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Department of Planning and Environment

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# LAHC Direct Dealing Assessment Framework

Submission and management of proposals

April 2023



# Acknowledgement of Country

The Department of Planning and Environment acknowledges that it stands on Aboriginal land. We acknowledge the Traditional Custodians of the land and we show our respect for Elders past, present and emerging through thoughtful and collaborative approaches to our work, seeking to demonstrate our ongoing commitment to providing places in which Aboriginal people are included socially, culturally and economically.

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LHC Direct Dealing Assessment Framework

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## More information

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1.0	April 2023	Commercial	First version

Reviews will occur every 3 years, or when significant changes are made to the NSW Government policies guiding the Framework.

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# 1. Executive summary

Direct dealings are exclusive dealings between LAHC (Government) and non-Government entities over a commercial proposal.

The LAHC Direct Dealing Assessment Framework ('the Framework') outlines a transparent and streamlined process to facilitate LAHC and non-Government sector proponents working together to develop and deliver innovative ideas and new housing.

Its key objectives are to provide consistency and certainty to non-Government proponents seeking to deal directly with LAHC, and to guide LAHC in managing all forms of direct dealing proposals. This covers four key areas, outlined below:

- **Purpose, scope and application (Section 2):**

- The Framework applies to non-Government entities seeking to directly deal with LAHC, including Community Housing Providers (CHPs) under the *CHP Direct Dealing Policy*, local government and private sector proponents under the *NSW Government Unsolicited Proposals: Guide For Submission and Assessment* (USP Guidelines), as well as LAHC.
- Relevant policies and entry points to the LAHC process are detailed in Section 2.

- **Guiding principles (Section 4):**

- LAHC will generally consider proposals where direct dealing can be justified, and where assessment of the proposal suggests the proponent and proposal have the capability to satisfy five key evaluation criteria: uniqueness, value for money, strategic alignment, capability and capacity and appropriate allocation of risk.
- LAHC and the proponent will work collaboratively, in a probity-rich environment, to explore and, if appropriate, develop direct dealing proposals.

- **Roles and responsibilities (Section 3):**

- Proponents will submit direct dealing proposals and any other requested information to LAHC, and negotiate detailed proposals and/or commercial conditions with LAHC.
- LAHC will review and assess proposals, provide feedback to guide proposal development, and document all aspects of the process.

Further detail is provided in Section 3 and the Detailed Process (Section 5).

- **Process (Section 5):**

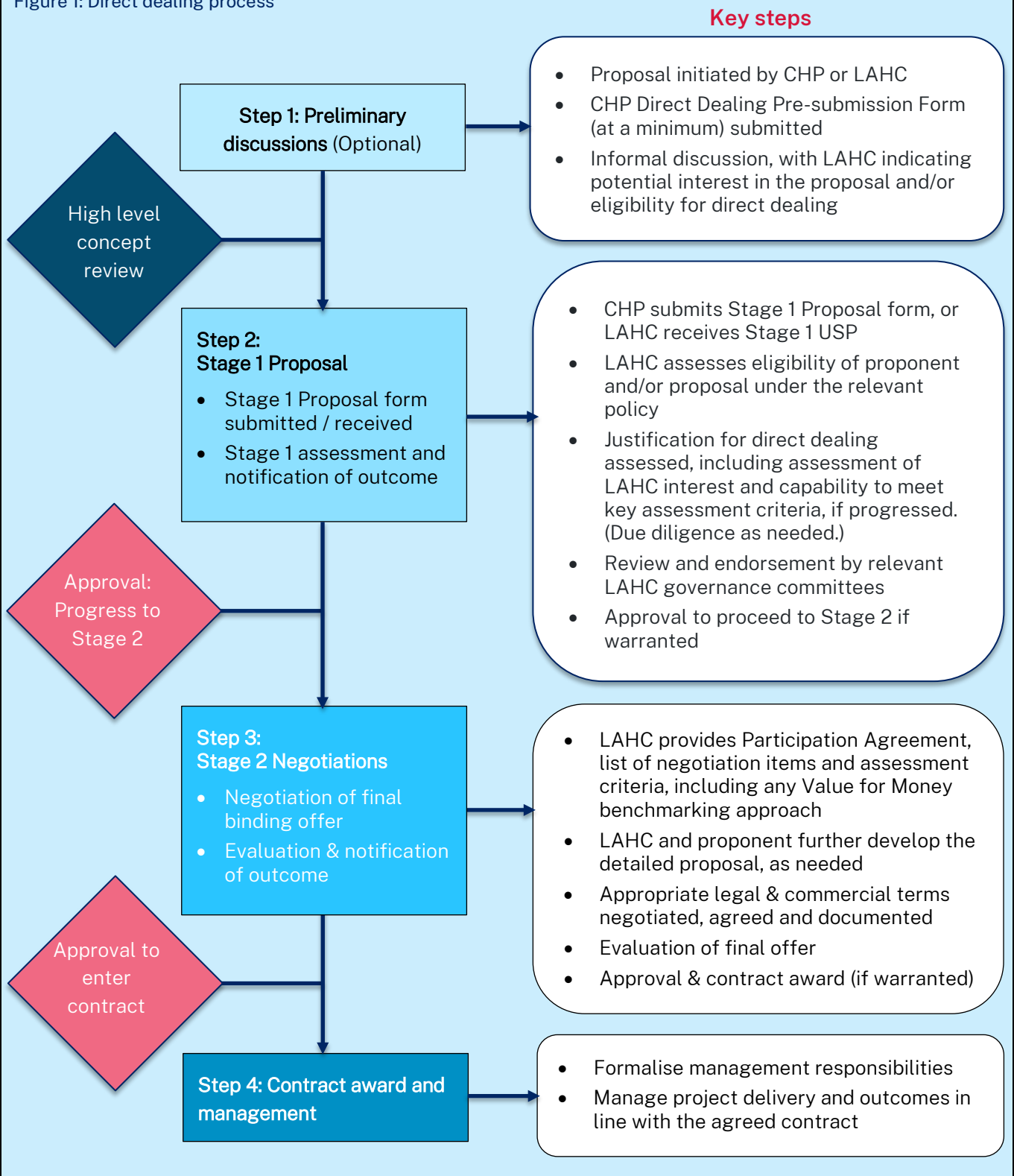
- This Framework sets out the processes to be followed by both LAHC and proponents in the direct dealing process. There are **four key steps**:
  1. **Preliminary discussions, available to CHPs only. (Optional, but recommended)**
  2. **Submission and assessment of a Stage 1 Proposal**
  3. **Negotiations**
  4. **Contract award and management.**

