



Australian Government

Department of Infrastructure and Regional Development



National Alliance Contracting Guidelines

Policy Principles

September 2015



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- Department of Treasury and Finance, Victoria (Chair)
- Treasury, New South Wales
- Treasury, Queensland
- Department of Treasury and Finance, Western Australia
- Department of Infrastructure and Regional Development, Australian Government

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Table of contents

Introduction	3
General Section	5
Policy principles	7
1 Public accountability and public interest	7
1.1 Ensuring public accountability for project delivery	7
1.2 Making sure the public interest is protected	7
1.3 Ensuring government approvals are in place	8
2 Value-for-money	9
2.1 Preparing the Business Case in line with government guidelines	9
2.2 Articulating and reporting on the Value-for-Money proposition	9
2.3 Ensuring symmetry of capability and capacity	10
2.4 Using external advisers and service providers	10
3 Efficient and effective market engagement	11
3.1 Ensuring an efficient and effective procurement process	11
3.2 Ensuring effective competition and contestability	11
3.3 Engaging the market under constrained conditions	12
3.4 Ensuring appropriate training for public officials	12
Supplementary policy statement	14



Mandurah Entrance Rd, Western Australia

Introduction



Luggage Point Advanced Water Treatment Plant, Queensland

Governments¹ aim to achieve a very broad range of social, environmental and economic objectives on behalf of their communities through the delivery of capital and non-capital programs. Capital and infrastructure projects can be delivered using a number of different procurement methods, which should be selected and applied on the basis of a thorough analysis of project characteristics and risks.

The Australian, state and territory governments (the Council of Australian Governments—‘COAG’) are committed to considering infrastructure delivery options that make the best use of the resources of both the public and private sectors. Alliancing is a proven infrastructure procurement method that is being used by governments across Australia alongside other methods to deliver infrastructure to the community.

In alliances, a public sector agency delivers the project collaboratively with private sector parties in procuring major capital assets, and agrees to take uncapped risks and share opportunities.² The use of alliance contracting is appropriate when it can be demonstrated that an alliance approach will deliver incremental Value-for-Money (VfM) over other alternatives.

The key benefits of alliance contracting include that the parties are incentivised to work cooperatively to complete the project within the time and budget forecasts in the Business Case, to find the best solutions for the project (rather than for their own interests), and to work quickly and collaboratively to resolve issues as they arise. Agencies are using alliance contracting to capitalise on such benefits.

A recent study³ has shown that there has been a significant increase in the use of alliances in the Australian public sector in recent years. Therefore, it is timely to develop common policy principles for alliancing, in order to promote leading practice for the delivery of these infrastructure projects to the community.

¹ Unless otherwise stated, the expression ‘government’ is used to denote all the government entities of Australia, which include the Commonwealth of Australia and all Australian state governments and territories.

² In alliancing, the project team is integrated; it is required to act in good faith, with integrity, keep to certain principles (such as ‘no blame’) and make unanimous decisions and recommendations on all key project issues. The concept of collective assumption of risk applies in alliance contracts where the alliance Participants bear all risks equitably (although not always equally regarding financial consequences).

³ In *Pursuit of Additional Value: A benchmarking study into alliancing in the Australian Public Sector*, DTF Victoria, October 2009.

The purpose of this paper is:

- to establish this one agreed national set of policy principles, including a governance and approval framework, that Australian governments will apply as their policy for alliance contracting (with separate sections for each jurisdiction appended to outline specific application and administrative arrangements); and
- to provide a set of mandatory principles to be applied by all public sector agencies using the alliance delivery method, so that the positive outcomes of alliance contracting are consolidated, and to ensure it is used and applied appropriately.

This policy framework is underpinned by the following three main principles:

1. Governments should ensure good public accountability and transparency, and protect the public interest.
2. Each project should achieve Value-for-Money in line with Business Case commitments.
3. An efficient and effective market engagement should be undertaken for each project.

The application of these principles should assist public sector agencies in applying the alliance delivery method effectively to achieve government objectives for select infrastructure projects.

This National Alliance Contracting Policy Principles has three sections:

1. **General**—which sets out the scope of the policy's application
2. **Policy Principles**—which sets out the policy principles agreed by all Australian governments.
3. **Supplementary Policy Statement**—which sets out a policy statement regarding forms of relationship and collaborative contracting with characteristics similar to alliancing (including early contractor involvement and managing contractor models).



