

# **NATIONAL TREASURY PPP MANUAL**

## **MODULE 1: SOUTH AFRICAN REGULATIONS FOR PPPs**

### **NATIONAL TREASURY PPP PRACTICE NOTE NUMBER 02 OF 2004**

In accordance with section 76(4)(g) of the Public Finance Management Act, 1999 (PFMA), National Treasury may issue instructions to institutions to which the PFMA applies in order to facilitate the application of the PFMA and the regulations promulgated under the PFMA.

This National Treasury PPP Practice Note Number 02 of 2004 'South African Regulations for PPPs' applies to departments, constitutional institutions, public entities listed or required to be listed in schedules 3A, 3B, 3C and 3D to the PFMA and subsidiaries of such public entities.



NATIONAL  
TREASURY

PPP

unit

# PPP PROJECT CYCLE

Reflecting Treasury Regulation 16 to the  
Public Finance Management Act, 1999

PROJECT PREPARATION PERIOD

PROJECT TERM

Phase I

## INCEPTION

- Register project with the relevant treasury
- Appoint project officer
- Appoint transaction advisor

Phase II

## FEASIBILITY STUDY

Prepare a feasibility study comprising:

- Needs analysis
- Options analysis
- Project due diligence
- Value assessment
- Economic valuation
- Procurement plan

Treasury Approval: I

Phase III

## PROCUREMENT

- Design a fair, equitable, transparent, competitive, cost-effective procurement process
- Prepare bid documents, including draft PPP agreement

Treasury Approval: IIA

- Pre-qualify parties
- Issue request for proposals with draft PPP agreement
- Receive bids
- Compare bids with feasibility study and each other
- Select preferred bidder
- Prepare value-for-money report

Treasury Approval: IIB

- Negotiate with preferred bidder
- Finalise PPP agreement management plan

Treasury Approval: III

PPP agreement signed

Phase IV

## DEVELOPMENT

- Measure outputs, monitor and regulate performance,

Phase V

## DELIVERY

- liaise effectively, settle disputes
- Report progress in the Annual Report

Phase VI

## EXIT

- Scrutiny by the Auditor-General

PPP Manual reference

Module 1  
Module 2

**MODULE 3**

Module 6

Module 1  
Module 2

**MODULE 4**

Module 6

Module 7

Module 8

Module 9

Module 1  
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Module 1  
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**MODULE 6**

Module 7

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Module 9

## ABOUT THIS MODULE

*Module 1: South African Regulations for PPPs* opens with brief notes on how PPPs and this Manual itself fit within South Africa's public finance management system in national and provincial government.

The substance of *Module 1* presents Treasury Regulation 16 to the Public Finance Management Act, 1999 (PFMA), the legal foundation for PPPs, in an annotated form, taking the reader through the regulations and answering frequently asked questions. The module closes with specific instructions to institutions considering application for exemption from treasury approvals required in terms of Treasury Regulation 16 to the PFMA.

The PPP project cycle depicts the phases and stages of Treasury Regulation 16 to the PFMA. This PPP project cycle is referenced throughout *National Treasury's PPP Manual*.

Treasury Regulation 16, 2004, is attached as 'Annexure 1: Treasury Regulation 16'.

Institutions and private parties will find *Module 1* useful when they first consider a PPP and want an understanding of the legal foundation for PPPs. The module is also useful as a quick reference throughout the PPP project cycle. Cross-references to other modules in *National Treasury's PPP Manual* refer the reader to detailed guidance and information about the various phases and stages of developing a PPP.



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## INTRODUCTION

South Africa has established a firm regulatory framework in terms of which national and provincial government institutions can enter into public private partnership (PPP) agreements. The central legislation governing PPPs for national and provincial government is Treasury Regulation 16 issued to the Public Finance Management Act, 1999 (PFMA).

PPPs for municipal government are governed by the Municipal Systems Act, 2000, and the Municipal Finance Management Act, 2003. Municipalities are not subject to the PFMA or to Treasury Regulation 16. National Treasury will issue a separate PPP Manual for municipalities.

### ***National Treasury's PPP Manual***

*National Treasury's PPP Manual* and *Standardised PPP Provisions* are founded on the PFMA and Treasury Regulation 16, and have been produced for national and provincial departments, constitutional institutions, and public entities listed or required to be listed in schedules 3A, 3B, 3C and 3D of the PFMA, and any subsidiaries of such public entities.

Each module of *National Treasury's PPP Manual*, together with *Standardised PPP Provisions*, is issued by National Treasury as a PPP Practice Note, in terms of section 76(4)(g) of the PFMA. These PPP practice notes, which will be updated from time to time, constitute instructions in terms of section 76 of the PFMA, aimed at facilitating the application of the PFMA and its regulations.