For further detail refer to Figure 1 (following page) and Section 5 (Detailed Process).

# 1.1. Process overview

LAHC and proponents will follow a four-stage process for the submission, development, negotiation and assessment of direct dealing proposals, outlined in Figure 1 (below).

Figure 1: Direct dealing process



## 2. Purpose

The NSW Land and Housing Corporation (LAHC) Direct Dealing Assessment Framework sets out the processes and standards to be followed by LAHC and non-Government<sup>1</sup> entities for proposed direct dealings – defined as exclusive dealings between LAHC and a non-Government entity over a commercial proposal.

A key objective of the Framework is to provide consistency and certainty to non-Government sector participants seeking to directly deal with LAHC, including by setting out how proposals will be assessed within a transparent framework. It should be read alongside relevant policies noted below.

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### 2.1. Scope and application

The Direct Dealing Assessment Framework ('the Framework') applies to the following forms of direct dealing proposals, whether unsolicited (proposed by a non-Government party) or solicited (requested) by LAHC:

- Proposals under the *Community Housing Provider Direct Dealing Policy* (CHP Direct Dealing Policy)
- Unsolicited proposals put forward under the NSW Government *Unsolicited Proposals Guide for Submission and Assessment* (USP Guidelines), where LAHC is determined to be the relevant agency to assess the proposal following a Stage 1A or 1B assessment under the USP Guidelines
- Any other exclusive dealing between LAHC and a non-Government sector body over a commercial proposition or proposal, in line with the NSW Government *Direct Dealing Guidelines*.

The application of the Framework varies between Community Housing Provider-led (CHP-led) and other non-Government sector-led proposals.

For **CHP-led proposals** this Framework guides LAHC and proponents on the full process for submission, assessment and (if warranted) negotiation and approval of direct dealing proposals. (A process overview is shown in Figure 1, following page.)

**All other non-Government sector-led proposals** will initially be submitted to the NSW Department of Enterprise, Investment and Trade (DEIT) in accordance with the USP Guidelines<sup>2</sup>. Where the proposal is considered unsuitable for assessment by the NSW Government, but suitable for consideration by LAHC, DEIT may refer a proposal to LAHC following Stage 1A or Stage 1B assessment under the USP Guidelines. In this case the Framework will apply from the point the proposal is received by LAHC – shown as Stage 1 in the LAHC process overview in Figure 1 (previous page).

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<sup>1</sup> The non-Government sector refers to private individuals, companies, not-for-profit entities and non-NSW Government owned Local Authorities such as councils, in line with the USP Guidelines.

<sup>2</sup> Proposals submitted to LAHC under the Property and Development NSW [Community Use Policy](#) are an exception.

