**Sample Document**

**Two Step Development Phase Agreement – Proponent and Advisors**

This sample document has been prepared by the NSW Crown Solicitor’s Office. It forms part of a suite of sample social impact investment documents that have been developed by the Office of Social Impact Investment for use in connection with a Social Benefit Bond (SBB) arrangement involving private investors in the Australian wholesale capital market.

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If you have any questions in relation to this sample document, or any specific provision or other related information, queries can be directed to socialimpactinvestment@dpc.nsw.gov.au.

[NSW Government letterhead]

To: [*insert name of Authorised Representative of the Proponent]*

[*insert Authorised Representative's title]*

*[insert name of Proponent]*

[*insert address of Proponent*] ["**Proponent**"]

**\*Drafting note: This letter, as it is ultimately intended to form an agreement, would be addressed to someone within the Proponent's organisation that is senior and would have the authority to enter into a legally binding agreement eg CEO.**

Attention: [*insert name or delete if not applicable*]

Date: [*insert date letter issued*]

Dear Sir/Madam

Request for Proposal Social Impact Investment (SII)

## **Background**

A. The Crown in right of the State of New South Wales, acting through NSW Treasury and NSW Department of Premier and Cabinet as lead agencies (the **State**), wishes to undertake a Social Impact Investment (SII).

B. The State issued a Request for Proposal entitled "[*insert title of the RFP*]" on [*insert date of issue of the RFP*] (**RFP**).

C. The Proponent has submitted a proposal in response to the RFP.

D. The Proponent has been selected by the State to participate in the Co-development Phase and depending on the outcome of the Co-development Phase, the Joint Development Phase (collectively referred to as the **Development Phases**, as described in the RFP in accordance with the terms of this letter agreement and the RFP.

E. The Proponent has indicated to the State that either:

(i) it has not been assisted and advised in relation to its proposal, but it reserves the right to be assisted and advised in relation to the Development Phase by a third party (**Advisor**) during that phase, and if it chooses to do so, the Proponent intends that the Advisor form part of its working group under the Development Phases; or

(ii) it has been, and will be, assisted and advised in relation to its proposal and the Development Phases by [insert name of advisor(s)] (**Advisor**) and that it intends the Advisor to form part of its working group under the Development Phases.

**2. Objectives, Purpose and scope of the Development Phases**

 **Co-development Phase**

2.1 The Co-development Phase will commence on the date on which a signed copy of this letter agreement on behalf of the Proponent is received by the State (**Commencement Date**) and will terminate 4 calendar months from the Commencement Date unless otherwise extended by the State in writing or unless terminated earlier in accordance with the terms of this letter agreement.

**Objective and purpose of the Co-development Phase**

2.2 The objective and purpose of the Co-development Phase is for the parties, together with other relevant stakeholders, to work together to assist the Proponent in developing its Proposal including referrals, services and financial model for further evaluation under this RFP (**Detailed Proposal**).

 **Evaluation of Detailed Proposal**

2.3 At the conclusion of the Co-development Phase, the State, through the State’s Steering Committee for this RFP (**Steering Committee**), will

(a) review the Detailed Proposal based on the evaluation criteria set out in the RFP and without limiting the State’s rights under the RFP or otherwise, determine whether the Detailed Proposal should proceed to the Joint Development Phase; and

(b) within a reasonable time of having made a decision, notify the Proponent of its decision in writing.

2.4 The State will be deemed to have given notification in accordance with clause 2.3 if the parties, after the State having made a decision for the purposes of clause 2.3, take steps to commence the Joint Development Phase.

 **Joint Development Phase**

2.5 The Joint Development Phase will commence on the earlier of:

(a) the date of the notice referred to in clause 2.3(b); and

(b) the date of the first step taken to commence the Joint Development Phase referred to in clause 2.4; and

will terminate 8 months from this date unless otherwise extended by the State in writing or unless terminated earlier in accordance with the terms of this letter agreement.