National Treasury PPP Practice Note Number 01 of 2004:

***Standardised PPP Provisions: First Issue: 11 March 2004***

National Treasury PPP Practice Note Number 02 of 2004:

***National Treasury's PPP Manual Module 1: South African Regulations for PPPs***

National Treasury PPP Practice Note Number 03 of 2004:

***National Treasury's PPP Manual Module 2: Code of Good Practice for BEE in PPPs***

National Treasury PPP Practice Note Number 04 of 2004:

***National Treasury's PPP Manual Module 3: PPP Inception***

National Treasury PPP Practice Note Number 05 of 2004:

***National Treasury's PPP Manual Module 4: PPP Feasibility Study***

National Treasury PPP Practice Note Number 06 of 2004:

***National Treasury's PPP Manual Module 5: PPP Procurement***

National Treasury PPP Practice Note Number 07 of 2004

***National Treasury's PPP Manual Module 6: Managing the PPP Agreement***

National Treasury PPP Practice Note Number 08 of 2004

***National Treasury's PPP Manual Module 7: Auditing PPPs***

National Treasury PPP Practice Note Number 09 of 2004:

***National Treasury's PPP Manual Module 8: Accounting Treatment for PPPs***

National Treasury PPP Practice Note Number 10 of 2004:

***National Treasury's PPP Manual Module 9: An Introduction to Project Finance***

The ‘instructions’ contained in *National Treasury’s PPP Manual* are presented in the form of detailed best practice guidance, based on National Treasury’s PPP Unit’s experience in PPPs to date. An institution to which Treasury Regulation 16 applies which seeks materially to deviate from this guidance should inform the relevant treasury of such intentions prior to execution, and justify its reasons for such material deviation in the relevant application(s) for treasury approvals in terms of the regulation.

### **The PFMA**

The PFMA approach to financial management focuses on outputs and responsibilities and is a cornerstone of government’s strategy to improve financial management in the public sector.

Government is increasingly focusing its efforts on outputs and outcomes, wanting to ensure that, in spending taxpayers’ money, it produces the intended result. The PFMA makes the heads of departments (the accounting officers) of national and provincial departments and the CEOs or boards of schedule 3 public entities (the accounting authorities) responsible for implementation. They are directly accountable to Parliament or the provincial legislature for the effective and efficient management of their budgets to achieve their public mandates. These responsible officials need constantly to evaluate value-for-money choices. A PPP choice for the delivery of a public service, or to achieve a public good, warrants such investigation.

By its nature, a PPP entails:

- targeted public spending, principally on outputs to agreed standards
- leveraging private sector finance and efficiencies
- allocating risks to the party best able to manage them.

As a mechanism of delivery, a PPP is firmly in line with the intent of the PFMA.

### **Treasury Regulation 16 to the PFMA**

The PFMA provides, in section 76, that National Treasury must make regulations for a range of matters to do with the effective and efficient management and use of financial resources. Many of these matters are relevant to PPPs, and National Treasury’s Regulation 16 provides precise and detailed instructions for PPPs. The regulations have been amended since they were first issued in May 2000 to take account of experience in implementing PPPs.

**Treasury Regulation 16 to the PFMA defines a PPP, and sets out the phases and tests it will have to go through.**

The gazetted regulation is reproduced here, annotated at the points at which questions are frequently asked. The regulation is also attached as ‘Annexure 1: Treasury Regulation 16’.

# UNDERSTANDING TREASURY REGULATION 16 TO THE PFMA

## 16.1 Definitions

In this regulation, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act, has the same meaning, and –

“**affordability**”<sup>1</sup> means that the financial commitments to be incurred by an institution in terms of the PPP agreement can be met by funds –

- (a) designated within the institution’s existing budget for the institutional function to which the agreement relates; and/or
- (b) destined for the institution in accordance with the relevant treasury’s future budgetary projections for the institution;

“**institution**” means a department, a constitutional institution, a public entity listed, or required to be listed in schedules 3A, 3B, 3C and 3D to the Act, or any subsidiary of any such public entity.

### **Which national and provincial government institutions are subject to Treasury Regulation 16?**

All references to ‘institution(s)’ in Treasury Regulation 16 are to these particular institutions of government:

- all national and provincial government departments
- all constitutional institutions listed in schedule 1 to the PFMA
- all national and provincial public entities listed in schedules 3A, 3B, 3C and 3D to the PFMA and any subsidiary of any such public entity.

The major public entities listed in schedule 2 to the PFMA are not subject to Treasury Regulation 16. Municipalities are not subject to the PFMA or to its regulations.

“**institutional function**” means –

- (a) a service, task, assignment or other function that an institution is entitled or obliged to perform –
  - (i) in the public interest; or
  - (ii) on behalf of the public service generally; or
- (b) any part or component of or any service, task, assignment or other function performed or to be performed in support of such a service, task, assignment or other function;

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1. *Affordability is dealt with in detail in Module 4: Feasibility Study and in Module 5: PPP Procurement.*

“private party” means a party to a PPP agreement, other than –

- (a) an institution to which the Act applies;
- (b) a municipality or a municipal entity under the ownership control of one or more municipalities; or
- (c) the accounting officer, accounting authority or other person or body acting on behalf of an institution, municipality or municipal entity referred to in paragraph (a) or (b);

#### **How is a private party defined?**

The regulation defines a private party to a PPP agreement in the negative, explicitly excluding public institutions. PPPs in South Africa are thus specifically defined to exclude public-public partnerships. Not-for-profit entities are not excluded from the definition of a private party but their capacity to carry substantial financial, technical and operational risk in a project will determine the role they are able to play in a PPP.

