

TERMS OF REFERENCE

**for the provision of
a review of the treatment of contingent liabilities incurred by the state through PPPs
with appropriate recommendations**

for the National Treasury,

January 2006

Introduction and Background

1. Sections 66 and 70 of the Public Finance Management Act (PFMA) prescribes the powers of Government and public Entities to borrow money, issue guarantees, indemnities or securities or enter into any other transaction that may bind the Institution or the National Revenue Fund.
2. The Minister of Finance has either to approve or concur with a variety of transactions related to borrowing, the issuance of guarantees, indemnities or securities.
3. Treasury Regulation 16 issued in terms of the PFMA, sets out an explicit process for the approval of Public Private Partnership Agreements by the relevant national or provincial Treasury.
4. The National Treasury intends establishing an explicit methodology for the approval and/or recording of explicit contingent liabilities incurred through PPP Agreements,
5. This assignment is to carry out a review of international practice related to such contingent liabilities, a review of the contingent liabilities incurred in a sample of three PPP Agreements signed to date and to make recommendations as to the most appropriate manner for approving and recording of contingent liabilities incurred through PPP Agreements
6. The Public Private Partnership (PPP) Unit of the National Treasury will administer the assignment, the management of which will be the responsibility of the Asset and Liability Management Branch.
7. The PPP Unit was established in mid-2000, following the promulgation of Treasury Regulation 16 in May 2000, which regulates South African public-private partnership (PPP) projects for all national and provincial government departments and certain public entities (Institutions).
8. A PPP is defined in the Treasury Regulations as follows:

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

 - (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;
9. Of the multiplicity of types of PPPs, the most common is one where the private sector assumes all responsibility and risk in designing, financing, building, operating a facility, so as to provide services on behalf of government and ultimately transferring the facility back to government at the end of a pre-determined concession period.
10. This type of PPP most commonly results in a Special Purpose Vehicle (SPV) being created by the private sector as a ring fenced entity to protect the balance sheet of the sponsors. This SPV is typically funded fully by the private sector in the form of debt and equity and assumes the obligations, risks and revenues flowing from the concession agreement signed between the SPV and the government institution. This type of funding arrangement is known by the generic term “project finance”.

11. Further distinct forms of project finance PPPs are those where revenue for the SPV comes from user fees and those where revenue comes from a payment from government for the services rendered. In both cases payment is made only when the service is delivered by the SPV. An example of the former is a PPP toll road where road users pay at the toll booth when the road is fully functional, an example of the latter is a public hospital where the SPV has designed, financed, built and equipped a hospital and the state pays a service payment (usually called a Unitary Charge) for the availability and performance of that hospital from within which the state provides hospital services to its patients.
12. The PPP Unit has prepared and issued as National Treasury PPP Practice Note Number 01 of 2004 the Standardised PPP Provisions (Standardisation). The Standardisation sets out a standard approach to risk to be adopted in PPP Agreements by all Institutions. In so doing Standardisation effectively sets out many of the contingent liabilities that the state is willing to accept through PPPs. These include compensation on termination of the PPP Agreement, obligations to pay compensation on Unforeseeable Discriminatory Government Conduct and Compensation Events as well as possibly the various indemnities provided by the Institution.
13. There are also a number of PPP Agreements of the user-pays type where the Institution incurs an obligation to pay the Private Party should revenue fall below certain levels.
14. National Treasury wishes to establish a Contingent Liability Committee (CLC) to promote the optimum management of government's contingent liabilities.
15. Scope of Work Required
16. The CLC will focus attention on the explicit contingent liabilities incurred through PPPs, being those obligations dependent on some possible, future event (and not those commitments that are dependent on the contractually required services being rendered since these commitments are dealt with in the budgetary process).
17. For the purposes of this study the term contingent liability is to be understood in the broad sense of obligations to make payments under a PPP Agreement that are neither reflected in the applicable budgets of the Institution nor (where GRAP or GAAP is used) reflected on the balance sheet of that Institution.
18. This assignment must assist by providing the National Treasury with:
19. A review of international practice for treatment of explicit contingent liabilities incurred through PPPs in at least three countries that have similar PPP markets and public accounting systems. The countries preferred by the Treasury for analysis are the UK, Australia and New Zealand although prospective consultants are free to make alternative proposals;
20. a review of the contingent liabilities arising in three PPPs to date being the Department of Trade and Industry (**the dti**) Head Office, the Chapman's Peak Toll Road and the Gautrain;
21. an analysis of Accounting Standards Board Proposed Guideline On Accounting For Public Private Partnerships treatment of direct and contingent liabilities with particular focus on any possible "double counting" of contingent and direct liabilities;
22. in addition consultation with the Office of the Accountant- General, the Asset and Liability Management Branch of the National Treasury and the PPP Unit is essential. The national Treasury has carried out preliminary work and has established terms of reference for the CLC and this will be shared with the consultant. It is expected that the consultant will a) maintain the confidentiality of the information and b) not be constrained in any way to the initial work and any conclusions drawn therein;