### 3. Roles and responsibilities

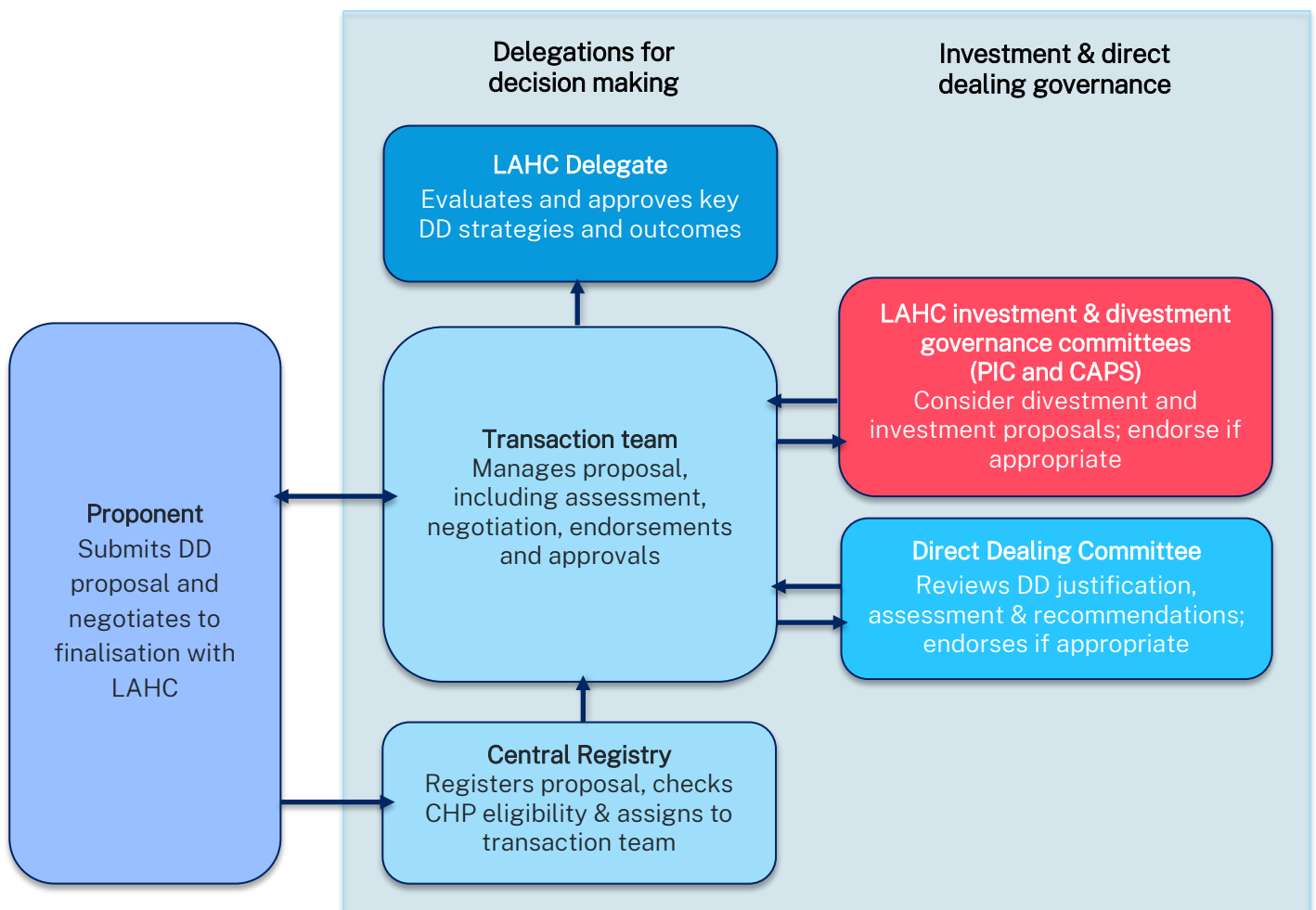
LAHC and the proponent will provide appropriately skilled and experienced personnel to work collaboratively on development, negotiation and assessment of direct dealing proposals.

Prior to evaluation and approval of direct dealing proposals by delegated authorities, LAHC’s direct dealing committee will review, and if appropriate, endorse the justification for direct dealing.

Separately, LAHC’s Property and Investment Committee (PIC) will consider proposals for LAHC to acquire or invest in redevelopment of LAHC properties, and the Committee for the Approval of Property Sales (CAPS) will consider proposals for LAHC to divest LAHC-owned properties.

Key participants in the process are shown in Figure 2, with details on roles and responsibilities provided in the following section.

Figure 2: Governance and approvals



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## 3.1. Roles and responsibilities

The roles and responsibilities of the proponent and LAHC are outlined below, with further information provided under 'Detailed Process'.

As the detailed process may vary depending on the type, scale and complexity of proposals, LAHC will clearly communicate its requirements and expectations at each stage of the process, and proponents are encouraged to seek clarification as needed.

All parties will collaborate to progress proposals in a timely fashion.

### Proponent

The Proponent is required to:

- prepare and submit a formal proposal with LAHC, as detailed for Stage 1 and (if relevant) the Preliminary discussion stage under 'Detailed Process'. The formal proposal will comprise at least a completed Stage 1 Proposal Form, and any relevant attachments or information
- enter into a Participation Agreement if recommended to proceed to Stage 2
- participate in development of a detailed proposal and/or negotiations with LAHC
- provide a final offer at the conclusion of Stage 2
- respond to LAHC requests for clarification or further information throughout the process.

### LAHC

Depending on the size and complexity of the proposal, LAHC will provide a transaction lead, supported by subject matter expert(s) (SMEs) with the capability and capacity to work with the proponent on the direct deal agreement. The Transaction lead / SME(s) will:

- provide a single point of contact to manage the process, guide proponents as necessary, and keep proponents informed of progress and likely timing of next steps and approvals
- assess and participate in detailed development of proposals
- make recommendations to the Direct Dealing Committee, delegated approval officer and/or other governance groups as necessary, as to whether the proposal should progress. This includes progression to negotiations or whether LAHC should accept a binding offer and enter into any proposed transaction documents
- develop a governance and approval pathway appropriate to the risk, value and complexity of the proposal
- prepare evaluation reports as required by the Direct Dealing Committee, LAHC delegate(s) or governance groups.

### Direct Dealing Committee

LAHC's Direct Dealing Committee (DDC) oversees individual direct dealing proposals. The Committee will review and (if appropriate) endorse recommendations made by transaction teams



relating to direct dealing proposals – noting any justification for direct dealing must be endorsed by the DDC before approval is granted to enter into direct negotiations.

For DDs that represent significant risk, value and/or complexity the Committee may also evaluate final negotiated outcomes against relevant negotiation, evaluation and/or governance plans prior to delegated approvals.

## LAHC Delegate

LAHC's Delegate will:

- approve justifications for direct dealing and negotiation, evaluation and governance plans, including confirming the approach to assessing value for money
- review and (if appropriate) approve recommendations from the evaluation and negotiation phases - taking into account assessment of final negotiated outcomes against the relevant justification and governance and engagement strategy.

## Additional governance – High risk, high value proposals

For high risk, high value proposals LAHC may establish a proposal-specific panel to provide additional assurance and transparency in the approval process. This panel will comprise personnel and/or independent advisors (such as technical, financial and/or a probity advisor) with knowledge and experience appropriate to review of the direct dealing process and outcomes. It will review the evaluation of the final binding offer prior to delegated approvals.

