

2. Government Grants and Funding for Property Projects

Local Government Roadshow November 2023

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Seminar outline

Designing Grant
Guidelines

Identifying Grant
Recipients

Developing Grant
Terms

Unfair Contract
Terms

Designing Grant Guidelines

- **What is the legislative basis for the program?**
 - Does your government agency have statutory power to commission this program?
- **Who should design the program?**
 - Your government agency?
 - Another government agency?
 - Experts?
 - Service providers?
 - Industry?
 - Clients?



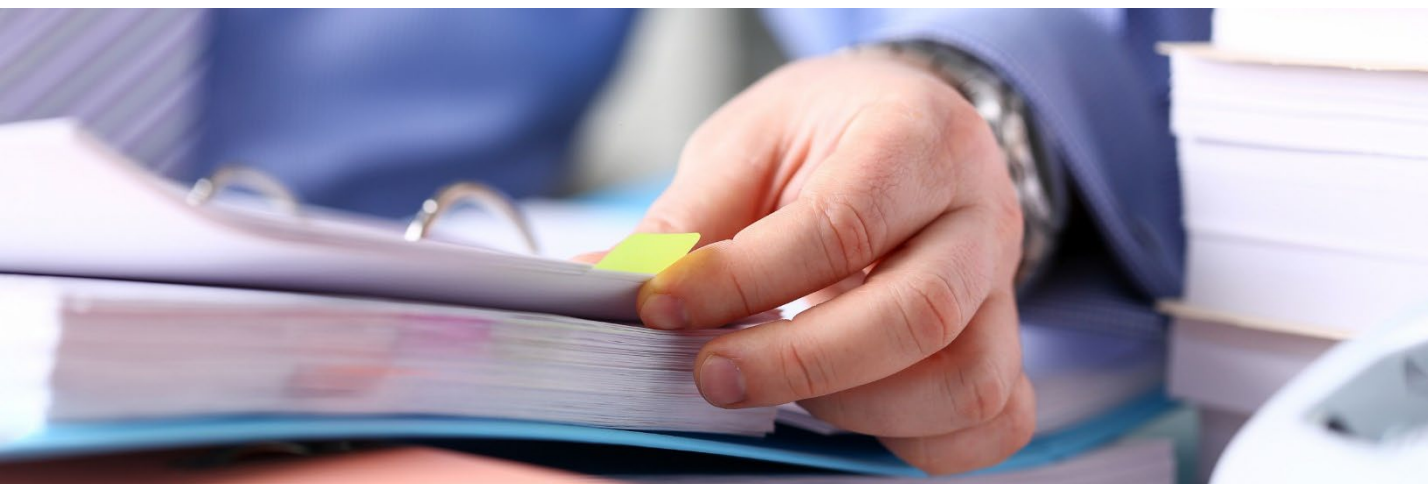
Design

- **How should you design the program?**
 - Traditional model – government is expert
 - Expressions of interest - encourage innovative solutions
 - Co-design – gather a broad range of stakeholders to brainstorm solutions
- **How do you define the program and its objectives?**
 - Activity
 - Deliverables
 - Funding
 - Outcomes



Performance Measures

- How do we measure success?
- **Traditional performance metrics**
 - Funding acquittal (typically audited)
 - Annual or activity reports, submitted on time
 - Evaluation reports (qualitative)
- **Impact or outcome measures**
 - Eg building energy performance contracts
 - Eg closing the gap
- **Impact or outcome measures**



A typical capital grant program

Victorian Independent Schools – Block Grant Authority (VIS BGA)

Funding for:

- New school (up to \$6M and 1.5 yr build)
- Expand existing school (up to \$3.6M and 1.5 yr build)
- Upgrade facilities (up to \$2.4M and 1 yr build)

4x annual rounds of applications (2023-2026 for funding to be made available late 2024-2027)