2.6 The objectives of the Joint Development Phase are:

(a) to further develop and/or design the overall approach to the implementation of a SII;

(b) put agreements in place for the implementation of the SII; and

(c) ensure resource plans and other agreements are in place to support the SII's implementation. (**Objectives**)

**Purpose and Scope of Joint Development Phase**

2.7 The purpose and scope of the Joint Development Phase is to develop the Detailed Proposal to a level of feasibility suitable for contracting including:

(a) specification of the following matters for the SII:

(i) cohort;

(ii) program outcome;

(iii) evidence base for program;

(iv) measurement of outcomes and unintended consequences;

(v) duration of the program, its assessment and the return to investor(s);

(vi) extension/variation provisions;

(vii) return to the State;

(viii) social benefits/impacts;

(ix) government relationship with investor(s), Proponent, and program provider (if different);

(x) risk allocation;

(xi) structure of the SII;

(xii) process for appointment of independent evaluators or similar for both the program and payments;

(xiii) monitoring process;

(xiv) communication strategy;

(xv) risk management strategy;

(xvi) roles and responsibilities of the parties for the duration of the program;

(xvii) such other matters as the parties may reasonably agree; and

(b) terms and conditions of the agreement to implement the SII (as specified in accordance with clause 2.7(a)) to be entered into by the relevant government agency and the Proponent in the event that the Proposal is developed to an acceptable level of feasibility and the Proponent is chosen as a successful proponent under the RFP (**SII Implementation Agreement**).

**Successful Proponent**

2.8 At the conclusion of the Joint Development Phase, the State will review and evaluate the Detailed Proposal as developed in accordance with clause 2.6 (**Revised Proposal**), against the evaluation criteria set out in the RFP and without limiting the State's rights under the RFP or otherwise, determine whether the Proponent is selected as a successful proponent and within a reasonable time of having made a decision, notify the Proponent of its decision.

2.9 The State will be deemed to have given notification in accordance with clause 2.8 if the relevant parties execute the SII Implementation Agreement. If, following consideration of the Revised Proposal**,** the State actually notifies the Proponent in accordance with clause 2.8 that the Proponent is selected as a successful proponent then the parties will proceed to execute the SII Implementation Agreement as negotiated and settled as part of the Revised Proposal.

2.10 The Proponent acknowledges and agrees:

(a) there is no guarantee that the Proponent, or any other proponent, will be selected to proceed to the Joint Development Phase or as a successful proponent;

(b) the process for selecting a successful proponent, if that occurs, outlined in this letter agreement supplements the process contained in the RFP. If there is any inconsistency or ambiguity between this letter agreement and the RFP, that inconsistency will be resolved by the State in its absolute discretion;

(c) nothing in this letter agreement may be construed as an indication or representation to the Proponent by the State that the Proponent will be selected to proceed to the Joint Development Phase or as the successful proponent. The State is not liable for any loss or damage suffered by the Proponent arising out of or in connection with the Proponent not being selected to proceed to the Joint Development Phase or as the successful proponent. For the avoidance of doubt, the reference to the Proponent in this clause includes the Advisor (where the Proponent has engaged, or been assisted by, an Advisor) and the Proponent indemnifies, and must procure that the Advisor indemnifies, the State against any claim or loss arising directly or indirectly out of or in connection with the Proponent (including the Advisor) not being selected to proceed to the Joint Development Phase or as the successful proponent.

**3. Commitments**

**Good faith, co-operation and collaboration**

3.1 Each of the parties agrees to act in good faith during the Development Phases. This means that the parties will act honestly and reasonably having regard to the terms of this letter agreement and the RFP and co-operatively by doing everything properly and reasonably within a party's control which is necessary to enable the other party to perform its obligations under this letter agreement.

3.2 The parties agree to work collaboratively throughout the Co-development Phase and, if applicable, the Joint Development Phase in accordance with the following principles:

 (a) all efforts by the parties will be open, transparent and collaborative;

(b) to the extent possible, all estimates of outcomes, milestones, measurements, timeframes and costs will be validated by competitive market testing or will otherwise be established by benchmarking by the Proponent to a standard reasonably acceptable to the State;

(c) all innovations and technical solutions identified by the Proponent will be incorporated into the SII Implementation Agreement and considered in evaluating the SII;

(d) there will be a genuine commitment to innovation and continuous improvement in the development of the SII, the SII Implementation Agreement and to satisfying the State's requirements as set out in the RFP and the Objectives;

(e) the terms of the SII Implementation Agreement will be developed as part of the SII Joint Development Phase but will as far as reasonably possible be consistent with relevant precedent documentation (if any) published by the State; and

(f) the SII will be delivered in accordance with the SII Implementation Agreement.