## Investment and divestment governance

Proposals for LAHC to divest (sell) LAHC-owned property, or to invest through allocating capital and/or other resources to property redevelopment or acquisition projects, will be considered by one of two standing governance committees:

- Divestment - the Committee for Approval of Property Sales (CAPS)
- Investment – Property and Investment Committee (PIC).

Key considerations in divestment and investment decisions include the proposal's alignment with LAHC and NSW Government strategic and policy frameworks, value for money, the LAHC pipeline, and availability of funding (if requested).

Proponents do not need to separately address the considerations of these investment and divestment committees in their proposals. These will be covered where proposals effectively address the value for money (including risk allocation) and strategic alignment Proposal Assessment Criteria detailed in Section 4.3 – noting:

- These assessment criteria and considerations are common to both processes
- Questions in the Stage 1 Proposal Form correspond to the Proposal Assessment Criteria, and LAHC will seek further information if needed
- Decision-making on project funding and prioritisation (pipeline development) is informed by factors (such as relative value) that cannot be anticipated by proponents.

# 4. Guiding principles

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## 4.1. Optimise outcomes

By their nature, direct dealings are unlikely to have been considered in LAHC's strategic planning. In order to proceed, proposals must be broadly consistent with LAHC's objectives and plans, and offer some unique attributes that justify departing from a competitive tender process.

While outcomes must always be in the best interests of LAHC, it is recognised that a proponent would expect a fair rate of return for its involvement in a project and that outcomes should be mutually beneficial for the proponent and LAHC.

In order to demonstrate that optimal Value for Money will be achieved, an 'open book' approach to negotiations will be adopted once the proposal has progressed to the negotiation phase (Stage 2). To guide the proponent, LAHC will provide an early indication of an acceptable return on investment and other requirements to be achieved by the proponent in the delivery of its proposal. Proponents will allow LAHC to review and discuss the full financial model, including underlying assumptions and data that will materially impact value for money. (Examples include cost and revenue assumptions, interest rates, contingencies and risk pricing.)

Where LAHC assesses a proposal as not meeting the criteria, LAHC reserves its right to go to market. The proponent will be provided with the opportunity to participate in the procurement process should the concept be offered to the market but will have no additional rights beyond those afforded to other market participants. If LAHC elects to go to market in such circumstances, it will respect any Intellectual Property (IP) owned by the proponent.

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## 4.2. Clear justification for direct dealing

Before entering any formal discussions with a potential counterparty, LAHC must establish and document the justification for engaging in direct dealing. The justification for direct dealing must be endorsed by LAHC's Direct Dealing Committee, at a minimum.

In line with the NSW Government Direct Dealing Guidelines, LAHC will consider:

- why direct dealing is the most suitable approach
- whether any other procurement or market engagement approaches were considered and if so, which ones
- why a competitive process does not need to, or cannot be conducted, but value for money can still be achieved

- how the direct deal with the potential counterparty may allow LAHC to achieve an objective consistent with the ICAC guidelines<sup>3</sup>
- how the direct deal complies with any applicable requirements under the *Public Works and Procurement Act 1912* and enforceable procurement provisions made by the NSW Procurement Board under that Act
- any risks arising from the procurement method (including complaints and legal action taken under the *Public Works and Procurement Act 1912*).

The detail to be included with the justification must be aligned to the significance, size and risk of the project, as well as reflecting the early stage of the direct dealing process.

The justification for direct dealing must be valid through to delivery of the proposal and assessed throughout to confirm its validity. If at any point the justification for direct dealing is no longer valid (due to the proposed direct deal failing to satisfy any of the considerations above) LAHC will reconsider direct dealing on the proposal.

### 4.3. Proposal assessment criteria

At each stage, LAHC will evaluate direct dealing proposals against the criteria and considerations in Table 1 (below), noting:

- evaluation will be appropriate to the stage of the direct dealing process and level of development of the proposal at that stage. (Refer Detailed Process)
- key considerations may be tailored to reflect the type, scale and complexity of proposals.

Table 1: Proposal assessment criteria

Criteria	Key considerations
<p><b>Uniqueness</b></p> <p>Demonstration of unique benefits of the proposal and the unique ability of the proponent to deliver the proposal</p>	<ul style="list-style-type: none"> <li>• Can this proposal be readily delivered by competitors? If the answer is yes:               <ul style="list-style-type: none"> <li>— What justification would LAHC have to the public and other proponents for not seeking best value through a competitive tender process?</li> <li>— What benefit(s) would be gained?</li> <li>— Are the benefits and outcomes of the proposal unlikely to be obtained via a standard competitive procurement process?</li> </ul> </li> <li>• Does the proponent own or control something that would limit LAHC from contracting with other parties if LAHC went to tender, such as adjacent real property or other unique assets?</li> <li>• Are there other attributes which may not necessarily stand alone as unique but, when combined, create a “unique” proposal? Attributes may include financial arrangements or the ability to deliver a strategic outcome that is strongly aligned to LAHC’s mission.</li> </ul>

<sup>3</sup> A guide to interpretation and compliance with the *Public Works and Procurement Act 1912* and ICAC’s [Direct Negotiations: Guidelines for managing risks in direct negotiations](#) is provided in Appendix 1.