“project officer”<sup>2</sup> means a person identified by the accounting officer or accounting authority of an institution, who is capable of managing and is appropriately qualified to manage a PPP to which that institution is party from its inception to its expiry or termination;

“public private partnership” or “PPP” means a commercial transaction between an institution and a private party in terms of which the private party –

- (a) performs an institutional function on behalf of the institution; and/or
- (b) acquires the use of state property for its own commercial purposes; and
- (c) assumes substantial financial, technical and operational risks in connection with the performance of the institutional function and/or use of state property; and
- (d) receives a benefit for performing the institutional function or from utilising the state property, either by way of:
  - (i) consideration to be paid by the institution which derives from a revenue fund or, where the institution is a national government business enterprise or a provincial government business enterprise, from the revenues of such institution; or
  - (ii) charges or fees to be collected by the private party from users or customers of a service provided to them; or
  - (iii) a combination of such consideration and such charges or fees;

#### **What does a PPP entail?**

A PPP is a contract between a public sector institution and a private party, in which the private party assumes substantial financial, technical and operational risk in the design, financing, building and operation of a project.

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2. The project officer's role and functions are dealt with in detail in *Module 3: PPP Inception*.

Two types of PPPs are specifically defined:

- where the private party performs an institutional function
- where the private party acquires the use of state property for its own commercial purposes.

A PPP may also be a hybrid of these types.

Payment in any scenario involves one of three mechanisms:

- the institution paying the private party for the delivery of the service, or
- the private party collecting fees or charges from users of the service, or
- a combination of these.

### **What is a PPP not?**

The way that a PPP is defined in the regulations makes it clear that:

- a PPP is not a simple outsourcing of functions where substantial financial, technical and operational risk is retained by the institution
- a PPP is not a donation by a private party for a public good
- a PPP is not the privatisation or divesture of state assets and/or liabilities
- a PPP is not the 'commercialisation' of a public function by the creation of a state-owned enterprise
- a PPP does not constitute borrowing by the state.

### **What types of PPP does the regulation cater for?**

Treasury Regulation 16 caters for a wide variety of PPP types. It allows such projects to be developed in South Africa with a range of different characteristics, combining private party risk in various ways for designing, financing, building, operating, infrastructure and services, and for owning and transferring assets. This wide variety of PPP types is reflected in international experience.

### **What PPP financing structures and funding sources<sup>3</sup> does the regulation provide for?**

Treasury Regulation 16 is not prescriptive about the financing structure of a PPP. It is assumed that these will vary widely from project to project and sector to sector, and will be closely linked to the funding sources that can be secured for each deal.

However, PPPs typically involve the private party raising both debt and equity to capitalise the project. *National Treasury's Standardised PPP Provisions* have been developed for this typical PPP financing structure and sources of funding.

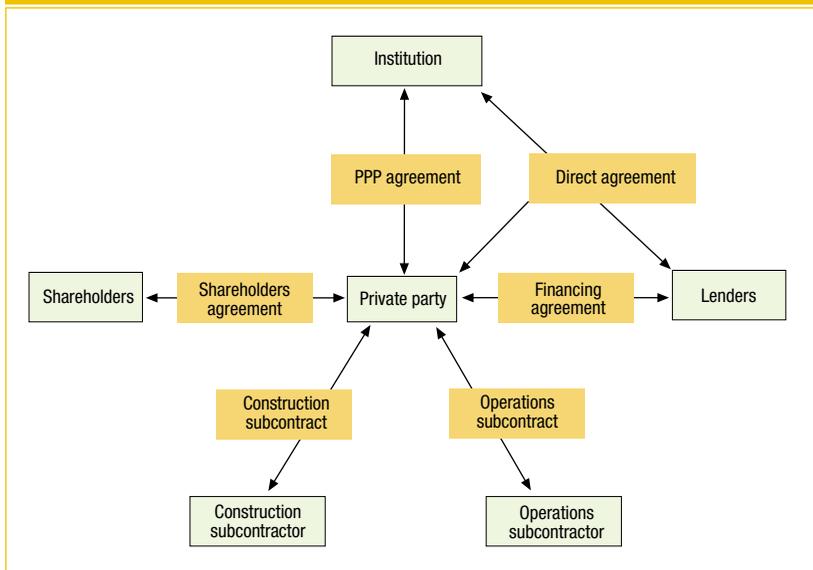
PPPs may involve a degree of capital contribution by the institution to the initial costs of the project. Some PPP projects do not involve debt finance at all, being initially funded either wholly through corporate finance or by a combination of government funds and private equity. In end-user-pay projects there may also be an element of government funding support to either or both the capital and the operating costs of the project.

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3. Financing structure and funding sources are dealt with in *Module 4: PPP Feasibility Study*. Refer also to *Module 9: An Introduction to Project Finance*.

