treasury and Finance appoints a steering committee to assess the proposal against the MLP criteria (see section 1 above) with other relevant Departments. During this process, the Government will decide if the proposal should proceed, not proceed or be issued for competitive tender.



Stage 2 involves:

- conducting further DD based upon gaps identified in Stage 1.
- the Government assessing the value for money of the project (including against the High-Value High Risk framework for large projects) in detail, against the key criteria. This can involve the usual Government evaluation methods or alternative value-assessment methods if the usual methods are not appropriate for the project. This also involves assessing the level of Government funding required, and whether that funding is available or should be approved.
- the Government and proponent determining the procurement strategy (including across Stage 3) including preparation of key documents. During this process, the Government will decide if the proposal should proceed, not proceed or be issued for competitive tender.

Stage 3 involves exclusively negotiating with the Government and the Government making the final full merits and financial assessment against the key assessment criteria. The proponent will make a final offer which, if successful, will result in a contract award.

With the above simplified process, there are now fewer chances that a MLP will be offered to competitive tender. Conversely, there are now fewer steps for proponents to demonstrate the merits of the proposal and address any potential areas for improvement. Otherwise, practically, the process remains similar to the previous five-step process.

Conclusion

The new MLP Guidelines and process provides a more transparent and simplified process for proponents to bring new projects to the Victorian Government. The changes have improved the process, by likely broadening the acceptance criteria to provide further flexibility to proponents and the Government, by simplifying the assessment stages and by providing guidance of the priority areas in which the Government appears to be soliciting private-sector interest.

The new process provides greater clarity for proponents and will hopefully drive further innovation in Government procurement processes.

Contact Us



Matt Coleman
Partner
Melbourne
matt.coleman
@bakermckenzie.com



Anthony Whelan
Partner
Melbourne
anthony.whelan
@bakermckenzie.com



Leigh Duthie
Partner
Melbourne
leigh.duthie
@bakermckenzie.com



Matthew Bliem
Senior Associate
Melbourne
matthew.bliem
@bakermckenzie.com

© 2021 Baker & McKenzie. **Ownership:** This site (Site) is a proprietary resource owned exclusively by Baker McKenzie (meaning Baker & McKenzie International and its member firms, including Baker & McKenzie LLP). Use of this site does not of itself create a contractual relationship, nor any attorney/client relationship, between Baker McKenzie and any person. **Non-reliance and exclusion:** All information on this Site is of general comment and for informational purposes only and may not reflect the most current legal and regulatory developments. All summaries of the laws, regulation and practice are subject to change. The information on this Site is not offered as legal or any other advice on any particular matter, whether it be legal, procedural or otherwise. It is not intended to be a substitute for reference to (and compliance with) the detailed provisions of applicable laws, rules, regulations or forms. Legal advice should always be sought before taking any action or refraining from taking any action based on any information provided in this Site. Baker McKenzie, the editors and the contributing authors do not guarantee the accuracy of the contents and expressly disclaim any and all liability to any person in respect of the consequences of anything done or permitted to be done wholly or partly in reliance upon the whole or any part of the contents of this Site. **Attorney Advertising:** This Site may qualify as "Attorney Advertising" requiring notice in some jurisdictions. To the extent that this Site may qualify as Attorney Advertising, PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. All rights reserved. The content of the this Site is protected under international copyright conventions. Reproduction of the content of this Site without express written authorization is strictly prohibited.