23. a detailed summary of options for the treatment of contingent liabilities by the National Treasury in accordance with the PFMA and based on international practice. These options must include:
24. appropriate definitions of the term "contingent liability" in the context of the CLC, in other words setting out options for the scope of liabilities to be considered by the CLC;
25. the manner in which contingent liabilities are assessed and quantified in terms of impact and likelihood;
26. distinction on the basis of the materiality of contingent liability;
27. distinction on the Institution incurring such contingent liability (e.g. provincial or national department or public entity);
28. legislative requirements for approval of contingent liabilities;
29. once the preferred option is identified by the task team, a detailed methodology for the treatment, quantification and, if appropriate, approval of contingent liabilities;
30. an assessment of the alignment of the proposed treatment of contingent liabilities with the existing PPP approval process in terms of treasury regulation 16 so as to avoid duplication of approvals;
31. recommendations as to any appropriate revision of the proposed accounting treatment for PPPs and
32. recommendations as to the simplest and most effective process for the approval and/ or recordal of contingent liabilities arising from PPP Agreements

Information Provided

33. The National Treasury will provide to the following:
 - a) PPP Agreements for the dti, Chapman's peak and Gautrain projects. (Note will be subject to strict confidentiality requirements of consultants appointment contract).
 - b) The draft Accounting Standards Board Proposed Guideline On Accounting For Public Private Partnerships
 - c) The draft Terms of Reference for the Contingent Liability Committee
34. The consultant can access information on treasury PPP documentation, including the Treasury Regulations at the website www.ppp.gov.za.

Required outcomes

35. The required outcome is thus a fully motivated, detailed summary of international practice, local practice to date, recommended manner of dealing with, and quantifying the contingent liabilities incurred through PPPs and an assessment of the alignment of approval processes for PPP Agreements and the contingent liabilities incurred through such agreements.

Required work Items and deliverables

36. The following minimum discrete work outputs are required:
37. The reviews of international and local practice as required in Scope of Work items a) and b) in 15 above.
38. The analyses required in terms of Scope of Work items c) in 15 above.
39. Discussions with National Treasury with summary thereof including work carried out by National Treasury to date.
40. Options, assessments of impact and recommendations as required in Scope of Work items e) to i) in 15 above.

41. Prospective consultants are to expand on these work items in their proposals.

Skills and experience required of the consultant

- 42. The consultant must have the following minimum skills/ resources and experience
- 43. International expertise and access to accurate and detailed information on international practices related to the treatment of contingent liabilities.
- 44. Ability to mobilise this expertise rapidly
- 45. Proven experience and understanding of contingent liabilities in both Public Entities and private sector companies
- 46. Understanding of project finance and PPPs

Management of this assignment

47. The PPP Unit will administer this assignment. A task team led by the Chief Director Risk Management and comprising members of the ALM Branch, the office of the Accountant General and the PPP Unit will be established. This team will receive report back from the appointed consultants and weekly meetings will be held during the period of the assignment. The consultant must attend these meetings.

Timeframe

48. The target date for submission of a final report is 13 March 2006.

Budget

- 49. The PPP Unit has set a budget for professional fees and disbursements on this assignment at R500 000 (five hundred thousand Rand), excluding VAT.
- 50. Bidders are required to propose a fixed budget for professional fees and disbursements, payable at specified milestones through the assignment as presented in the mark-up to the draft Contract (Addendum 1). Payments will not be made against hours worked.