In essence, Treasury Regulation 16 provides that affordability limits, value-for-money considerations and the risk profile of the project will determine a PPP project's financing structure and sources of funding.

Figure 1.1: Typical PPP structure



“**preferred bidder**”<sup>4</sup> means the bidder, including any bidding consortium, to be appointed as preferred bidder in terms of regulation 16.5.4;

“**PPP agreement**” means a written contract recording the terms of a PPP concluded between an institution and a private party;

“**relevant treasury**” means the National Treasury unless delegated in terms in section 10(1)(b) of the Act;

#### **Which treasury is the ‘relevant treasury’?**

National Treasury currently has the responsibility for regulating PPPs in terms of Treasury Regulation 16 to the PFMA. These powers may be delegated to provincial treasuries, thus the regulation refers throughout to ‘the relevant treasury’.

4. The process for choosing the preferred bidder is covered in *Module 5: PPP Procurement*.

“state property” includes all movable and immovable property belonging to the state as well as intellectual property rights vested in the state;

“transaction advisor”<sup>5</sup> means a person or persons appointed in writing by an accounting officer or accounting authority of an institution, who has or have appropriate skills and experience to assist and advise the institution in connection with a PPP, including the preparation and conclusion of a PPP agreement; and

“value for money”<sup>6</sup> means that the provision of the institutional function or the use of state property by a private party in terms of the PPP agreement results in a net benefit to the institution defined in terms of cost, price, quality, quantity, risk transfer or a combination thereof.

## **16.2 Exclusive competency of accounting officers and accounting authorities**

16.2.1 Only the accounting officer or the accounting authority of an institution may enter into a PPP agreement on behalf of that institution.

## **16.3 Project inception<sup>7</sup>**

16.3.1 As soon as the institution identifies a project that may be concluded as a PPP, the accounting officer or accounting authority must in writing –

- (a) register the PPP with the relevant treasury;
- (b) inform the relevant treasury of the expertise within that institution to proceed with a PPP;
- (c) appoint a project officer from within or outside the institution; and
- (d) appoint a transaction advisor if the relevant treasury so requests.

### **What does the PPP project cycle involve?**

The PPP project cycle enables the three regulatory tests of affordability, value for money, and risk transfer to be applied at every stage of preparing for, procuring and managing a PPP agreement. Regulation 16 sets out six distinct phases to the project cycle. It requires that the institution apply these tests throughout, and that specific treasury approvals are given at phases II and III of the project cycle. (See the PPP project cycle chart.)

## **16.4 Feasibility study<sup>8</sup> – Treasury Approval: I**

16.4.1 To determine whether the proposed PPP is in the best interests of an institution, the accounting officer or the accounting authority of that institution must undertake a feasibility study that –

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5. The transaction advisor's role and functions and the appointment process are covered in *Module 3: PPP Inception*.
  6. Value for money is covered in *Module 4: PPP Feasibility Study and Module 5: Procurement*.
  7. The steps in 16.3.1 are covered in *Module 3: PPP Inception*.
  8. How to do a PPP feasibility study is covered in *Module 4: PPP Feasibility Study*.

- (a) explains the strategic and operational benefits of the proposed PPP for the institution in terms of its strategic objectives and government policy;
- (b) describes in specific terms –
  - (i) in the case of a PPP involving the performance of an institutional function, the nature of the institutional function concerned and the extent to which this institutional function, both legally and by nature, may be performed by a private party; and
  - (ii) in the case of a PPP involving the use of state property, a description of the state property concerned, the uses, if any, to which such state property has been subject prior to the registration of the proposed PPP and a description of the types of use that a private party may legally subject such state property to;
- (c) in relation to a PPP pursuant to which an institution will incur any financial commitments, demonstrates the affordability of the PPP for the institution;
- (d) sets out the proposed allocation of financial, technical and operational risks between the institution and the private party;
- (e) demonstrates the anticipated value for money to be achieved by the PPP; and
- (f) explains the capacity of the institution to procure, implement, manage, enforce, monitor and report on the PPP;

#### **What are the tests for a PPP?**

Whatever the PPP type, structure, payment mechanism, or sources of funding, all South African PPPs governed by Treasury Regulation 16 are subjected to three strict tests:

- Can the institution afford the deal?
- Is it a value-for-money solution?
- Is substantial technical, operational and financial risk transferred to the private party?

16.4.2 An institution may not proceed with the procurement phase of a PPP without prior written approval of the relevant treasury for the feasibility study.

16.4.3 The treasury approval referred to in regulation 16.4.2 shall be regarded as Treasury Approval: I.

16.4.4 If at any time after Treasury Approval: I has been granted in respect of the feasibility study of a PPP, but before the grant of Treasury Approval: III in respect of the PPP agreement recording that PPP, any assumptions in such feasibility study are materially revised, including any assumptions concerning affordability, value for money and substantial technical, operational and financial risk transfer, then the accounting officer or accounting authority of the institution must immediately –

- (a) provide the relevant treasury with details of the intended revision, including a statement regarding the purpose and impact of the intended revision on the affordability, value for money and risk transfer evaluation contained in the feasibility study; and

- (b) ensure that the relevant treasury is provided with a revised feasibility study after which the relevant treasury may grant a revised Treasury Approval: I.