Criteria	Key considerations
<p><b>Value for Money</b></p> <p>Does the proposal deliver value for money to the NSW Government?</p>	<p>A proposal delivers Value for Money if it achieves the required project outcomes and objectives in an efficient, high quality, innovative and/or cost-effective way with appropriate regard to the allocation, management and mitigation of risks.</p> <p>Key factors considered will be drawn from the USP Guidelines, and aligned to the type and complexity of the proposal. These may include:</p> <ul style="list-style-type: none"> <li>• Efficient delivery of government and non-government owned housing, including time and/or financial benefits/savings that would not otherwise be achieved</li> <li>• Affordability: Does the proposal require funding from LAHC? Does LAHC have these funds available or budgeted and if not what source would be proposed?</li> <li>• Return on investment: A positive return on investment for LAHC and/or transacting LAHC property (through the sale of freehold tenure or the sale of development or other rights) at least for market value. For divestments (sales) this will be assessed based on independent market valuation, and for redevelopment proposals, typically on the basis of residual land value.</li> <li>• Proponent return on investment: Any returns to the Proponent are appropriate given the nature of the direct deal and the risks or benefits that arise from it</li> <li>• Quality of all aspects of the proposal, including: achievable timetable, clearly stated proposal objectives and outcomes, design, community impacts, appropriately detailed proposal documentation, appropriate commercial and/or contractual arrangements (including any key performance targets), and a clear process for obtaining any planning or other required approvals.</li> <li>• Innovation in service delivery, design, construction methodologies and/or maintenance.</li> <li>• Competitively tendering aspects of the proposal where feasible or likely to yield value for money.</li> <li>• Optimal risk allocation (refer to criterion below)</li> </ul> <p>Evaluation of Value for Money may also include:</p> <ul style="list-style-type: none"> <li>• Interrogation of the proponent’s financial models to determine the reasonableness of any capital, land acquisition and maintenance cost estimates and revenue estimates</li> <li>• Benchmarking; e.g. to a comparable reference project or acquisition cost.</li> <li>• Analysis of whether the proposed Return on Investment to the proponent is proportionate to the proponent’s risks, and industry standards</li> </ul> <p>Note: A high level indicative Value for Money assessment will occur at Stage 1. A more detailed assessment of Value for Money will occur at Stage 2.</p>
<p><b>Alignment to NSW Government policies and LAHC Portfolio Strategy</b></p> <p>Does the proposal meet a LAHC and/or</p>	<ul style="list-style-type: none"> <li>• Does the proposal assist LAHC to deliver against NSW Government and/or LAHC objectives, strategic plans and policies relevant to the proposal? Consider: <ul style="list-style-type: none"> <li>— <i>Future Directions for Social in NSW and Housing 2041</i> (NSW Government)</li> <li>— LAHC’s 20-Year Portfolio Strategy, and Local Government Area (LGA) and local area analyses. (These are available on the LAHC website, and will be discussed with proponents as part of assessment of the proposal.)</li> </ul> </li> </ul>

Criteria	Key considerations
NSW Government need?	<p>— the Community Housing Provider Direct Dealing Policy.</p> <p>Key considerations will include the project’s ability to support achievement of housing targets, including growing or rightsizing the existing level of social housing, and to deliver well-designed, fit for purpose homes in locations that meet tenant demand.</p> <ul style="list-style-type: none"> <li>• What is the opportunity cost for Government if it were to proceed with the proposal? Assessment will consider impacts on existing or planned LAHC renewal projects.</li> <li>• Does the proposal have the potential to achieve planning approval, taking into account relevant planning and environmental controls?</li> </ul> <p>Consideration will also be given to whether the proposal would require LAHC to re-prioritise or re-allocate funding.</p>
<b>Capability and Capacity</b>	<p>Does the proponent have the experience, capability and capacity to carry out the proposal?</p> <p>Where appropriate, the proponent should provide referees in relation to working with government (e.g. NSW or other Australian governments).</p>
<b>Risk Allocation</b>	What risks are to be borne by the proponent and by LAHC?

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## 4.4. Interactive Process

LAHC will manage an interactive process with the proponent at all formal stages of assessment, commencing with discussions of the Stage 1 Proposal.

As the detailed process may vary depending on the type, scale and complexity of proposals, LAHC will clearly communicate its requirements and expectations at each stage of the process, and proponents are encouraged to seek clarification as needed.

During the Stage 1 assessment interactions will be limited to clarification of the proposal by LAHC in order to effectively carry out the assessment. It will not be an opportunity to negotiate the details of the proposal. This opportunity will arise in Stage 2 if the proposal proceeds past the Stage 1 assessment.

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## 4.5. Resource Commitments

For a direct dealing to progress LAHC and the proponent will be required to commit resources. The staged approach to assessment outlined in the Process Overview seeks to minimise the potential for unnecessary expenditure.

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## 4.6. Probity

LAHC seeks to conduct its commercial dealings with integrity. The assessment of direct dealing proposals must be fair, open and demonstrate the highest levels of probity consistent with the public interest. The assessment of direct dealing proposals will be conducted through the application of established probity principles that aim to assure all parties of the integrity of the decision making processes. These principles are outlined in this section.

### **Maintaining impartiality**

Fair and impartial treatment will be applied at each stage of the assessment process. LAHC will clearly separate assessment activities and personnel from approval activities and personnel.

### **Maintaining accountability and transparency**

Accountability and transparency are critical to the integrity of the assessment.

Accountability requires that all participants be held accountable for their actions. LAHC's direct dealing process promotes accountability via identification of responsibilities, feedback to proponents, and appropriate documentation of all activities and decision making through the assessment process.

Transparency refers to the preparedness to open a project and its processes to scrutiny and debate. LAHC will promote transparency by providing reasons for its decisions, and public disclosure of relevant summary information regarding direct dealing proposals, as appropriate.