General section



Springvale Road Rail Grade Separation, Melbourne, Victoria

Policy principles and application

Value for money is a key driver of all procurement decisions, including the use of alliance contracting for delivering and/or operating infrastructure. For complex projects with high risks that cannot be fully dimensioned, alliancing can potentially offer the best procurement strategy for achieving the government's investment objectives. The alliance approach allows such risks to be worked through collaboratively as the project develops.

The policy principles apply to all state and territory governments as well as the Australian Government in relation to the procurement of projects and/or services through alliance contracting.

The planning and implementation of all alliance contracting by all departments and public sector agencies must be consistent with the final form of the alliancing policy principles approved by their jurisdiction.⁴ The application of the policy principles to the alliance contracting activities of a Government Business Enterprise (or its equivalent) will be clarified by individual jurisdictions.

It is important for all agencies contemplating alliance contracting to benchmark their planning and procurement practices against the national alliancing guidance material published from time-to-time by the Commonwealth Department of Infrastructure and Transport, as well as to adhere to all other relevant government and Treasury/Finance policies and guidelines in their jurisdiction.⁵

Some circumstances may arise in specific projects that are unforeseen by these policy principles, and an agency may consider that the public interest is better served by varying the application of this policy or published guidelines. If this occurs, the agency should robustly analyse the departure, including any cost implications of such a variation, and seek approvals to make the suggested departure in line with section 1.3 of this policy.

⁴ For convenience, the reference to 'agency' is used in this policy to mean any government-owned entity, including departments. In the alliance-contracting context, the 'agency' is commonly referred to as the Owner, although it is not appropriate to read this as a reference to the Owner Participants.

⁵ This refers to all alliancing-specific guidelines published by the Commonwealth Department of Infrastructure and Transport, as well as to other government and (often) Treasury or Finance policies and guidelines that are not specific to any one procurement method, e.g., policies and guidelines pertaining to probity, Business Case development, etc.



Western Corridor Recycled Water Scheme, Queensland

Policy principles

1

Public accountability and public interest

The following policy principles underpin the government's support for alliance contracting.

1.1 Ensuring public accountability for project delivery

Agencies and their public officials are accountable for the use of public funds and the consequences flowing from their use, and for successful project delivery. This accountability is best demonstrated by agencies working to clear objectives in a transparent way, accepting responsibility for their decisions and actions, striving to make the best use of public resources, and submitting themselves to appropriate scrutiny.⁶

One of the risks with alliance contracting is that the adoption of a collaborative or a best-for-project approach to commercial negotiations or conflict resolution may not always be enough for agencies to satisfy public standards of accountability. In addition, it is important for agencies to always maintain an equal, balanced relationship with the private sector alliance Participants. If an agency forms relationships with these alliance Participants which are too familiar or unbalanced, the benefits that should be gained from a collaborative approach to project delivery could be put at risk. For example, the benefit might be lost where the agency depends too heavily on the private sector Proponent for information and advice, where the agency is 'captured' by them, and/or where the agency's responsibility to government is compromised by this dependency.⁷

It is important for an alliance contract to have a governance framework that clearly identifies the roles and responsibilities of all alliance Participants. In particular, a clear distinction needs to be made between the 'Owner', and the 'Owner Participants' who are part of the alliance. The Owner (who can be a Minister, the departmental head, the agency's board, etc.) may delegate certain limited responsibilities to their nominated representatives in an alliance.

Irrespective, Owners cannot delegate their accountabilities to the state⁸ for delivering agreed investment outcomes. These outcomes should be fully articulated in the Business Case and include both the longer-term delivery of the service benefits to the community and the capital project that the Owner considers is required to enable those service benefits to be realised. It is also important for the legal framework to preserve the Owner's capacity to assert and enforce the state's rights.

1.2 Making sure the public interest is protected

An agency may have satisfied the public interest⁹ in managing the public funds used to deliver an alliance project efficiently, economically and effectively, but it is also important that the agency is actually 'seen' to have achieved this. This means that the agency should, independently from the alliance, verify and ensure that the public interest is being protected throughout the life of the alliance.

⁶ Paraphrased from the *Victorian Public Administration Act 2004*.

⁷ These matters are discussed in *Guidelines for Managing Risks in Direct Negotiation*, NSW Independent Commission Against Corruption (ICAC), 2006.

⁸ The expression 'state' here is used to denote all the government entities of Australia, which include the Commonwealth of Australia and all Australian state governments and territories.