## **16.5 Procurement<sup>9</sup> – Treasury approvals IIA and IIB**

- 16.5.1 Prior to the issuing of any procurement documentation for a PPP to any prospective bidders, the institution must obtain approval from the relevant treasury for the procurement documentation, including the draft PPP agreement.
- 16.5.2 The treasury approval referred to in regulation 16.5.1 shall be regarded as Treasury Approval: IIA.
- 16.5.3 The procurement procedure –
  - (a) must be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective; and
  - (b) must include a preference for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination in compliance with relevant legislation.

### **How is the private party chosen?**

The regulation sets out clear PPP procurement steps that must be followed by institutions, and prescribes distinct **treasury approvals** that must be obtained in this phase.

The Promotion of Administrative Justice Act, 2000 (PAJA), imposes a range of obligations arising from section 33(1) of the Constitution of the Republic of South Africa to effect citizens' rights to fair administrative action. These values are lawfulness, reasonableness and procedural fairness.

Each administrative action in a PPP procurement process must be in accordance with the law and prescribed procedures; there must be accountability, responsiveness and openness in the decision-making of the institution; all bidders at each stage of a procurement process must have an equal chance of competing for the contract; and no action taken by government may prejudice their competitiveness.

### **How is BEE<sup>10</sup> applied in PPPs?**

In providing that active measures must be taken to promote black economic empowerment (BEE) at all stages of PPPs, the regulations are in line with broader government BEE policy. *Module 2: Code of Good Practice for BEE in PPPs* informs how BEE must be approached. The code is to be issued by the Minister of Trade and Industry in terms of the Broad-based Black Economic Empowerment Act, 2003 (the BBBEE Act). The Preferential Procurement Policy Framework Act, 2000 (PPPFA) also applies.

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9. The stages and steps for procuring the PPP are covered in *Module 5: PPP Procurement*.

10. BEE is dealt with in all the modules as applicable to a particular phase, stage or step in the PPP process. *Module 2: Code of Good Practice for BEE in PPPs* provides the policy and specific guidance.

- 16.5.4 After the evaluation of the bids, but prior to appointing the preferred bidder, the institution must submit a report for approval by the relevant treasury, demonstrating how the criteria of affordability, value for money and substantial technical, operational and financial risk transfer were applied in the evaluation of the bids, demonstrating how these criteria were satisfied in the preferred bid, and including any other information as required by the relevant treasury.
- 16.5.5 The treasury approval referred to in regulation 16.5.4 shall be regarded as Treasury Approval: IIB.

### **16.6 Contracting PPP agreements – Treasury Approval: III<sup>11</sup>**

- 16.6.1 After the procurement procedure has been concluded but before the accounting officer or accounting authority of an institution concludes a PPP agreement, that accounting officer or accounting authority must obtain approval from the relevant treasury –
- (a) that the PPP agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfer as approved in terms of regulation 16.4.2 or as revised in terms of regulation 16.4.4;
  - (b) for a management plan that explains the capacity of the institution, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the PPP; and
  - (c) that a satisfactory due diligence including a legal due diligence has been completed in respect of the accounting officer or accounting authority and the proposed private party in relation to matters of their respective competence and capacity to enter into the PPP agreement.
- 16.6.2 The treasury approval referred to in regulation 16.6.1 shall be referred to as Treasury Approval: III.

### **16.7 Management of PPP agreements<sup>12</sup>**

- 16.7.1 The accounting officer or accounting authority of the institution that is party to a PPP agreement is responsible for ensuring that the PPP agreement is properly implemented, managed, enforced, monitored and reported on, and must maintain such mechanisms and procedures as approved in Treasury Approval: III for –
- (a) measuring the outputs of the PPP agreement;
  - (b) monitoring the implementation of the PPP agreement and performances under the PPP agreement;
  - (c) liaising with the private party;

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11. See *Module 5: PPP Procurement*.

12. *Module 6: Managing the PPP Agreement* covers the processes in detail.

- (d) resolving disputes and differences with the private party;
  - (e) generally overseeing the day-to-day management of the PPP agreement; and
  - (f) reporting on the PPP agreement in the institution's annual report.
- 16.7.2 A PPP agreement involving the performance of an institutional function does not divest the accounting officer or accounting authority of the institution concerned of the responsibility for ensuring that such institutional function is effectively and efficiently performed in the public interest or on behalf of the public service.
- 16.7.3 A PPP agreement involving the use of state property by a private party does not divest the accounting officer or accounting authority of the institution concerned of the responsibility for ensuring that such state property is appropriately protected against forfeiture, theft, loss, wastage and misuse.

### **16.8 Amendment and variation of PPP agreements**

- 16.8.1 The prior written approval of the relevant treasury is required for any material amendments to a PPP agreement including any material variations to the outputs therein, or any waivers contemplated or provided for in the PPP agreement.
- 16.8.2 The relevant treasury will approve a material amendment only if it is satisfied that the PPP agreement, if so amended, will continue to provide –
- (a) value for money;
  - (b) affordability; and
  - (c) substantial technical, operational and financial risk transfer to the private party.
- 16.8.3 The accounting officer or accounting authority must substantially follow the procedure prescribed by regulations 16.4 and 16.6 for obtaining such treasury approval.