3.3 The parties agree they will each exercise proper professional skill and due diligence in the Co-development Phase and, if applicable, the Joint Development Phase and will ensure that their respective, officers, employees, contractors and agents, and additionally in the case of the Proponent, the Proponent will ensure that, where it has engaged, or been assisted by, an Advisor, its Advisor and the Advisor’s respective, officers, employees, contractors and agents are appropriately qualified, skilled and experienced and also exercise professional skill, care and diligence.

3.4 Each party will as soon as reasonably practicable after the Commencement Date nominate in writing a working group to represent that party during the Co-development Phase and, if applicable, the Joint Development Phase. The parties agree, as far as reasonably possible, to keep the same working group throughout the Co-development Phase and, if applicable, throughout the Joint Development Phase.

**Sharing of information**

3.5 Each party will maintain and make their records and other information and documentation relevant to the Co-development Phase and, if applicable, the Joint Development Phase and a SII available to each other (and/or each other's nominated auditor) on request. A party will not be required to make records, information or documentation available if these are subject to confidentiality obligations or are unable to be lawfully disclosed by a party.

**Negotiations with investors**

3.6 It is the Proponent's responsibility to negotiate with the investors in the development of the SII and the SII Implementation Agreement. The State may, where the State considers it reasonable and appropriate to do so, assist the Proponent in these negotiations.

**Disputes**

3.7 The Proponent acknowledges that the Co-development Phase and, if applicable, the Joint Development Phase are steps in the procurement process set out in the RFP and this letter agreement is subject to the terms and conditions of the RFP.

3.8 If a dispute arises between the parties in relation to the Co-development Phase or, if applicable, the Joint Development Phase and/or this letter agreement each party agrees to use all reasonable efforts to settle the dispute by discussions between their nominated senior representatives. If the nominated senior representatives are unable to resolve the dispute then the dispute will be referred to the Steering Committee for advice as to how the Co‑development phase or, if applicable, the Joint Development Phase is to proceed, including in the event that the dispute cannot be resolved, whether the relevant development phase and this letter agreement is to be terminated under clause 4.2.

**Advisor**

3.9 Where the Proponent engages, or is assisted by, an Advisor, the Proponent is responsible to ensure that the Advisor takes all necessary action to enable the Proponent to fulfil its obligations in a timely manner under this letter agreement.

**4. Term**

4.1 Subject to clause 4.2, this letter agreement will commence on the Commencement Date and will terminate on the first to occur of the following dates:

(a) if the Proponent is selected as a successful proponent in accordance with this letter agreement, the date the SII Implementation Agreement is executed by the relevant government agency and the Proponent;

(b) if the Detailed Proposal is determined to be not suitable and the Proponent is not invited to proceed to the Joint Development Phase, the date of written notification to the Proponent that its Detailed Proposed is not suitable to progress to the Joint Development Phase under this RFP;

(c) if the Detailed Proposal is considered suitable and the Proponent is invited to participate in the Joint Development Phase but the Proponent is not selected as a successful proponent, the date of written notification to the Proponent that it has been unsuccessful; or

(d) if the State and the Proponent by mutual agreement decide that this letter agreement is to terminate, the date agreed in writing as the termination date.

4.2 The State may at any time in its absolute discretion and with immediate effect terminate this letter agreement by giving the Proponent written notice of termination.

4.3 On termination or expiry of this letter agreement each party agrees to:

(a) return to the other party all copies of information, documentation and material provided by the other party for the purposes of this letter agreement and in whatever form the information, documentation and material is held by that party; or

(b) alternatively, if permitted by the other party, destroy all copies of the information, documentation and material referred to in clause 4.3(a).

4.4 The State may, on termination or expiry of this letter agreement, at no cost, use any of the work, documentation or information developed under this letter agreement for any purpose whatsoever and the Proponent must provide any such work, documentation or information to the State, to enable the State's use, within 10 business days of a written request.

4.5 The Proponent must not do, or omit to do, anything which prevents the State from carrying out a SII including without limitation, the State contracting with any other person or persons to implement a SII.

4.6 Termination or expiry of this letter agreement does not affect the continued operation of clauses that by their nature should survive termination or expiry, including without limitation, consequences of termination or expiry, intellectual property, confidentiality and access to records.