Eligibility requirements – must be a member of Independent Schools Victoria

Mix of Commonwealth and Victorian Government funding

Evidence of ownership of land (or lease for minimum period)

10 year minimum period

Obligation to repay for failure to comply with conditions

Identifying Grant Recipients

Individuals:
Full legal name, ABN,
address

**Companies
(eg Pty Ltd or Ltd):**
Full company name (from
ASIC Connect), ACN,
ABN and address

Associations (Inc):
Full association name
(from Consumer Affairs
Victoria), association
number, ABN and
address

**Other (partnerships,
government):**
Full name (from
Australian Business
Register), ABN and
address

Administering Grant Programs

Business names mask the underlying legal entity

- Use ASIC Connect to check the business name registration to identify the underlying legal entity
- This can be presented in the contract as “[Business Name Holder] trading as [Business Name]”

Beware of trusts

- These are usually difficult to identify
- Often the company will have an ACN without any ABN, and the trust will have its own ABN (eg “The Trustee of the XYZ Trust”)
- This can be presented in the contract as “ABC Pty Ltd in its personal capacity and as trustee of the XYZ Trust”

Developing Grant Terms

- Termination for convenience
 - Prior to committing to a building contract?
- Payment terms
 - Does the grant get paid early or late?
- Indemnities
- Audit and inspection
- Intellectual property
- Acknowledgments
- Disclaimers

Developing Grant Terms - Security

- Registered mortgage
- General security agreement
 - Importance of registering PPSR security interests
- Constitution and winding up clauses
 - Traditionally used for not-for-profit grant recipients
- Minimum period
 - Active use?
 - Or not misused?
- Obligation to repay for failure to comply with conditions
 - Pro rata repayment?

Unfair terms in standard contracts

- Part 2-3 of the Australian Consumer Law (in schedule 2 of the *Competition and Consumer Law 2010* (Cth))
- Originally regulated unfair standard form contracts signed by consumers
- Since 12 November 2016, extends to unfair standard form contracts signed by small businesses
- From 9 November 2023, *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) strengthens the regime further to “large” small businesses

Unfair terms in standard contracts

“small business contract” (s23(4))

Until 9 November 2023

- Contract for goods and services
- One party has less than 20 employees
- Upfront consideration is up to \$300K (contracts less than 12 months) or \$1 million (contracts over 12 months)

From 9 November 2023

- One party has less than 100 full/part-time/regular casual employees AND/OR less than \$10M turnover
- No contract value thresholds

Unfair terms in standard contracts

“*standard form contract*” (s27)

- One party has bargaining power
- Contract prepared in advance
- Take it or leave it
- No opportunity to negotiate

From 9 November 2023, Courts will have regard to repeat usage and will disregard opportunity to:

- negotiate minor terms
- choose pre-determined options
- negotiate terms of another contract

Unfair terms in standard contracts

“*unfair*” (s24)

- would cause a significant imbalance in the parties’ rights and obligations arising under the contract
- not reasonably necessary to protect the advantaged party’s legitimate interests
- would cause detriment if relied on
- consider “transparency” (plain language, legible, presented clearly, readily available) and contract as a whole

Unfair terms in standard contracts

Examples of unfair terms (s25) or “grey terms”

- Only one party can avoid contract
- Only one party can terminate
- Penalties for breach/termination applied to only one party
- Only one party may vary contract
- Only one party may renew contract
- Only one party may change price or goods
- Only one party interprets contract
- Only one party limits its liability
- ... and so on

Consequences of including unfair contract terms

Until 9 November 2023

- Unfair contract term would be void and not enforceable

From 9 November 2023

- In addition to the above, Courts may impose a penalty on body corporates of greater of \$50M or 3x benefit obtained or 30% turnover
- Penalty for individuals is \$2.5M.
- Courts have broader remedies to make orders (eg vary contract, prevent loss, prevent similar terms in future standard form contracts, issue injunctions)

These penalties are significant! Each unfair term can be a separate contravention.

Questions



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