Bid submission requirements

51. The following are required in submissions from bidders in order for their proposals to qualify for proposal evaluation:

- a) A Covering letter *inter alia*:
 - accepting the Conditions of Bidding and
 - submitting a marked-up version of the draft Contract (attached at **Addendum 1**) and
 - attaching Tax Clearance Certificates from South African Revenue Services for the bidder.
- b) A Technical Proposal, setting out at least:
 - the names of all proposed team members and the professional role that each person will play in the assignment;
 - the suitability of each person for the proposed roles in terms of their relevant skills and experience;
 - availability to perform the work within the timeframe (substantiated by listing other known professional commitments during the contract period), and
 - one-page summary résumés of each person setting out relevant work completed by each proposed team member with references.
 - A detailed project execution plan, including :
 - ❖ Defined work items and deliverables and how these will be delivered

- ❖ A clear project timeline
 - ❖ Staff allocations (who does what)
 - Any changes to the scope of work in this terms of reference.
- c) A Financial Proposal based on a fixed fee inclusive of all disbursements and VAT:
- The bidder must make a proposal for professional fees payable for the assignment. The bidder must also make proposals for the payment of this sum in tranches, at satisfactory completion of key milestone deliverables at various stages in the assignment. The proposed schedule of payments may include a mobilisation allowance, but thereafter, actual sums payable must be linked to completion stages in the outline work plan. VAT will be paid pro-rata at each tranche payment, and is to be indicated separately in the proposal. These sums will be included as Schedule B to the Agreement a draft of which is attached here at **Addendum 1**, which must be submitted as part of the proposal.

Proposal evaluation

52. Only proposals that have submitted the documentation set out above will be qualified for evaluation. Incomplete proposals will be returned to the bidders and will not be evaluated by the technical evaluation panel.
53. The PPP Unit reserves the right to reject any proposal that exceeds the budget ceiling.
54. The Head of the PPP Unit will establish a technical evaluation panel for the purpose of evaluating complete proposals received by the deadline. The panel will evaluate qualifying proposals according to the criteria set out below. The panel's recommendation will be submitted to the Treasury Bid Committee for approval. The appointment will be made thereafter. The decision of the Treasury Bid Committee will be final.
55. Each proposal will be evaluated by the panel according to the following criteria and scoring:

Category	Criteria	Maximum points
Expertise, experience, availability related to	Demonstrated skill, experience & availability of each person in consultants team to deliver required quality product on time	40
• international practice relevant to the treatment of contingent liabilities		• 14
• local practice relevant to the treatment of contingent liabilities in Public Entities		• 10
• local practice relevant to the treatment of contingent liabilities in the private sector		• 10
• knowledge of PPP and Project Finance		• 6
Project execution plan	Plan shows ability to deliver a quality product within the shortest period of time.	15

Preferential Procurement	Calculated in terms of the attached Preferential Procurement requirements	10
Price	Lowest total fixed fee payable. Other proposal prices will be allocated points pro rata to the lowest price proposal.	35
TOTAL		100

56. Any proposal evaluated must score at least 25 out of the 40 technical points in order to be considered further and must score 10 out of 15 points for the project execution plan.

57. Bidding details

58. Any technical queries about the Terms of Reference should be submitted in writing to william.dachs@treasury.gov.za and will be responded to via email only.

59. The PPP Unit reserves the right to withdraw this bid, to amend the term or to postpone this work by email notice to all parties who have received the Terms of Reference.

60. Deadline for submission of proposals is 11h00 on 10 February 2006

61. Proposals must be submitted by hand to:

**National Treasury
Tender Information Centre between ABSA and Salzburg Restaurant
240 Vermeulen Street (corner Andries)
Pretoria**

The proposal must be clearly labeled:

“Proposal to carry out a review of the treatment of contingent liabilities incurred by the state through PPPs with appropriate recommendations”

62. The decision of the Treasury Bid Committee will be final.

ADDENDUM 1.

Draft –

TO BE MARKED UP BY BIDDER AND SUBMITTED AS PART OF PROPOSAL

CONTRACT
FOR
FOR THE PROVISION OF
A REVIEW OF THE TREATMENT OF CONTINGENT LIABILITIES INCURRED BY THE STATE
THROUGH PPPS WITH APPROPRIATE RECOMMENDATIONS
FOR THE NATIONAL TREASURY,

General terms and conditions for an agreement between the National Treasury herein represented by the head of the Public Private Partnership Unit (PPP Unit) who warrants that he is authorised thereto (hereinafter referred to as ‘the National Treasury’) and

[insert name of consultant company], registration number [insert registration number], herein represented by [insert name of company representative] in his or her capacity as [insert capacity] who warrants that he or she is duly authorised thereto (hereinafter referred to as ‘the consultant’)

Background

The National Treasury wishes to produce a review of the treatment of contingent liabilities incurred by the state through PPPs with appropriate recommendations. To do so, it needs to hire the services of a skilled and experienced consultant to carry out the work set out in the Terms of Reference for this assignment. This is to be done under the policy direction of a Task Team, made up of representatives of various branches of the National Treasury.

