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GOVERNMENT NOTICE

NATIONAL TREASURY

No. R. 1737

28 November 2003

PUBLIC FINANCE MANAGEMENT ACT, 1999:

TREASURY REGULATION 16

ERRATUM

The incorrect version of the existing Treasury Regulation 16 appeared in the previous Gazette No. 25605 dated 24 October 2003.

The correct version now appears.

The existing Treasury Regulation 16 contained in this Schedule, Annexure "A," and promulgated in Gazette No. 23463 dated 25th May 2002, is to be repealed in its entirety and replaced by Treasury Regulation 16 as set out in this Schedule, Annexure "B," which is hereby published for public comment in terms of Section 78 of the Public Finance Management Act, 1999, for twenty-one days from the date of this publication.

Any representations may be submitted in writing to:

**The Director-General
National Treasury
Private Bag X115
PRETORIA
0001**

Representations must be marked for the attention of **Ms Penny Mason** and may either be posted to the above address, transmitted by fax to: **(012) 315 5477**, or sent by E-mail to **penny.mason@treasury.gov.za**

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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 –

"affordable", in relation to a public -private partnership (PPP) agreement, means that the financial commitments to be incurred by an institution in terms of the agreement can be met by funds –

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

"institution", in relation to this Treasury Regulation, includes a department, constitutional institution and public entity listed in Schedules 3A, 3B, 3C and 3D of the Act.

"institutional function" means –

- (a) a service, task, assignment or other function that an institution performs –
 - (i) in the public interest; or
 - (ii) on behalf of the public service generally; or
- (b) any part or component of such a service, task, assignment or other function;
- (c) but excludes a service, task, assignment or other function that is not of an ongoing nature.

"private party", in relation to a PPP agreement, means a party to a PPP agreement other than –

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

"property", in relation to a PPP agreement, includes all movable and immovable property belonging to the state as well as intellectual property rights vested in the state;

"project officer" means the person identified by the accounting officer or accounting authority to manage the project from its inception to completion;

"public-private partnership" means a commercial transaction between an institution and a private party in terms of which –

Annexure "A" – Existing Version

- (a) the private party either performs an institutional function on behalf of the institution for a specified or indefinite period; or acquires the use of state property for its own commercial purposes for a specified or indefinite period;
- (b) the private party receives a benefit for performing the function or by utilising state property, either by way of:
 - (i) compensation from a revenue fund;
 - (ii) charges or fees collected by the private party from users or customers of a service provided to them; or
 - (iii) a combination of such compensation and such charges or fees;

"public private partnership (PPP) agreement" means an agreement approved in terms of these *Regulations*;

"value for money" means that the provision of the institutional function by a private party in terms of the public-private partnership agreement results in a net benefit to the institution, defined in terms of cost, price, quality, quantity, or risk transfer, or a combination thereof.

16.2 Exclusive competency of accounting officers and accounting authorities

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

16.3 Treasury approval

16.3.1 The accounting officer or accounting authority may not proceed with a PPP without the prior written approval of –

- (a) the National Treasury; or
- (b) the relevant provincial treasury, if it is a provincial institution and the National Treasury has, in terms of section 10(1)(b) of the Act, delegated the appropriate powers to the provincial treasury.

16.3.2 The relevant treasury may grant such approval only if it is satisfied that the proposed PPP will –

- (a) provide value for money;
- (b) be affordable for the institution; and
- (c) transfer appropriate technical, operational and financial risk to the private party.

16.3.3 When a provincial treasury grants such approvals, it must exercise its delegated powers subject to any limitations and qualifications in terms of the National Treasury's delegation.

16.3.4 As soon as an institution identifies a PPP, the accounting officer or accounting authority-

- (a) must inform the relevant treasury of the expertise within that institution to proceed with a PPP;
- (b) if the relevant treasury so requests, must appoint a specialist consultant for

Annexure "A" – Existing Version

this purpose; and

- (c) must appoint a project officer from within or outside the institution who is capable and appropriately qualified to manage the project.

16.4 Feasibility study – Treasury Approval: I

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

- (a) explains the strategic and operational benefits of the PPP agreement for the institution in terms of its strategic objectives and government policy;
- (b) describes in specific terms –
 - (i) the nature of the institutional function concerned;
 - (ii) the extent to which this function, or the use of state property, both legally and by nature, can be performed by a private party in terms of a PPP agreement; and
 - (iii) what other forms of PPP agreement were considered, and how the proposed form was selected;
- (c) assesses whether the agreement will –
 - (i) provide value for money;
 - (ii) be affordable for the institution; and
 - (iii) transfer appropriate technical, operational and financial risk to the private party.
- (d) includes any relevant information, figures and the economic criteria used to justify these assessments; and
- (e) explains the capacity of the institution to effectively enforce the agreement, including to monitor and regulate implementation of and performance in terms of the agreement.

16.4.2 An institution may not proceed with the procurement phase of a PPP without written treasury approval for the feasibility study on aspects relating to the affordability, value for money and appropriate technical, operational and financial risk transfer.