### **16.9 Agreements binding on the state**

- 16.9.1 A PPP agreement or an agreement amending a PPP agreement, binds the state only if the agreement was entered into on behalf of an institution –
- (a) by the accounting officer or accounting authority of that institution; and
  - (b) if all treasury approvals required in terms of this regulation 16 have been granted by the relevant treasury in respect of the PPP.

#### **Are unsolicited bids provided for?**

The regulation makes no provision for unsolicited bids, and National Treasury is not in favour of them. Unsolicited bids are difficult to manage, threaten to violate constitutional protections of fair administrative process and competitive procurement, and internationally, have not proven to deliver faster or secure better value for money in PPPs. National Treasury encourages institutions to listen to innovative ideas from the private sector but, in so doing, not to acquire associated intellectual property rights, and

not to make any commitments that will undermine competitive procurement. If the ideas seem promising, institutions should register the project with the relevant treasury in terms of Treasury Regulation 16 and follow the project cycle as regulated.

## 16.10 Exemptions

16.10.1 The relevant treasury may, subject to any terms and conditions that it considers appropriate and upon written application from an institution, exempt that institution whether in relation to a specific PPP or in general, from complying with any or all of the provisions of this regulation 16.

### Applying for exemption from Treasury Regulation 16

An institution may be exempted from obtaining the prescribed treasury approvals, and the procurement of a PPP may thus be able to go ahead without the oversight and statutory approvals of the relevant treasury.

The relevant treasury will consider two kinds of exemption application:

- for the duration of a particular project; and/or
- for the institution itself, for a specific period.

National Treasury has set the following conditions for such exemptions:

- No exemptions will be given to institutions from complying with the regulatory tests or phases of a PPP that are prescribed by Treasury Regulation 16.
- The application must clearly demonstrate the institution's capacity to manage a PPP to the standards and phases outlined in Treasury Regulation 16 by addressing the issues outlined below.
- An exemption from treasury approvals does not exempt the institution from applying *Standardised PPP Provisions*, as set out therein.
- An exemption from treasury approvals does not exempt the institution from substantively following procedures outlined in *National Treasury's PPP Manual*.
- An exemption from treasury approvals does not exempt the institution from complying with the *Code of Good Practice for BEE in PPPs*.
- No exemptions will be given retrospectively.
- Only the accounting officer/authority may apply to the relevant treasury on behalf of an institution.

### Part A: Exemption for a particular PPP

The application must demonstrate the institution's capacity to manage the PPP through the phases and to the standards set by Treasury Regulation 16 without the oversight and approvals of the relevant treasury.

The following must be addressed:

1. Give a short description of the project.
2. What institutional function and/or use of state property is envisaged?
3. What is the envisaged extent of public funding and/or revenue from users?
4. What is the proposed extent of private sector capital/skill/infrastructure?
5. What risks are to be transferred to a private party?

6. What is the anticipated duration of the PPP agreement?
7. How does the institution propose to determine affordability, value for money and appropriate risk allocation for the project?
8. Give a short history of similar projects undertaken by the institution.
9. Outline the policy and actual procedures followed to date by the institution in three similar projects, specifically in relation to approving project feasibility studies, compiling and approving bid documents, managing the competitive bidding process, evaluating bids, determining value for money, establishing contract management systems and negotiating and managing contracts.
10. Outline the institution's management system for the project, attaching relevant resumés of key personnel.
11. Submit the curriculum vitae of the appointed project officer, together with his or her job description.

### **Part B: Exemption for an institution**

National Treasury views the past experience of the institution in successfully planning for, procuring and implementing PPP projects as the key factor in granting an institutional exemption. The application must therefore demonstrate the capacity of the institution established for procuring and managing all its possible PPPs through the phases and to the standards set in Treasury Regulation 16 without the oversight and approvals of the relevant treasury. The exemption may be granted for a specific period, and re-applied for after that. The application must state the extent to which such institutional capacity relies on the experience of specific individuals.

The following must be addressed:

1. Give a short description of the institution.
2. Motivate the period of time for which an exemption is sought.
3. What institutional function and/or use of state property is envisaged for PPPs?
4. What is the extent of public funding and/or revenues from users, for projects envisaged?
5. What is the extent of private sector capital/skill/infrastructure envisaged?
6. What risks are likely to be transferred to the private sector?
7. Provide a summary of the PPP projects undertaken by the institution to date.
8. Outline the institution's policy for determining project affordability, value for money and appropriate risk allocation.
9. Outline the actual procedures established in the institution for approving project feasibility studies, approving bid documents, managing the competitive bidding process, evaluating bids, determining value for money, establishing contract management systems, and negotiating and managing PPP agreements.
10. Outline the institution's capacity to manage and administer PPPs, attaching relevant resumés of key personnel.
11. Submit the curriculum vitae of people who will be assigned as project officers for the institution's envisaged PPP projects, together with their job descriptions.