⁹ The NSW Ombudsman (in Public Sector Agencies fact sheet No 16, June 2005) described the concept of the 'public interest' as referring to considerations affecting the good order and functioning of the community and government affairs, for the wellbeing of citizens. It is generally recognised that the phrase is incapable of precise definition, as there is no single and immutable public interest.

Alliance contracting relies on parties acting with the highest levels of integrity and having open and transparent information sharing about opportunities and risks for optimising the government's agreed outcomes. Alliancing usually incorporates the 'open-book' principle and, for this to be effective, it is important for agencies to have advisers who are able to fully understand and provide advice on the open-book details, independently of the alliance. The agency will benefit from this independent advice by having clear project specifications, accessing benchmarking data and understanding how project costs have been built-up.

Before making any commitments to proceed, or signing any form of contract with any preferred party, the agency should satisfy itself that the final (or negotiated) tender proposal is cost-effective, total pricing is consistent with best-in-market values, and the project deliverables are consistent with the approved Business Case. It is important that the state's legal position and its commercial exposure are always transparent and well understood by the agency.

1.3 Ensuring government approvals are in place

Governments in each jurisdiction will have their individual approval processes for capital investment projects. In addition to these general processes, this policy requires a further approvals process to be followed for:

- all project alliance contracts (irrespective of the value of the alliance contract); and
- any program alliances (including alliances for ongoing operations and maintenance).

Each jurisdiction will have a Minister responsible for alliancing policies and guidelines. Responsibility for the alliancing policy in each jurisdiction will, in most instances, reside with the Treasury or Finance portfolios. Moreover, each alliancing project will be subject to the ultimate responsibility of the relevant Portfolio Minister, unless otherwise decided by government.

The approvals process for each alliance contract (set out in Figure 1) requires the endorsement of the agency's Portfolio Minister and then the approval of the Treasurer (or Minister for Finance as the case may be) at each of the following stages:

- on completion of the Business Case (which may also require Cabinet approvals);
- before the start of formal market engagement activities, tender processes and the public release of tender documents; and
- before executing contracts and any other forms of agreements with preferred alliance parties.

The process also requires the agency to seek the Portfolio Minister's endorsement and then the approval of the Treasurer for:

- any material departures from the Business Case, or from any other project approvals previously provided by the Portfolio Minister, the Treasurer and/or Cabinet; and
- any material departures from this policy and published guidelines (irrespective of the value of the alliance contract).

It is not considered appropriate for an agency to make any internal or public commitment to any infrastructure project (including any proposed alliance project) before the Business Case recommendations and potential methods of delivering the project are evaluated, the procurement strategy is finalised and the required approvals are obtained.

The approvals process required by this policy is shown in Figure 1 at the end of this document.

2

Value-for-money

2.1 Preparing the Business Case in line with government guidelines

Governments rely upon a comprehensive and robust Business Case from the agency, with clear and transparent assessments of the proposed investment and the procurement options analysis, so it can decide whether to support any one investment proposal against competing priorities for public resources. Such business cases should be prepared by agencies in accordance with their relevant jurisdiction's policies and guidelines.¹⁰

A Business Case that recommends alliancing as the preferred procurement option should be supported by an options analysis that shows the potential for superior value for money outcomes compared to other procurement alternatives.

Although a Business Case may demonstrate otherwise, alliancing is unlikely to provide optimal outcomes for projects with a capital value of less than \$50 million, primarily due to the resources which are required (from both the agency and industry) to set up and maintain an effective project or program alliance. Alliancing should only be considered for small projects if the agency's Business Case has expressly addressed the relevant resource impacts and costs. It is important for any recommendation by an agency to use an alliance contract (where there is an anticipated capital value of less than \$50 million) to be accompanied by supporting information and a full procurement strategy analysis.

Where an agency intends to establish a program alliance,¹¹ this policy still requires the agency to show the superior case for using alliance contracting to deliver the project(s), and for selecting the program alliance approach, in the Business Case.

2.2 Articulating and reporting on the Value-for-Money proposition

It is necessary for the agency to articulate both the price and non-price elements of the Value-for-Money proposition in the Business Case, including:

- the service delivery benefits;
- relevant service delivery and capital budgets developed on a whole-of-life basis; and
- cost contingencies for risks, and the assumptions underlying them.