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

16.5 Submission to obtain treasury approval

16.5.1 A written application for the feasibility study approval (Treasury Approval: I) must be submitted to the relevant treasury together with the feasibility study containing the following –

- (a) a brief "sector needs and options analysis" and priority ranking of the PPP being proposed on the basis of this analysis;
- (b) demonstrated affordability, risk transfer and an initial indication of how value for money will be realised; and
- (c) the institutional arrangements for monitoring the implementation of the PPP.

16.5.2 If at any time during the project, any of the assumptions in the feasibility report

Annexure "A" – Existing Version

differ materially from the feasibility study approval, especially with regard to affordability, value for money and appropriate technical, operational and financial risk transfer, the accounting officer or accounting authority must immediately –

- (a) notify the relevant treasury of the intended revision;
- (b) submit details of the revision to the relevant treasury;
- (c) indicate the impact of the intended revision on the assumptions of the feasibility study relating to affordability, value for money and appropriate technical, operational and financial risk transfer; and
- (d) ensure that the relevant treasury is provided with a revised feasibility study after which the relevant treasury may grant a revised treasury approval.

16.6 Procurement – Treasury approvals: IIA and IIB [Section 76(4) of the PFMA]

16.6.1 Prior to the issuing of procurement documentation to any prospective bidders, the institution must obtain approval from the relevant treasury for the procurement documentation, including at least the main terms of the proposed agreement, the aspects of affordability, value for money and risk transfer.

16.6.2 The treasury approval referred to in paragraph 16.6.1 shall be regarded as Treasury Approval: IIA.

16.6.3 A PPP agreement must be procured in accordance with applicable procurement legislation.

16.6.4 The procurement procedure must include –

- (a) an open and transparent pre-qualification process;
- (b) a competitive bidding process in which only pre-qualified organisations may participate; and
- (c) criteria for the evaluation of bids to identify the bid that represents the best value for money.

16.6.5 After the evaluation of the bids but prior to entering into negotiations with any of the bidders, the institution must submit a report for approval by the relevant treasury, demonstrating the means by which affordability, quantification of value for money, appropriate technical, operational and financial risk transfer was established.

16.6.6 The approval referred to in paragraph 16.6.5 shall be regarded as Treasury Approval: IIB.

16.6.7 The procurement procedure may include –

- (a) a preference for categories of bidders, in terms of the relevant legislation, such as persons disadvantaged by unfair discrimination, provided that this does not compromise the value for money requirement; and
- (b) incentives for recognising and rewarding genuine innovators in the case of unsolicited proposals, provided that these incentives do not compromise the competitive bidding process.

**16.7 Contracting public-private partnership agreements -
Treasury approval: III**

16.7.1 After the procurement procedure has been concluded but before the accounting officer or accounting authority of an institution enters into a PPP agreement, he or she must obtain approval from the relevant treasury –

- (a) that the PPP agreement contains the affordability, value for money and appropriate technical, operational and risk transfer in regulation 16.4.2 or revised in terms of paragraph 16.5.2; and
- (b) for a management plan that explains the capacity of the institution to effectively enforce the agreement including, to monitor and regulate implementation of and performance in terms of the agreement.

16.7.2 The treasury approval referred to in paragraph 16.7.1 shall be referred to as Treasury Approval: III.

16.8 Management of public-private partnership agreements

16.8.1 The accounting officer or accounting authority is responsible for ensuring that a PPP agreement is properly enforced, and must establish mechanisms and procedures for –

- (a) monitoring and regulating the implementation of, and performance in terms of, the agreement;
- (b) liaising with the private party;
- (c) resolving disputes and differences with the private party;
- (d) generally overseeing the day-to-day management of the agreement; and
- (e) reporting on the management of the agreement in the institution's annual report.

16.8.2 A PPP agreement does not divest the accounting officer or accounting authority of the responsibility for ensuring that the relevant institutional function is effectively and efficiently performed in the public interest.

16.9 Amendment of public-private partnership agreements

16.9.1 Only the accounting officer or accounting authority may enter into an agreement to amend a PPP agreement.

16.9.2 Written approval of the relevant treasury is required for material amendments to PPP agreements.

16.9.3 The relevant treasury will approve an amendment only if it is satisfied that a proper risk assessment of proposed changes have been completed and the amended PPP agreement will continue to –

- (a) provide value for money;
- (b) be affordable for the institution; and
- (c) transfer appropriate technical, operational and financial risk to the private party.

Annexure "A" – Existing Version

16.9.4 The accounting officer or accounting authority must substantially follow the procedure prescribed by clauses 16.3 and 16.5 for obtaining treasury approval.

16.10 Certain agreements not binding on the state

16.10.1 A PPP agreement or an agreement amending a PPP agreement does not bind the state if the agreement was entered into on behalf of an institution –

- (a) by a person other than the accounting officer or accounting authority of the institution; or
- (b) without the approval of the relevant treasury.

16.11 Exemptions

16.11.1 The National Treasury may under certain terms and conditions and upon written application from an institution, exempt that institution from the application of this regulation or from any commercial transaction that falls within the definition of "public private partnership".

