project through creativity and the application of intellectual property.

Proponents may be invited to provide additional input during the course of the evaluation process.

The report states that all expressions of interest and any intellectual property contained in them, including details of technology of finance, shall be treated in confidence.

Once the Capital Works Committee is satisfied that the conditions for selection have been met, then a contract will be negotiated, subject to the proponent obtaining the appropriate development approvals.

The obvious weak point of the procedure set out in this report is the lack of protection for the proponent of a development concept. There is a potential for the proponent to commit a good deal of time, resources and money to the development of a concept which could create a job for a competitor. It is this problem which lead to the AFCC developing a discussion paper on private sector provision of infrastructure, which is reported below.

Interestingly, in September, the ACTU launched a 570 page report compiled by the Evatt Research Centre at the initiation of the Australian Public Service Federation, which attacks the NSW Government's reasons for privatisation as "politically motivated" and in some cases intellectually shallow.

This report argues that the claims that privatisation produces micro economic benefits are not justifiable and that changing from public to private ownership does not necessarily result in structural reform or increased productivity.

The NSW Government's sale of assets, corporatisation and privatisation has attracted a great deal of controversy and comment in the press. Only time will tell what increases in efficiency and benefits to the community result from this political philosophy.

PRIVATISATION - AFCC DISCUSSION PAPER - PUBLIC INFRASTRUCTURE FROM PRIVATE INVESTMENT

- John Tyrril

AFCC has prepared a discussion paper on private sector construction of public infrastructure, which raises a number of interesting issues for government, construction Authorities and the construction industry generally. This discussion paper proposes the preparation of guidelines both to encourage the development and to manage the realisation of private sector initiatives for the provision of public infrastructure.

The discussion paper notes that, in the public interest and public accountability, governments are usually anxious to gain the benefits of competition. The discussion paper notes that competition between proponents to identify and develop proposals for private sector provision of public infrastructure is an effective form of competition. It further notes that this form of competition will function best in the event that the private sector knows the various Governments' infrastructure policy goals and where the private sector is confident that a proposal can result in a negotiated contract.

As expressed in the discussion paper, at issue for the private sector is the question whether the Government policies and procedures provide a reasonable probability of reward for ingenuity displayed and development capital risked. It is AFCC's view that a hard and fast policy of referring all private sector proposals to open or even selective tender is likely to kill the motivation necessary for the development of such proposals. The paper notes that negotiated contracts may be the only option where the proponent owns something too vital to the proposal, such as land or a patented process. Much of the content of the discussion paper is addressed at situations where this is not the case.

In relation to projects identified and initiated by a government, the paper notes that the government will normally initiate "user pays" projects by calling for expressions of interest. The paper suggests that the Government's goal should be to encourage all interested parties to submit a preliminary proposal, with a view to asking for firm proposals from two and not more than three chosen from those proponents whose proposals best satisfy the brief in economic and functional terms. AFCC proposes that, when proceeding from preliminary to firm proposals, an allowance should be made for cost reimbursement, at the detailed design stage only, to be paid from the project. AFCC suggests that these costs are part of industry overheads and that they should be clearly attributable to the specific project.

In relation to projects initiated by the private sector, AFCC notes that a government could simply action the proposal in the same fashion as a project which it initiates, but suggests that to do so would kill motivation and thereby initiative. AFCC suggests that therefore, in practical terms, government can only action private sector proposals by calling for "expressions of interest" or by negotiating directing with a proponent.

In calling for expressions of interest, the paper suggests that there are three issues of particular concern. These are:

- Where the proprietary interest, if any, of the proponent can and should be protected in the call for expressions of interest;
- Where the proponent should be given any commercial advantage; and
- Whether the proponent should receive compensation if a competitor succeeds in winning the project.

The paper suggests that calls for expressions of interest should be phrased in such a way as to hide the proprietary element of concepts. If the project depends upon a novel proprietary idea and this idea cannot be protected, then the paper suggests it may be inappropriate to call for expressions of interest for the proposal. The discussion paper does recognise the difficulties in protecting proprietary interest.

Where the proponent's proprietary interest cannot be protected through the method of calling for expressions of interest and where a negotiated contract is not possible due to policy or the need to satisfy the issues of public accountability, then the paper suggests that the commercial advantage, reward or compensation for the proponent should be considered. The paper makes the following interesting proposal:

> If the proponent's tender on the "expression of interest" is unsuccessful, then the concept is for the successful tenderer to reimburse the proponent's audited costs, including overheads, of developing the proposal. The successful bidder would also pay the proponent a fee of somewhere between 1 and 5% of the tendered construction price, within a period of six months in acceptance of tender.
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> This proposal would have several benefits. The proponent would receive a competitive price advantage over other tenderers, commensurate with the cost of developing the scheme and the level of the proponent's compensation fee. This price advantage would increase the proponent's chance of succeeding, thus maintaining incentive to develop proposals which would be subject to an "expression of interest" (or tender) process.
>
> If the proponent is unsuccessful, then it would be reimbursed all its costs in developing the proposal and would receive a compensation fee, which it would earn without risks or additional investments. The potential for compensation should maintain incentive.
>
> The level of compensation for the proponent should be adequate, without constituting a total disincentive for competitors to tenders.
>
> The incentive would still be there for tenderers to come up with alternatives to gain a competitive edge over other tenderers and the proponent.

The discussion paper next addresses the issue of public accountability in relation to negotiated contracts. AFCC suggests that the public interest can be accomodated if the project satisfies the following tests:

- The project is consistent with overall government policy objectives;
- The legitimate concerns of interested parties have been accomodated in the assessment and decision process;
- The cost to the public is fair and reasonable.

In order to determine whether the cost to the public is fair and reasonable, the public interest is properly addressed and that the return for the proponent is commensurate with the proponent's risks and investment, the discussion paper proposes:

- a properly conducted public comment and evaluation process, including a cost-benefit analysis; and
- an Economic Impact Statement.

The discussion paper proposes that the Economic Impact Statement should be subject to public scrutiny and should include the following:

- an estimate of the capital costs of the project and an exposition of procedures to ensure that these costs reflect current industry standards.
- exposition of the risks that justify the level of costs to users.
- a clear identification of the financial winners and losers amongst the public, together with any proposals for compensation to the latter.

AFCC suggests that a properly developed Economic Impact Statement will enable Government to publicly demonstrate that the price to be paid by the public is fair and reasonable. AFCC suggests that Government guidelines should be developed to determine when a negotiated contract should be considered and that such guidelines should include the following circumstances:

- Whenever a project is complex and extensive and its development is clearly best done in conjunction with the private sector organisation that would be responsible for design and construction.
- Whenever the project depends upon some proprietary idea that is uniquely valuable and that idea cannot be otherwise protected.
- Whenever government is unable to secure a competitive advantage from the initial proponent.
- Whenever an analysis of risk shows that a negotiated contract could be acceptable.
- Whenever the development of an Economic Impact Statement can assure the price is fair and reasonable.

Finally, the discussion paper proposes the development of Guidelines for the Use of Private Sector Funds in Public Infrastructure and provides a draft for consideration and development.

The report entitled "Public Infrastructure From Private Investment: A Discussion Paper" is available from AFCC. Those interested in this topic should seek a copy, as it contains more detail than has been possible in this summary.