# ANNEXURE

## ANNEXURE 1

Treasury Regulation 16

16

**TREASURY REGULATION 16 TO THE  
PUBLIC FINANCE MANAGEMENT ACT, 1999**  
as published in Government Gazette, 2004.

## **16. Public private partnerships**

### **16.1 Definitions**

In this regulation, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act, has the same meaning, and –

“**affordability**” means that the financial commitments to be incurred by an institution in terms of the PPP agreement can be met by funds –

- (a) designated within the institution’s existing budget for the institutional function to which the agreement relates; and/or
- (b) destined for the institution in accordance with the relevant treasury’s future budgetary projections for the institution;

“**institution**” means a department, a constitutional institution, a public entity listed, or required to be listed in schedules 3A, 3B, 3C and 3D to the Act, or any subsidiary of any such public entity.

“**institutional function**” means –

- (a) a service, task, assignment or other function that an institution is entitled or obliged to perform –
  - (i) in the public interest; or
  - (ii) on behalf of the public service generally; or
- (b) any part or component of or any service, task, assignment or other function performed or to be performed in support of such a service, task, assignment or other function;

“**private party**” means a party to a PPP agreement, other than –

- (a) an institution to which the Act applies;
- (b) a municipality or a municipal entity under the ownership control of one or more municipalities; or
- (c) the accounting officer, accounting authority or other person or body acting on behalf of an institution, municipality or municipal entity referred to in paragraph (a) or (b);

“**project officer**” means a person identified by the accounting officer or accounting authority of an institution, who is capable of managing and is appropriately qualified to manage a PPP to which that institution is party from its inception to its expiry or termination;

“**public private partnership**” or “**PPP**” means a commercial transaction between an institution and a private party in terms of which the private party –

- (a) performs an institutional function on behalf of the institution; and / or
- (b) acquires the use of state property for its own commercial purposes; and
- (c) assumes substantial financial, technical and operational risks in connection with the performance of the institutional function and/or use of state property; and
- (d) receives a benefit for performing the institutional function or from utilising the state property, either by way of:
  - (i) consideration to be paid by the institution which derives from a revenue fund or, where the institution is a national government business enterprise or a provincial government business enterprise, from the revenues of such institution; or
  - (ii) charges or fees to be collected by the private party from users or customers of a service provided to them; or
  - (iii) a combination of such consideration and such charges or fees;

“**preferred bidder**” means the bidder, including any bidding consortium, to be appointed as preferred bidder in terms of regulation 16.5.4;

“**PPP agreement**” means a written contract recording the terms of a PPP concluded between an institution and a private party;

“**relevant treasury**” means the National Treasury unless delegated in terms of section 10(1)(b) of the Act;

“**state property**” includes all movable and immovable property belonging to the state as well as intellectual property rights vested in the state;

“**transaction advisor**” means a person or persons appointed in writing by an accounting officer or accounting authority of an institution, who has or have appropriate skills and experience to assist and advise the institution in connection with a PPP, including the preparation and conclusion of a PPP agreement; and

“**value for money**” means that the provision of the institutional function or the use of state property by a private party in terms of the PPP agreement results in a net benefit to the institution defined in terms of cost, price, quality, quantity, risk transfer or a combination thereof.

## **16.2 Exclusive competency of accounting officers and accounting authorities**

16.2.1 Only the accounting officer or the accounting authority of an institution may enter into a PPP agreement on behalf of that institution.

### 16.3 Project inception

- 16.3.1 As soon as the institution identifies a project that may be concluded as a PPP, the accounting officer or accounting authority must in writing –
- (a) register the PPP with the relevant treasury;
  - (b) inform the relevant treasury of the expertise within that institution to proceed with a PPP;
  - (c) appoint a project officer from within or outside the institution; and
  - (d) appoint a transaction advisor if the relevant treasury so requests.

### 16.4 Feasibility study – Treasury Approval: I

- 16.4.1 To determine whether the proposed PPP is in the best interests of an institution, the accounting officer or the accounting authority of that institution must undertake a feasibility study that –
- (a) explains the strategic and operational benefits of the proposed PPP for the institution in terms of its strategic objectives and government policy;
  - (b) describes in specific terms –
    - (i) in the case of a PPP involving the performance of an institutional function, the nature of the institutional function concerned and the extent to which this institutional function, both legally and by nature, may be performed by a private party; and
    - (ii) in the case of a PPP involving the use of state property, a description of the state property concerned, the uses, if any, to which such state property has been subject prior to the registration of the proposed PPP and a description of the types of use that a private party may legally subject such state property to;
  - (c) in relation to a PPP pursuant to which an institution will incur any financial commitments, demonstrates the affordability of the PPP for the institution;
  - (d) sets out the proposed allocation of financial, technical and operational risks between the institution and the private party;
  - (e) demonstrates the anticipated value for money to be achieved by the PPP; and
  - (f) explains the capacity of the institution to procure, implement, manage, enforce, monitor and report on the PPP;
- 16.4.2 An institution may not proceed with the procurement phase of a PPP without prior written approval of the relevant treasury for the feasibility study.
- 16.4.3 The treasury approval referred to in regulation 16.4.2 shall be regarded as Treasury Approval: I.
- 16.4.4 If at any time after Treasury Approval: I has been granted in respect of the feasibility study of a PPP, but before the grant of Treasury Approval: III in respect of the PPP agreement recording that PPP, any assumptions in such feasibility study are materially revised, including any assumptions

concerning affordability, value for money and substantial technical, operational and financial risk transfer, then the accounting officer or accounting authority of the institution must immediately –