Pursuant thereto, the National Treasury has entered into negotiations with the consultant for the provision of the services based on the consultant’s proposal in response to the terms of reference. The consultant has agreed to provide the services on the terms and conditions set out herein.

Now it is hereby agreed as follows:

1. Definitions

In the agreement, unless the context indicates otherwise, the following words and expressions shall have the following meanings unless inconsistent with the context:

‘affiliate’	in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company, and ‘holding company’ and ‘subsidiary’, shall have the meanings assigned to them in the Companies Act, 1973;
‘agreement’	means this agreement and any annexures thereto;
‘applicable laws’	means all applicable laws, ordinances, regulations, judgements and orders of any competent court, central bank or governmental agency, authority in any relevant jurisdiction within the Republic of South Africa;
‘business day’	means any day other than a Saturday, Sunday or public holiday in the Republic of South Africa;
‘commencement date’	means the [insert date as agreed by parties];
‘completion date’	means the date on which the services by the consultant are completed;
‘confidential information’	means any information: (a) determined by the National Treasury to be privileged or confidential;

	(b) which if disclosed would violate a person's right to privacy;
	(c) declared to be privileged, confidential or secret in terms of any law including, but not limited to, information contemplated in section 34(1); 35(1); 36(1); 37(1)(a); 38(a); 39(1)(a); 40 or 43(1) of the Promotion of Access to Information Act, 2000;
'consultant'	means [insert name of company]
'deliverables'	means those deliverables as set out in the agreement documents;
'good industry practice'	means using standards, practices, methods and procedures conforming to applicable law and exercising that degree of skill, care, diligence, prudence and foresight that would reasonably and ordinarily be expected of a skilled, and experienced person engaged in a similar type of undertaking under similar circumstances;
'National Treasury default'	means an act or omission by the National Treasury which results in a breach of any of its material obligations under the agreement;
'parties'	means the National Treasury and the consultant;
'PPP'	means public-private partnership as defined in Treasury Regulation 16.1 to the Public Finance Management Act, 1999;
'proposal'	means the consultant's response to the National Treasury's terms of reference in respect of the carrying out of the services;
'services'	means those services to be provided by the consultant;
'signature date'	means the date of signature of this agreement by the last signing party;
'termination date'	means any date of termination of the agreement in accordance with clause 13 of the agreement;
'variation'	means any variation to the scope of services in terms of the agreement; and
'VAT'	means any value-added tax, or any similar tax, which is imposed in place of or in addition to such tax.

2. Interpretation

- 2.1 The agreement shall be interpreted according to the following provisions, unless the context requires otherwise:
- 2.1.1 References to the provisions of any law shall include such provisions as amended, re-enacted or consolidated from time to time in so far as such amendment, re-enactment or consolidation applies or is capable of applying to any transaction entered into under the agreement;
- 2.1.2 References to clauses, sub-clauses, annexures and schedules are references to the clauses, sub-clauses, annexures and schedules of the agreement;
- 2.1.3 The headings of clauses, sub-clauses, annexures and schedules are included for convenience only and shall not affect the interpretation of the agreement;
- 2.1.4 Reference to 'the agreement' shall include the agreement and its annexures, schedules as amended, varied, novated or substituted in writing from time to time;
- 2.1.5 The parties acknowledge that each of them has had the opportunity to take legal advice concerning the agreement, and agree that no provision or word used in the agreement shall be interpreted to the disadvantage of either party, because that party was responsible for or participated in the preparation or drafting of the agreement or any part of it;

- 2.1.6 Words importing the singular shall include the plural and vice versa, and words importing either gender or the neuter shall include both genders and the neuter, and 'person' shall include both corporeal and incorporeal entities;

3. Agreement to provide services

- 3.1 With effect from the commencement date, the National Treasury hereby appoints the consultant to provide the services and the consultant agrees to provide the services to the National Treasury on the terms and conditions recorded in the agreement.

4. Duration

- 4.1 The agreement shall commence on the commencement date and terminate on the termination date.

5. Scope of services

- 5.1 The scope of services to be provided by the consultant in terms of the agreement is set out in the deliverables schedule, annexed hereto as Schedule A. The Scope of Work may be extended by mutual agreement recorded in writing between the parties at any stage, by amendment or expansion of the Terms of Reference and by extension of this Contract.