### **Managing conflicts of interest**

In support of the public interest, transparency and accountability, LAHC requires the identification, management and monitoring of conflicts of interest. Proponents, personnel in the transaction team any consultants working on the proposal will be required to disclose any current or past relationships or connections that may unfairly influence or be seen to unfairly influence the integrity of the assessment process.

### **Maintaining confidentiality**

While accountability and transparency are critical in the assessment of direct dealing proposals, there is also a need for some information to be kept confidential, at least for a specified period of time. All proposals submitted will be kept confidential at Stage 1 of the assessment process to provide proponents with confidence in the integrity of the process.

### **Obtaining value for money**

LAHC will seek to optimise value for money for government by working with proponents to develop attractive, innovative proposals which are assessed according to strategic merit and in line with appropriate Value for Money criteria. At Stage 2 of the assessment process, LAHC will clearly

define the approach to assessing Value for Money – noting the key considerations will be in accordance with this Framework.

Where a probity advisor is appointed, their role will be to monitor the evaluation process and ensure that Value for Money has been optimally considered. (It is not the role of the probity advisor to determine whether the proposal meets the required Value for Money criterion.)

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## 4.7. Participation Agreement

Where proposals progress to Stage 2 negotiations LAHC and the proponent will enter into a Participation Agreement (or similar). This will provide an agreed framework for negotiations and align expectations regarding participation in the process.

Key elements<sup>4</sup> include:

- acknowledgement that a Value for Money outcome is a requirement for the proposal to proceed
- assessment criteria and other relevant LAHC requirements
- communication channels, including a prohibition on lobbying
- agreement regarding any cost arrangements
- resource commitments
- conflict of interest management arrangements
- confidentiality requirements
- commitment to following an open book approach to discussions
- Stage 2 timeframe
- approval requirements, including planning and environmental approvals
- acceptance of relevant government policies<sup>5</sup>
- schedule of items and issues to be negotiated. (This may be provided separately to the Participation Agreement)

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<sup>4</sup> These may vary based on the nature, complexity, or degree of development of the proposal.

<sup>5</sup> Examples include the Aboriginal Procurement Policy, requirements for skills, training and diversity in construction, and the relevant LAHC Asset Management Framework, where the social housing delivered will be managed by a CHP.

# 5. Detailed process

Key steps in the submission and management of direct dealing proposals are detailed below. LAHC will communicate with proponents throughout the process to ensure the process is clear, to collaboratively progress the proposal, and advise the proponent of the outcome of each stage of assessment.

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## 5.1. Preliminary discussions (open to CHPs only)

CHPs or LAHC may initiate a proposal under the CHP Direct Dealing Policy<sup>6</sup>. In both cases a preliminary discussion is strongly recommended prior to committing significant resources to proposal development. This is an informal discussion, which explores the potential for direct dealing based on:

- LAHC and the CHP's interest in the proposal
- whether direct dealing on the proposal is likely to be justified
- whether the CHP is eligible to apply under the Policy.

Preliminary discussions will also provide the opportunity to resolve any queries regarding the direct dealing process and LAHC's objectives, as relevant to the proposal.

Requests for preliminary discussions may be made via LAHC's [Contact us](#) webpage.

### Preliminary discussions:

- Are the CHP and proposal eligible?
- Is direct dealing appropriate?
- Are both parties interested?

### Proponent responsibilities

CHPs will be required to submit a completed CHP Direct Dealing Pre-submission Form prior to the meeting via LAHC's [Contact us](#) webpage. This should contain:

- the address of site(s) involved in the proposal
- an overview of the proposal and benefits, including projected housing yield if relevant
- the CHP's rationale for direct dealing on the proposal.

### LAHC responsibilities

LAHC will prepare for these discussions by:

- reviewing the information presented
- establishing whether any LAHC-owned sites proposed may be considered for direct dealing

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<sup>6</sup> Where LAHC is considering initiating a direct dealing proposal, LAHC must give particular consideration to compliance with the *Public Works and Procurement Act 1912* and ICAC's [Direct Negotiations: Guidelines for managing risks in direct negotiations](#). A guide to interpretation is provided in Appendix 1.



- confirming LAHC's strategic priorities and plans for the local area, as relevant to the proposal.

During discussions LAHC will work with the CHP to explore:

- whether direct negotiations are likely to be justified, based on the proposal's potential to satisfy all considerations under 'Clear justification for direct dealing' (refer Guiding Principles)
- LAHC's potential interest in pursuing the proposal, and to the extent possible at this stage, the potential for the proposal to meet the key proposal assessment criteria outlined in Table 1 (uniqueness, value for money, strategic alignment, capability and capacity and risk allocation).

LAHC will make a high-level assessment of the potential for direct dealing on the proposal, in line with the considerations above.

## Outcomes

LAHC will advise the CHP of its view on whether the initial proposal should progress to a formal (Stage 1) submission, noting submission is at the discretion of the CHP.

Preliminary discussions will be commercial in confidence and will not commit either party to entering into formal discussions or commit the CHP to submitting a formal proposal.

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## 5.2. Stage 1 - Submission and assessment

Stage 1 involves formal assessment of the proponent's Stage 1 proposal. Assessment considers whether direct dealing can be justified under the relevant policy, and whether the proposal is of interest to LAHC, including its potential to benefit LAHC in its current form or following further development and/or negotiations. For CHP-led direct dealing proposals, CHP eligibility is also assessed.

Successful proposals will progress to detailed proposal development and/or negotiations, including collaborative development of any outstanding project details and commercial terms (Stage 2).

### Formal assessment:

- Is the proposal compliant?
- Can direct dealing be justified?
- Do the benefit(s) of the proposal warrant further investigation?

