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## GENERAL NOTICE

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**NOTICE 37 OF 2004**

**NATIONAL TREASURY**

**PUBLIC FINANCE MANAGEMENT ACT, 1999:**

**GAZETTE OF FINAL AMENDED VERSION OF TREASURY REGULATION 16**

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The final amended version of Treasury Regulation 16 is hereby published for public information. The version for public comment appeared in Gazette No. 25773 dated 28 November 2003.

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# 16

## Public-private partnerships

### KEY

[ ] denotes deletion

underlined portions denote insertions

#### 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,** affordability 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]** 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 **[performs –] 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”** [, **in relation]** means a party 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]** 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[, **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[, ] of an institution, who is capable and appropriately qualified to manage a PPP **[project]** to which that

institution is party from its inception to its expiration **[of the PPP agreement]** or termination;

**[“public-private partnership (PPP)”** “public-private partnership” or “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]**; and ¶
- (c) assumes substantial financial, technical and operational **[risk in terms of the PPP agreement]** 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 **[by]** 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 an agreement approved in terms of these Regulations;** means a written contract recording the terms of a PPP concluded between an institution and a private party;

**“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<sub>[,]</sub> 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 [the] a 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<sub>[,]</sub> defined in terms of cost, price, quality, quantity, **[or]** risk transfer<sub>[,]</sub> or a combination thereof.

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

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

### 16.3 Project inception

16.3.1 As soon as **[an]** the institution identifies a project that may be concluded as a PPP, the accounting officer or accounting authority must in writing-

- (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 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 **[for]** 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 **[in terms of a PPP agreement];** and
  - (ii) in the case of a PPP **[for]** involving 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]** 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 **[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]** incur any financial commitments, demonstrates the affordability of the PPP for the institution;
- (d) sets out the proposed allocation of **[risk]** 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 **[and regulates the implementation of]** the PPP **[agreement];**

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, before** 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 **[regarding the] in such 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,]** study are materially revised, including any assumptions concerning affordability [(if applicable)], value for money and substantial technical, operational and financial risk transfer, then the accounting officer or accounting authority of the institution must immediately –

(a) **[notify]provide** the relevant treasury with details of the intended revision[;]

(b) **submit details of the revision to the relevant treasury;**

(c) **indicate the**, including a statement regarding the purpose and 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 evaluation contained in the feasibility study; and

**[(d)]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 [Section 76(4) of the PFMA]

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 **[a] 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 **[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 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 **[enters into]** concludes a PPP agreement, that accounting officer or accounting authority[, ] must obtain approval from the relevant treasury –
- (a) that the PPP agreement **[contains]** meets the requirements of affordability, **[if applicable,]** 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 **[the]** its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor[,] and report on **[and regulate the implementation of]** the PPP **[agreement]**; and
  - (c) that a satisfactory **[legal]** due diligence including a legal due diligence has been completed **[of the private party and accounting officer or accounting authority, as the case may be,]** in respect of the accounting officer's or accounting authority and the proposed private party in relation to matters of [legal compliance,] 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 **[a]** 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 **[and regulating]** the implementation of[, ] and **[performance in terms of,]** 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 **[the relevant]** 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 **[any]** such 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 a PPP **[agreements]**agreement 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]** 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 **[the]** that institution; and
- (b) **[with the necessary]** if all treasury approvals [of] 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.