The Business Case, and its Value-for-Money proposition, represents the agreement between the agency and the government. The Business Case recommends the best procurement option to achieve the Value-for-Money proposition, i.e., delivering the project at the lowest price and to the required standard over the life of the project. The approved Business Case will subsequently direct and benchmark planning, negotiation and implementation activities for the alliance.

Within six months after the alliance completes the project, the agency should provide the Portfolio Minister and the Treasurer with a Value-for-Money report on outcomes achieved by the alliance. This should be in the form set out in the relevant Commonwealth Department of Infrastructure and Transport guidelines.

¹⁰ Each jurisdiction will have its own approval processes, policies and guidelines for approving and developing business cases for investment proposals. For example, see the *Victorian Lifecycle Guidance* material; and *National Public Private Partnerships Guidelines*.

¹¹ A program alliance for projects is effectively a pre-qualified panel of potential alliancing parties that an agency establishes so it can expeditiously and conveniently select from the panel to form an alliance for a specific project or for a package of related works.

2.3 Ensuring symmetry of capability and capacity

A key Value-for-Money driver and critical requirement for effective procurement is the agency's ability to effectively negotiate and manage commercial issues with the private sector. To protect the public interest and achieve optimal Value-for-Money outcomes, agencies should make sure that they have, and are able to apply, sufficient capacity and capability to alliance contracting—in particular, it is important for the agency to apply commercial good sense to all procurement activities.

The agency should ensure that efficient and effective market engagement occurs throughout the planning, evaluation, implementation and post-delivery phases of the alliance project. Appropriate mechanisms should be put in place upfront to ensure the agency is able to fully benefit from a collaborative approach and does not suffer any disadvantage from a mismatch to the capacity and capability of Non-Owner Participants from the private sector.

The application of adequate resources to the project will put the agency in a better position to achieve the benefits of the alliance delivery method. By involving people with the requisite experience in managing the project, the agency is likely to achieve better alignment between the alliance Participants, and therefore more robust decision-making processes within the alliance. The agency should provide people with sufficient seniority and expertise to provide active leadership in the alliance.

2.4 Using external advisers and service providers

In alliance contracting, agencies generally agree to take uncapped project risks and share opportunities. Therefore, to protect the public interest, it is important for the agency to maintain an active commercial engagement and be ready to participate in a large number of commercial decisions for the life of the alliance. It is in both the agency's and Non-Owner Participants' interests that the Owner brings appropriate commercial expertise and authority to the alliance. The process of allocating resources to establish and implement an alliance contract requires the agency to adopt a multi-disciplinary approach. For example, the agency will need to ensure that the proposed alliance contract has been fully considered from a commercial perspective, as well as from a technical perspective.

Where they have gaps in their skill and experience base, agencies may use external advisers (contractors or consultants) and service providers to assist with planning and engaging with alliance Proponents. However, it is important for public officials to ensure that they maintain key leadership and decision-making roles for the alliance project. The agency should be conscious that suppliers, external advisers and service providers in the market may otherwise be able to shape the structure and practice of alliancing, which may not always be in either the agency's or the public's interest. Given that the agency will ultimately be accountable for protecting the public interest, public officials should take the lead, in first making any recommendation to undertake a project through alliancing, and second, in deciding on the best way to structure a specific alliance to achieve the state's investment objectives.

3

Efficient and effective market engagement

3.1 Ensuring an efficient and effective procurement process

Governments allocate public resources to procurement processes that add optimal value to the public interest, and will seek to ensure that these procurement processes promote the efficient use of resources from participating private parties. As such, it is important that an agency only start a market engagement process that has already obtained government approval.

Procurement processes are best selected and tailored to deal effectively and efficiently with the known complexities and risks of a specific project, and in order to optimise Value-for-Money outcomes. Alliance contracting should only be selected after a robust analysis has been undertaken to determine whether it is the most appropriate procurement method in the circumstances, including prevailing market conditions. Where the government approves a recommendation to proceed with alliance contracting, the specific strategy and structuring of this alliance should be detailed before approvals for market engagement are sought.

As part of the market engagement process, agencies should make clear to the alliance Proponents when the alliance (including the agreed alliance principles such as 'no blame', 'good faith' and 'best-for-project') will formally begin. This policy supports the formal alliance starting only once the commercial negotiations have finished and the project alliance agreement has been executed by both parties.