- (a) provide the relevant treasury with details of the intended revision, including a statement regarding the purpose and impact of the intended revision on the affordability, value for money and risk transfer evaluation contained in the feasibility study; and
- (b) ensure that the relevant treasury is provided with a revised feasibility study after which the relevant treasury may grant a revised Treasury Approval: I.

### **16.5 Procurement – Treasury approvals IIA and IIB**

16.5.1 Prior to the issuing of any procurement documentation for a PPP to any prospective bidders, the institution must obtain approval from the relevant treasury for the procurement documentation, including the draft PPP agreement.

16.5.2 The treasury approval referred to in regulation 16.5.1 shall be regarded as Treasury Approval: IIA.

16.5.3 The procurement procedure –

- (a) must be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective; and
- (b) must include a preference for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination in compliance with relevant legislation.

16.5.4 After the evaluation of the bids, but prior to appointing the preferred bidder, the institution must submit a report for approval by the relevant treasury, demonstrating how the criteria of affordability, value for money and substantial technical, operational and financial risk transfer were applied in the evaluation of the bids, demonstrating how these criteria were satisfied in the preferred bid and including any other information as required by the relevant treasury.

16.5.5 The treasury approval referred to in regulation 16.5.4 shall be regarded as Treasury Approval: IIB.

### **16.6 Contracting PPP agreements – Treasury Approval: III**

16.6.1 After the procurement procedure has been concluded but before the accounting officer or accounting authority of an institution concludes a PPP agreement, that accounting officer or accounting authority must obtain approval from the relevant treasury –

- (a) that the PPP agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfer as approved in terms of regulation 16.4.2 or as revised in terms of regulation 16.4.4;
- (b) for a management plan that explains the capacity of the institution, and

- its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the PPP; and
- (c) that a satisfactory due diligence including a legal due diligence has been completed in respect of the accounting officer or accounting authority and the proposed private party in relation to matters of their respective competence and capacity to enter into the PPP agreement.
- 16.6.2 The treasury approval referred to in regulation 16.6.1 shall be referred to as Treasury Approval: III.

### **16.7 Management of PPP agreements**

- 16.7.1 The accounting officer or accounting authority of the institution that is party to a PPP agreement is responsible for ensuring that the PPP agreement is properly implemented, managed, enforced, monitored and reported on, and must maintain such mechanisms and procedures as approved in Treasury Approval: III for –
- (a) measuring the outputs of the PPP agreement;
  - (b) monitoring the implementation of the PPP agreement and performances under the PPP agreement;
  - (c) liaising with the private party;
  - (d) resolving disputes and differences with the private party;
  - (e) generally overseeing the day-to-day management of the PPP agreement; and
  - (f) reporting on the PPP agreement in the institution's annual report.
- 16.7.2 A PPP agreement involving the performance of an institutional function does not divest the accounting officer or accounting authority of the institution concerned of the responsibility for ensuring that such institutional function is effectively and efficiently performed in the public interest or on behalf of the public service.
- 16.7.3 A PPP agreement involving the use of state property by a private party does not divest the accounting officer or accounting authority of the institution concerned of the responsibility for ensuring that such state property is appropriately protected against forfeiture, theft, loss, wastage and misuse.

### **16.8 Amendment and variation of PPP agreements**

- 16.8.1 The prior written approval of the relevant treasury is required for any material amendments to a PPP agreement including any material variations to the outputs therein, or any waivers contemplated or provided for in the PPP agreement.
- 16.8.2 The relevant treasury will approve a material amendment only if it is satisfied that the PPP agreement, if so amended, will continue to provide –
- (a) value for money;
  - (b) affordability; and
  - (c) substantial technical, operational and financial risk transfer to the private party.

16.8.3 The accounting officer or accounting authority must substantially follow the procedure prescribed by regulations 16.4 and 16.6 for obtaining such treasury approval.

### **16.9 Agreements binding on the state**

16.9.1 A PPP agreement or an agreement amending a PPP agreement, binds the state only if the agreement was entered into on behalf of an institution –

- (a) by the accounting officer or accounting authority of that institution; and
- (b) if all treasury approvals required in terms of this regulation 16 have been granted by the relevant treasury in respect of the PPP.

### **16.10 Exemptions**

16.10.1 The relevant treasury may, subject to any terms and conditions that it considers appropriate and upon written application from an institution, exempt that institution whether in relation to a specific PPP or in general, from complying with any or all of the provisions of this regulation 16.