### Proponent responsibilities

Proponents are required to:

- Submit a completed Stage 1 Proposal Form
- Participate in formal discussion of the proposal with LAHC, and provide further information or clarifications as requested. Discussions may address a range of strategic, technical and commercial issues to enable LAHC to effectively evaluate the proposal.

### LAHC responsibilities

LAHC is responsible for:

- Confirming receipt of the Stage 1 Proposal in writing
- Undertaking an initial **compliance check** to ensure all required information has been provided and the proponent<sup>7</sup> and/or proposal are eligible for consideration under the relevant policy
- **Justification assessment:**
  - Assessing the justification for direct dealing, based on the proposal's potential to satisfy all considerations under 'Clear justification for direct dealing' (refer Guiding Principles)
  - Assessing the proposal to confirm LAHC interest, and the potential for a detailed proposal to satisfy each of LAHC's Proposal Assessment Criteria if progressed to Stage 2 (negotiations and/or proposal development with LAHC). Proposal assessment criteria are listed below and detailed in Table 1:
    - **Uniqueness:** Demonstration of unique benefits of the proposal and the unique ability of the proponent to deliver the proposal
    - **Value for Money:** Does the proposal deliver value for money to the NSW Government?
    - **Alignment to NSW Government policies and LAHC Portfolio Strategy:** Does the proposal meet a NSW Government and community need(s)?

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<sup>7</sup> Applies only to CHPs, noting Tier and registration requirements under the *Community Housing Provider Direct Dealing Policy*.

- **Capability and Capacity:** Does the proponent have the experience, capability and capacity to carry out the proposal?
- **Risk Allocation:** What risks are to be borne by the proponent and by LAHC?
- Requesting further information if required. This may involve discussions with the proponent to clarify the information provided and/or LAHC's requirements
- Documenting any justification for direct dealing, including assessment of the proposal, and recommending whether the proposal should progress to Stage 2
- Independent review of the justification for direct dealing by LAHC's Direct Dealing Committee (DDC)
- Independent review of proposals to divest, acquire or redevelop LAHC properties by LAHC's standing investment and divestment governance committees.
- Advising the proponent in writing of the outcome of this stage.

## Outcomes

This stage will result in one of the following outcomes:

- The proposal is considered suitable for progression to Stage 2 – direct negotiations. In this case proponents will be provided with the following information:
  - A summary of the assessment findings
  - The proposed process for further development and consideration of a detailed / final proposal, where this differs from the information provided in 'Stage 2 – Negotiation' (below)
  - Guidance as needed regarding value, scope, appropriate target return on investment parameters, timing, risk and other limitations affecting the detailed proposal in order to avoid unnecessary costs for the proponent
- The proposal is not considered suitable or sufficiently unique to justify direct negotiations with the proponent. In this case:
  - LAHC will inform the proponent in writing that the submission will not be considered further, providing reasons where possible for LAHC's decision not to proceed
  - If the opportunity is of interest but direct dealing cannot be justified LAHC may undertake a procurement process.

## Disclosure

Information on all proposals that progress to Stage 2 will be published on the LAHC website. This may include high level information on the proponent and proposal, the assessment process for Stage 2, any probity advisor appointed and reasons why the proposal has progressed to Stage 2. LAHC will consult with the proponent before any information is disclosed to ensure that commercially sensitive information remains confidential.

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## 5.3. Stage 2 –Negotiations

In Stage 2 the proponent and LAHC work collaboratively to finalise development and assessment of a detailed proposal, including negotiation of appropriate legal and commercial terms. The objective (subject to evaluation and approval of the final proposal) is to finalise all outstanding issues to enable LAHC and the proponent to enter into a binding agreement.

### Negotiations:

- Discuss and agree on detailed proposal
- Negotiate a final, binding offer, including appropriate legal and commercial terms

### Proponent responsibilities

During Stage 2, the proponent will:

- Participate in proposal development workshops and/or negotiations with LAHC
  - Submit any further information needed to address LAHC’s Justification and Proposal assessment criteria. (Refer relevant sections of Guiding Principles). As an example, further detail may be requested on:
    - proponent control over non-LAHC assets forming part of the proposal
    - project design and planning considerations
    - feasibility assessments
    - independent property valuations
    - proponent financial capacity, finance and funding options
    - the proponent’s capability to deliver the project and/or deal with government
    - project delivery plans, including tenant relocations and risk management
    - operational considerations, including asset maintenance and tenancy management plans during the lease period and the proposed condition of the site and dwellings when handed back to LAHC.
- Should LAHC apply additional criteria specific to a particular proposal, the proponent will be informed of these criteria at the commencement of Stage 2.
- Submit a final binding offer, including appropriate legal and commercial terms.

### LAHC responsibilities

During Stage 2, LAHC will:

- Commit appropriately experienced and qualified resources to participate in the Stage 2 process and negotiation team, including legal, financial and technical advice where appropriate
- Develop and enter into a project-specific Participation Agreement. This will take into consideration any recommendations or conditions required by the DDC, other LAHC governance bodies (e.g. CAPS or PIC) or delegates
- Prepare a negotiation plan and evaluation and governance plan (both internal documents)