16.12 General

16.12.1 An agreement between an institution and a private party for the latter to perform an institutional function without accepting the significant risks is not a PPP and must be dealt with as a procurement transaction.

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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 -

"affordable", in relation to a public-private partnership ("PPP") agreement, means that the financial commitments, where applicable, 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", in relation to this regulation, means a department, a constitutional institution, a public entity listed, or required to be listed in Schedules 3A, 3B, 3C and 3D of the Act or any subsidiary of any such public entity.

"institutional function" means -

- (a) a service, task, assignment or other function that an institution performs -
 - (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 in support of, such a service, task, assignment or other function;

"private party", in relation to a PPP agreement, means a party to a PPP agreement other than -

- (a) an institution to which the Act applies;
- (b) a municipality or service utility or 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, service utility or municipal entity referred to in paragraph (a) or (b);

"project officer" means a person, who is capable and appropriately qualified, identified by the accounting officer or accounting authority, to manage a PPP project from its inception to expiration of the PPP agreement;

"public-private partnership (PPP)" means a commercial transaction between an institution and a private party in terms of which the private party -

- (a) either performs an institutional function on behalf of the institution for the duration of the PPP agreement ; and / or
- (b) acquires the use of state property for its own commercial purposes for the duration of the PPP agreement ;
- (c) assumes substantial financial, technical and operational risk in terms of the PPP agreement; and

Annexure "B" – Proposed Version

- (d) receives a benefit for performing the institutional function or by utilising 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 government business enterprise, from the revenues of such institution;
 - (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 to be appointed as preferred bidder in terms of regulation 16.5.4;

"PPP agreement" means an agreement approved in terms of these *Regulations*;

"state property", in relation to a PPP agreement, 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, who has or have appropriate skills and experience to assist and advise the institution with the PPP including in respect of 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, or risk transfer, or a combination thereof.

16.2 Exclusive competency of accounting officers and accounting authorities

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

16.3 Project inception

- 16.3.1 As soon as an institution identifies a project that may be concluded as a PPP, the accounting officer or accounting authority-

- (a) must, in writing, register the PPP with the relevant treasury;
- (b) must inform the relevant treasury of the expertise within that institution to proceed with a PPP;
- (c) must appoint a project officer from within or outside the institution who is capable and appropriately qualified to manage the PPP; and
- (d) must 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 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 –

Annexure "B" – Proposed Version

- (i) in the case of a PPP for 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 in terms of a PPP agreement; and
 - (ii) in the case of a PPP for the use of state property, a description of the state property concerned, the uses, if any, to which such state property has been put up 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 in terms of a PPP agreement;
 - (c) in relation to a PPP pursuant to which an institution will pay the private party any consideration, establishes affordability for the institution;
 - (d) sets out the proposed allocation of risk between the institution and the private party;
 - (e) demonstrates value-for-money to be achieved by the PPP; and
 - (f) explains the capacity of the institution to procure, enforce, monitor, report on and regulates the implementation of the PPP agreement.
- 16.4.2 An institution may not proceed with the procurement phase of a PPP without 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, before Treasury Approval III, any assumptions regarding the feasibility of a PPP differ materially from the assumptions in the feasibility study for which Treasury Approval I was given, especially with regard to affordability, if applicable, value for money and substantial technical, operational and financial risk transfer, then the accounting officer or accounting authority must immediately –
- (a) notify the relevant treasury of the intended revision;
 - (b) submit details of the revision to the relevant treasury;
 - (c) indicate the impact of the intended revision on the assumptions of the feasibility study relating to affordability, if applicable, value for money and technical, operational and financial risk transfer; and
 - (d) 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 [Section 76(4) of the PFMA]**
- 16.5.1 Prior to the issuing of procurement documentation for a PPP to any prospective bidders, the institution must obtain approval from the relevant treasury for the procurement documentation, including a 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

Annexure "B" – Proposed Version

- (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 if applicable, 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 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 enters into a PPP agreement, that accounting officer or accounting authority, must obtain approval from the relevant treasury –

- (a) that the PPP agreement contains the affordability, if applicable, value for money and substantial technical, operational and financial risk transfer 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 the proposed mechanisms and procedures, to effectively enforce, monitor, report on and regulate the implementation of the PPP agreement; and
- (c) that a satisfactory legal due diligence has been completed of the private party and accounting officer or accounting authority, as the case may be, in relation to matters of legal compliance, 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 is responsible for ensuring that a PPP agreement is properly enforced, and must maintain mechanisms and procedures as approved in Treasury Approval III for –

- (a) measuring the outputs of the PPP agreement;
- (b) monitoring and regulating the implementation of, and performance in terms of, 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.

Annexure "B" – Proposed Version

16.7.2 A PPP agreement does not divest the accounting officer or accounting authority of the responsibility for ensuring that the relevant institutional function is effectively and efficiently performed in the public interest.

16.7.3 A PPP agreement does not divest the accounting officer or accounting authority of the responsibility for ensuring that any state property made available to a private party in terms of a PPP agreement 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 PPP agreements including, without limitation, any material variations to the outputs therein, any other amendments 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 clauses 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 the institution; and
- (b) with the necessary approvals of the relevant treasury.

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.