**5. Confidentiality**

5.1 Each party (**Recipient Party**) agrees during the term of this letter agreement:

(a) not to disclose the Confidential Information of the other party (**Disclosing Party**) to any person except:

(i) on a confidential basis to the officers, employees, contractors, subcontractors or agents of the Recipient Party requiring the information for the purposes of performing this letter agreement; and

(ii) on a confidential basis to the Recipient Party's legal or professional advisers;

(iii) with the prior written consent of the Disclosing Party; or

(iv) if required to do so by law, government policy or in connection with legal proceedings;

(b) to ensure that all Confidential Information of the Disclosing Party in the custody of the Recipient Party is protected at all times from unauthorised access or use by a third party or misuse, damage or destruction by any person.

5.2 For the purposes of this agreement "**Confidential Information**" means:

(a) any information exchanged between the parties before, on or after the date of this letter agreement regarding the business affairs of either party that is not publicly available;

(b) this letter agreement and its terms;

(c) any information that is marked confidential by either party; and

(d) any information disclosed to, or acquired by, the parties during the course of this letter agreement that is by its nature confidential.

5.3 For the purposes of this clause 5, Confidential Information of the Proponent includes, where the Proponent has engaged, or been assisted by, an Advisor, Confidential Information of the Advisor.

**6. Insurance**

The Proponent must continue to maintain all existing insurances which it is required to hold and maintain under existing service provider agreements with government agencies.

**7. Intellectual Property**

7.1 This letter agreement does not assign ownership of any Intellectual Property Rights existing on the Commencement Date and neither party may assert ownership of all or any part of the other party's pre-existing Intellectual Property Rights.

7.2 If the Proponent has any pre-existing Intellectual Property Rights as at the Commencement Date that are applied in the development or content of the SII and/or the SII Implementation Agreement, the Proponent grants to the State by this letter agreement an irrevocable, non-exclusive, world-wide, perpetual, transferable, sub-licensable, royalty-free licence of that pre-existing Intellectual Property Rights to use, reproduce, communicate to the public, modify, enhance, adapt or otherwise exploit the Intellectual Property Rights and sub-license these Intellectual Property Rights in relation to or in connection with an SII and its implementation by the State, or on the State’s behalf.

7.3 If any Intellectual Property Rights are developed solely by, or on behalf of, the Proponent or jointly by or on behalf of, the parties in the course of the parties performing their obligations under this letter agreement, the State owns those Intellectual Property Rights and such Intellectual Property Rights on their creation vest, or are otherwise assigned or transferred to the State without the need for further assurance.

7.4 If ownership of Intellectual Property Rights referred to in clause 7.3 is not capable of being vested in the State under clause 7.3 because the Proponent does not own or is unable at a reasonable cost to procure ownership of those Intellectual Property Rights, the Proponent must (at no cost to the State) ensure that the State is granted an irrevocable, non-exclusive, world-wide, perpetual, transferable, sub-licensable, royalty-free licence of that pre-existing Intellectual Property Rights to use, reproduce, communicate to the public, modify, enhance, adapt or otherwise exploit the Intellectual Property Rights and sub-license these Intellectual Property Rights in relation to or in connection with an SII and its implementation by the State, or on its behalf.

7.5 The Proponent must (at no cost to the State) hold or obtain all necessary consents from any individual that has Moral Rights in the Intellectual Property Rights to its use, adaptation and all other actions by the State (or any of its officers, employees, contractors and agents) or the Proponent in the exercise of the rights conferred under this clause 7. Such consents must be without restriction and without any requirement to attribute authorship or performership, including any act or omission that might otherwise infringe the Moral Rights of any individual.

7.6 The State by this letter agreement grants to the Proponent an irrevocable, non-exclusive, perpetual, royalty-free licence of the Intellectual Property referred to in clause 7.3 for use:

(a) if the Proponent is successful, in relation to the SII and its implementation in accordance with the SII Implementation Agreement; and

(b) in relation to a SII or similar other products, services or programmes within Australia in association with other Australian Commonwealth, State and Territory, and local government agencies and instrumentalities.

7.7 If the Proponent requires a licence additional to those granted in or under clause 7.6 to use Intellectual Property referred to in clause 7.3, the Proponent must make a written request to the State stating the nature of the additional licence required and the reason why such licence is required. The State will consider the request in good faith and, if the State considers it reasonable to do so in the circumstances, grant a further licence subject to the parties entering into a written agreement as to the terms of any additional licence.