6. Price and payment terms

- 6.1 During the term of the agreement and in consideration for the services provided by the consultant to the National Treasury, the National Treasury will pay the consultant that fixed fee as specified in the payments schedule, annexed hereto as Schedule B.
- 6.2 Payment of the mobilisation allowance will be made by the National Treasury within 30 days of the signature date. Invoices for further instalments may be submitted to the National Treasury by the consultant upon milestones achieved, as specified in the payments schedule, annexed hereto as Schedule B, and will be paid within 30 days of receipt of invoice.

7. Management

- 7.1 The National Treasury designates Mr William Dachs, Head PPP Unit, as Project Manager for purposes of this Contract. The Project Manager will be responsible for communication with the Consultant and for processing National Treasury's contractual obligations under this Contract.
- 7.2 The consultant shall meet at least weekly with the Task Team established by National Treasury to guide the review.
- 7.3 The functions of the Task Team are to:
- 7.3.1 to review the progress on the implementation of the assignment;
 - 7.3.2 to monitor and maintain alignment with applicable policy and strategy;
 - 7.3.3 to achieve agreement objectives within agreed scope, time, cost and quality;
 - 7.3.4 to provide advice and consent on scope variation;
 - 7.3.5 to provide feedback to relevant stakeholders.

8. Obligations of parties

- 8.1 The National Treasury undertakes:

- 8.1.1 to remunerate the consultant for its services as set out in the payments schedule, annexed hereto as Schedule B;
- 8.1.2 to provide all necessary logistical support to the consultant so as to enable it effectively to render the services;
- 8.1.3 to use its best endeavours to ensure that the consultant has timely and adequate access to all information, personnel and documentation available to the National Treasury that will be required by the consultant to render the services; and
- 8.1.4 to co-operate with the consultant at all times for purposes of facilitating a timeous and efficient delivery of the services.

- 8.2. The consultant undertakes:
- 8.2.1 to perform the services according to good industry practice;
 - 8.2.2 to devote the necessary time and attention to providing the deliverables, as set out in the deliverables schedule, annexed hereto as Schedule A, and not engage in any business or activity that will prevent the consultant from providing the services;
 - 8.2.3 to maintain, at all times, the highest degree of good faith towards the National Treasury and to ensure that no conflict of interest materialises, and in the event of a conflict of interest arising, to immediately advise the institution of same, upon which advises the National Treasury shall, in its sole and absolute discretion, decide whether to proceed with the agreement or to terminate it forthwith. Failure by the consultant to advise the National Treasury of any conflict of interest shall amount to a material breach of the agreement and shall entitle the National Treasury to terminate the agreement forthwith;
 - 8.2.4 to render the services in accordance with the deliverables, timeframes and specifications, as set out in the deliverables schedule, annexed hereto as Schedule A, as amended by written agreement of the parties;
 - 8.2.5 that all actions and commitments agreed upon or pursuant to the project management committee meetings or agreed to with the National Treasury, will be strictly adhered to;
 - 8.2.6 to maintain independence from other individuals, organisations or government bodies;
 - 8.2.7 to take out, at its own cost, appropriate insurance coverage against loss arising out of negligence, malpractice or unprofessional conduct of the consultant;
 - 8.2.8 to observe neutrality and objectivity in its views and opinions;
 - 8.2.9 to respect and observe all applicable laws;
 - 8.2.10 to provide the National Treasury with any information and reports reasonably requested by the National Treasury in connection with the services, and which information the consultant warrants to be accurate and complete;
 - 8.2.11 to maintain the professional personnel as promised and committed to by the consultant in its proposal, and that in the event of any dedicated member of the consultant becoming incapacitated and unable to carry out his or her duties or whose performance the National Treasury reasonably considers to be unsatisfactory in its discretion, to replace, at the consultant's cost, such member, subject to the written approval of the National Treasury.

9. Confidentiality

- 9.1 The consultant shall not, during the term of the agreement and thereafter, without the prior written consent of the National Treasury and other relevant government institutions, disclose any confidential information relating to the National Treasury, other relevant institutions, and the services to anyone other than those persons who are connected to the National Treasury and/or consultant and who are required or authorised to have access to such information.
- 9.2 The obligation to maintain the confidentiality of information shall survive the termination of the agreement, but will not apply to confidential information which was in the public domain prior to being disclosed by the consultant and has come into the public domain other than as a result of being divulged by the consultant.