3.2 Ensuring effective competition and contestability

Competition and contestability are the standard requirements for selecting government suppliers. These requirements are the foundation stone of public procurement, strengthen incentives to innovate, ensure that resources are allocated efficiently, and provide the most effective way of driving, achieving and demonstrating Value-for-Money. Although alliances rely on collaboration between the Participants once the alliance is established, it is still important for competition and contestability to be applied to the procurement of alliance contracts, including to the selection of government advisers, non-agency parties in an alliance and service providers who are not part of the alliance.

Consistent with the usual approach jurisdictions take to procurement policy and the need for accountability, agencies must ensure that the process for selecting alliance parties incorporates efficient and effective competition, contestability and transparency for maximising Value-for-Money outcomes. Any departure from price competition being a key tender selection criterion for a proposed alliance project or program alliance needs to be supported in the Business Case and/or procurement options analysis, endorsed by the Portfolio Minister and agreed by the Treasurer.¹²

¹² Detailed guidelines on how agencies should apply price competition to the procurement of alliance contracts is discussed in the *Guide to Alliance Contracting*, and *Guidance Note No 5, Developing the TOC in Alliance Contracting*; both published by the Department of Infrastructure and Transport, Commonwealth of Australia, March 2011.

Tarcutta Bypass, New South Wales



If an alliancing strategy proposes a departure from a competitive route (e.g., to negotiate the target cost of the project after the preferred Proponent has been selected) or otherwise removes or dilutes the competitive tension present under bidding conditions for other delivery methods, it is important for this issue to be fully explored, with a thorough analysis of the benefits of such a departure. Similarly, agencies should be cautious of any truncated processes that do not (or may not) provide sufficient time for the public and private parties to negotiate the best commercial outcome for the state prior to signing the agreement. If the agency considers that circumstances require a truncated process to be adopted, the Business Case and/or procurement options analysis should provide adequate support for this approach.

Also consistent with jurisdictional procurement policies is the need to ensure contestability and promote new market entrants. This means that potential bidders should have the opportunity to participate in a tender process even if they have no prior experience with alliance contracting.

3.3 Engaging the market under constrained conditions

Governments striving to respond to compelling community needs may set priorities that require a project to be completed in the fastest possible time. The collaborative processes in the alliance delivery method may, in selected cases, allow the project to commence earlier than an alternative procurement methodology. However, there may be a cost premium associated with this early start, and therefore it is important for the Business Case and/or procurement options analysis to fully alert government decision-makers to this premium.

The business-as-usual approach to project delivery should be to determine what is best-for-state and best-for-project. Accordingly, this policy does not support alliance contracting as the default approach to delivering an infrastructure project. Agencies should be conscious to ensure that alliancing is used when it is the best procurement strategy for achieving the government's investment objectives and has the best potential to offer Value-for-Money, and not when the Business Case has been inadequately planned, simply because significant time pressures apply to delivery of the project or where the project's scope is poorly defined.