7.8 The Proponent must (at no cost to the State):

(a) execute all documents and do all acts and things (including procuring that any relevant third party execute all documents and do all acts and things), required for the purposes of giving effect to the provisions of this letter agreement dealing with Intellectual Property Rights; and

(b) if required by the State, deliver to the State, or the State’s nominee, the Material referred to in clauses 72, 7.3 and 7.4 and copies of the consents referred to in clause 7.5.

7.9 Without limiting any other rights which the State may have under this letter agreement or at law, the Proponent agrees to compensate the State and its officers, employees, contractors and agents (**those compensated**) against all damage, liability or loss incurred or suffered by any of those compensated (including legal costs on a solicitor client basis) arising directly or indirectly out of or in connection with:

(a) a breach of this clause 7, whether by any act or omission and whether negligent, wilful reckless or unlawful; and/or

(b) any claim for infringement or alleged infringement of any Intellectual Property and Moral Rights in relation to or in connection with a SII and its implementation or any material provided or created under this letter agreement including any modifications, variations or adaptations to that material.

The Proponent's liability will be reduced to the extent the damage, liability or loss incurred or suffered was caused by those compensated.

7.10 For the purposes of this clause 7:

(a) **Intellectual Property** Rights means all intellectual and industrial property rights throughout the world, whether created before or after the Commencement Date, including copyright, trademarks, designs, patents, semiconductor or circuit layout rights, know-how, or other proprietary rights, whether or not registered or not registrable and any rights to register such rights;

(b) **Moral Rights** means the rights of integrity and rights of attribution of authorship and performership and other rights of a similar nature which now exists or which may exist in the future, including without limitation moral rights under Part IX of the *Copyright Act 1968* (Cth) and performers' protection under Part XIAof the *Copyright Act 1968* (Cth); and

(c) **Material** includes software and any document or other source of information compiled, recorded or stored in written form or on film, or by electronic process, or in any other manner or by any other means

(d) Where the Proponent has engaged, or been assisted by, an Advisor, to the extent that the Advisor has any pre-existing Intellectual Property Rights as at the Commencement Date that are applied in the development or content of the SII and/or the SII Implementation Agreement, the Proponent must procure that the Advisor grants to the State an irrevocable, non-exclusive, world-wide, perpetual, transferable, sub-licensable, royalty-free licence of that pre-existing Intellectual Property Rights to use, reproduce, communicate to the public, modify, enhance, adapt or otherwise exploit the Intellectual Property Rights and sub-license these Intellectual Property Rights in relation to or in connection with an SII and its implementation by the State, or on its behalf.

(e) For the avoidance of doubt:

(i) clauses 7.3 and 7.4 apply to any Intellectual Property Rights developed by the Advisor: on behalf of the Proponent; on behalf of the parties jointly; or otherwise by the Advisor, in the course of the Advisor participating in the Development Phases; and

(ii) clause 7.5 applies in relation to any Moral Rights of any individuals of the Advisor in relation to the Intellectual Property Rights conferred under this clause 7.

**8. Costs**

 Each party will bear its own costs arising out of or in connection with this letter agreement. For the avoidance of doubt, in relation to the Proponent, the State is not responsible for any costs arising out of or in connection with the Advisor’s involvement in the Proponent’s proposal including for the avoidance of doubt this letter agreement.

**9. Deed**

 This letter agreement is executed and takes effect as a deed.

**10. Governing Law**

 This letter agreement is governed by the law applying in New South Wales.

**11.** **Acceptance**

Please sign and return to the State the enclosed copy of this letter to indicate agreement and acceptance of its terms.

Yours faithfully

**[*Insert name of person on behalf of State that is authorised to enter into this Agreement*]**

**[*insert title of the State's authorised representative*]**

**signed for and on behalf of the Crown**

**in right of the State of New South Wales
acting through [*insert name of the Agency sending this letter*]**

The terms of this letter agreement are accepted and agreed by the Proponent.

|  |  |  |
| --- | --- | --- |
| **Executed for and on behalf of** [**insert name of Company that is Proponent] ACN [insert ACN]** in accordance with s. 127(1) of the *Corporations Act 2001* (Cth):..……………………………….……(insert name of Director)……..…………………………..……(insert name of Director/Company Secretary)**Date**:………………………………. | )))))))))))))) | ………….…………………………(signature of Director)………….…………………………(signature of Director/Company Secretary) |