- Hold an Establishment Meeting in order to:
  - Provide feedback to the proponent regarding any risks and concerns with the Stage 1 proposal
  - Request further information and clarify LAHC requirements where necessary
  - Provide the proponent with a copy of the Participation Agreement. This will define the approach to managing proposal development and/or negotiation workshops, including the process and protocols for negotiation.
  - Provide the proponent with a schedule of items for negotiation
  - Advise of any Proposal assessment criteria additional to those in Table 1 and confirm the approach to assessing Value for Money. (This may include benchmarking where appropriate).
- Ensure relevant policies (e.g. the Aboriginal Procurement Policy) and project assurance processes (e.g. Infrastructure Investor Assurance Framework) are applied where appropriate
- Participate in proposal development and/or negotiation meetings, with the aim of agreeing on acceptable commercial and legal terms (such as social and affordable housing yield, transaction structure and apportionment of risk) that will form the basis of a final offer and final binding transaction documents.
- Define appropriate contract management arrangements to monitor and ensure contracted outcomes are delivered. This may include definition of management responsibilities, and definition of reporting – e.g. to enable monitoring of project delivery and compliance with relevant NSW Government policies in the delivery phase, and provision of maintenance and tenancy management services in the operational phase
- Document agreed outcomes in a terms sheet (or similar)
- Undertake a comprehensive assessment of the final binding offer
- Prepare a recommendation for endorsement and approval, in line with LAHC’s direct dealing and investment governance frameworks
- Approve acceptance of the final binding offer, if warranted.

## Outcomes

The following outcomes may result from this stage:

- Recommendation to the relevant LAHC governance body and/or delegate that the final binding offer be accepted
- Recommendation to the relevant LAHC governance body and/or delegate that the final binding offer not be accepted.

## Feedback

- Where the proposal is accepted, LAHC will notify the proponent of any recommendations and ongoing contract management requirements
- Where the proposal is not accepted, LAHC will provide written feedback providing reasons for the decision.

## Disclosure

At the end of Stage 2, LAHC's website will be updated with the assessment outcome. Other information may also be published, such as reasons why the proposal has been accepted or not accepted.

Where a proposal has been accepted, LAHC will also disclose high level contract details, as required by the *Government Information (Public Access) Act 2009* (NSW). LAHC will consult with the proponent before any information is disclosed to ensure that commercially sensitive information remains confidential.

# Appendices

## Appendix 1: ICAC guidelines and relevant legislation

When considering whether to enter into direct dealing LAHC will ensure it complies with the legal requirements noted in the NSW Government *Direct Dealing Guidelines* and guidance provided by ICAC’s *Direct Negotiations: Guidelines for managing risks*. LAHC’s interpretation of key requirements are outlined below.

Table 2: Legal and statutory requirements relevant to direct dealing proposals

Requirement	Guide to interpretation
<p><b>Meet legal obligations under the <i>Public Works and Procurement Act</i> 1912</b></p>	<p>The <i>Public Works and Procurement Act</i> establishes the Procurement Board and outlines its authority to make policies and directions relating to procurement.</p> <p>The Act (Divisions 5 to 7) sets out provisions related to the Enforceable Procurement Provisions (EPPs), including complaints and penalties. (These are covered by the Act but are described separately below.)</p> <p>Agency requirements relevant to the Act are documented at operational level in the <a href="#">buy.nsw Procurement Policy Framework</a> and related Procurement Board Directions. Direct dealings are dealt with under ‘Non-traditional and Complex Market Approaches’ under the Framework. Detailed guidance is also available on direct dealing in the NSW Government <i>Direct Dealing Guidelines</i> and the ICAC Guidelines.</p>
<p><b>Satisfy legal duties arising from Australia’s obligation under international procurement agreements</b></p>	<p>Identical to the requirement to comply with PBD 2019-05 Enforceable Procurement Provisions (EPPs). This provides the legal framework for procurements covered by international trade agreements including the World Trade Organisation Agreement on Government Procurement (WTO GPA).</p> <p>The EPPs apply to LAHC construction (or development) procurements valued at or above \$9.584 million. LAHC may only initiate a direct dealing proposal where it can demonstrate the procurement is an ‘exempt procurement’ under Schedule 2 of the <i>Procurement (Enforceable Procurement Provisions) Direction 2019</i> (Exempt Procurement) or Clause 15 (Limited tendering) of the EPP Direction. Unsolicited, innovative proposals are noted (Clause 15(1)c) as a circumstance in which limited tendering may be permitted.</p> <p>When a direct deal relates to a procurement covered by the EPP Direction, LAHC is required to document the reasons for using limited tendering to conduct the procurement. For each contract</p>

Requirement	Guide to interpretation
	<p>awarded by limited tendering LAHC must prepare and keep a written report that includes:</p> <p>(a) the value and type of goods and services procured, and</p> <p>(b) a statement indicating the circumstances and conditions that justified the use of the limited tendering.</p> <p>In these cases the Direct Dealing Guidelines recommend legal advice is sought to confirm that the rationale satisfies the requirements of the EPP Direction.</p>
<p><b>Determine whether LAHC’s accreditation allows for this type of commercial proposition</b></p>	<p>Consultation with LAHC Procurement is recommended.</p>
<p><b>Achieve an objective consistent with the ICAC guidelines</b></p>	<p>The guidelines note that, when considering direct dealing, “it is critical that greater attention be paid to measures to mitigate the risk of corruption and ensure adequate levels of integrity”.</p> <p>If direct dealing cannot be avoided, LAHC is to ensure it:</p> <ul style="list-style-type: none"> <li>• Operates in accordance with key probity principles – fairness, impartiality, accountability, transparency and value for money – and that these principles govern decisions about direct negotiations</li> <li>• Avoids corrupt and “partial” conduct. This includes demonstrating LAHC has considered alternatives to particular direct dealing proposals and has taken measures to promote competition where possible</li> <li>• Manages the relevant risks, including by adhering to LAHC’s Direct Dealing Assessment Framework. (Page 13 of the ICAC guidelines provides detailed guidance on key measures).</li> </ul>