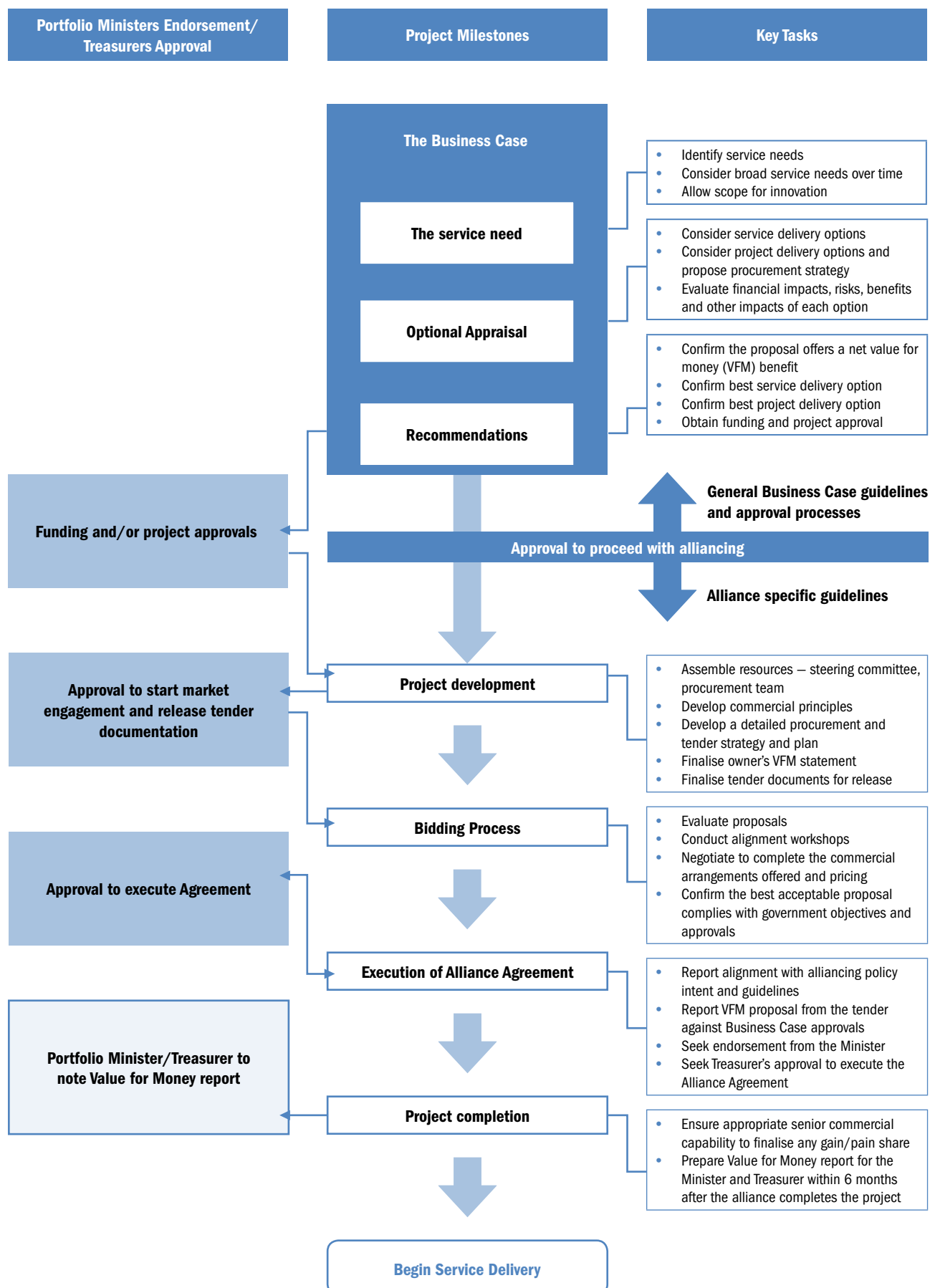
3.4 Ensuring appropriate training for public officials

The Commonwealth Department of Infrastructure and Transport will work to identify appropriate training for public officials participating in an alliance team or leadership group. This would support public officials in undertaking such a role in project alliances.



Sea Cliff Bridge, NSW

Figure 1: Alliancing tasks and approvals for alliance projects



Supplementary policy statement



This supplementary policy statement applies to all state and territory governments as well as the Australian Government in relation to the procurement of capital projects and/or related services through forms of relationship and collaborative contracting that do not fall into the definition of alliance contracting.¹³

The planning and procurement strategy of all forms of relationship and collaborative contracting showing characteristics of alliances, including early contractor involvement (ECI) and managing contractor (MC) models, by all departments and public sector agencies must be consistent with the final form of the foregoing policy principles applying to alliancing as approved by their jurisdiction.¹⁴

To clarify, this supplementary policy statement does not apply to public private partnerships or to traditional forms of contracting like construct only, design and construct etc.

Where a public sector agency believes that application of an alliance policy principle(s) will not lead to the best public sector outcome for a specific project being undertaken through a procurement process involving relationship and collaborative contracting, then a formal exemption is to be sought as part of the Business Case approval. Similarly, any departure from using competition on the outturn price as a key tender selection criterion for a proposed ECI or other collaborative contracting requires a formal exemption to be sought as part of the Business Case approval.

¹³ Whilst there are many models, and variants for each main model, that are described as examples of relationship and/or collaborative contracting, the underlying theme is embedding in the procurement process principles of working together efficiently and focussing on project outcomes, with each Participant contributing its best resources and applying a Risk or Reward balance that aligns the commercial interests of the parties leading to contract execution. There is an emphasis on openness and communication between Participants with the success of the project measured against key performance indicators. For the purpose of this supplementary policy statement, if there is any doubt as to whether a particular model being considered by an agency is a form of relationship and/or collaborative contracting, then the agency should proceed on the basis that this supplementary policy statement applies.

¹⁴ The application of this supplementary policy statement to the contracting activities of a Government Business Enterprise (or its equivalent) will be clarified by individual jurisdictions.