10. Ownership of material and intellectual property

- 10.1 Any information provided by the National Treasury and other relevant government institutions to the consultant and any studies, reports and documentation produced by the consultant in performance of the services (hereinafter 'materials') shall belong to and remain the property of the government of the Republic of South Africa as represented by the National Treasury, and will not be used by the

consultant for any purpose other than in accordance with the agreement, or by written permission of the National Treasury.

- 10.2 Upon termination of the agreement for any reason whatsoever, the consultant must return to the National Treasury and other relevant government institutions all materials in its possession that belong to the National Treasury and other relevant government institutions, regardless of whether or not such materials were originally supplied by the National Treasury to the consultant.

11. Warranties and indemnities

11.1 The consultant warrants that:

- 11.1.1 All corporate approvals and consents required for the incorporation of the consultant and all resolutions of the board of directors of the consultant authorising the execution and performance of the agreement have been obtained prior to the signature date of the agreement; and
- 11.1.2 It will use good industry practice and skill in performing the services.

11.2 The consultant indemnifies and holds the National Treasury harmless against any claim by any third party howsoever arising in connection with any wrongful act or omission of the consultant.

11.3 The National Treasury indemnifies and holds the consultant harmless against any claim by any third party arising in connection with any wrongful act or omission of the National Treasury.

12. Liability limitation

12.1 The consultant will accept liability to pay damages for losses suffered by the National Treasury arising as a direct result of breach of contract or negligence on its part in respect of the services. The maximum liability of the consultant for all claims arising out of the services provided in connection with this agreement shall be limited to an amount equal to twice the fees charged for the services.

13. Termination

13.1 The National Treasury reserves the right to terminate the agreement or temporarily defer the provisioning of the services, or any part thereof, at any phase with immediate effect on written notice to the consultant, should the National Treasury in its sole and absolute discretion, decide not to proceed with the services.

13.2 In the event of termination of the services in accordance with clause 13.1 above, the consultant will be remunerated for such services as have already been rendered.

13.3 Termination on National Treasury default

13.3.1 On the occurrence of a National Treasury default, or within a reasonable time after the consultant becomes aware of the same, the consultant may serve notice on the National Treasury of the occurrence (and specifying details) of such National Treasury default. If the relevant default has not been remedied or rectified within 10 (ten) business days of such notice, the consultant may serve a further notice on the National Treasury terminating the agreement with immediate effect.

13.4 Termination on consultant default

13.4.1 Consultant default means any of the following events or circumstances:

- 13.4.1.1 The consultant ceasing to carry on business;
- 13.4.1.2 A resolution being passed or an order of a court being made for the administration or the judicial management, winding-up, liquidation or dissolution of the consultant;
- 13.4.1.3 The consultant failing to maintain any required insurance in terms of clause 8.2.7;
- 13.4.1.4 The consultant committing a breach of any of its material obligations under the agreement;
- 13.4.1.5 The consultant ceasing to provide all or a substantial part of the services in accordance with the agreement;
- 13.4.1.6 The consultant providing services that are not good industry practice.

13.4.2 Institutional options

13.4.2.1 On the occurrence of a consultant default, or within a reasonable time after the National Treasury becomes aware of the same, and while the same is subsisting, the National Treasury may:

- 13.4.2.1.1 In the case of the consultant default referred to in clauses 13.4.1.1 to 13.4.1.3, terminate the agreement in its entirety by notice in writing having immediate effect;
- 13.4.2.1.2 In the case of the consultant default referred to in clauses 13.4.1.4 to 13.4.1.6, serve notice of default on the consultant, requiring the consultant to remedy the consultant default within 10 (ten) business days.
- 13.4.2.2 Failure by the consultant to remedy the consultant default within the specified time, as stipulated in clause 13.4.2.1.2, shall entitle the National Treasury to terminate the agreement.

13.4.3 Costs

- 13.4.3.1 Each party shall reimburse the other party with all costs incurred by that party in exercising any of its rights (including, without limitation, any relevant administrative expenses), on an own attorney and client basis incurred by that party in enforcing its rights under the agreement arising out of any breach, together with all supporting documents of such amount, which amount shall not exceed twice the amount of fees payable in terms of this agreement.

14. Dispute resolution

- 14.1 Should any dispute arise between the parties to this agreement with regard to the interpretation, the carrying into effect and implementation of any one or more of the provisions of this agreement, any of the rights and obligations of either party arising from the agreement, the termination or purported termination of or arising from the termination of, or the rectification or proposed rectification of the agreement, or out of pursuant to this agreement, or any other matter which in terms of this agreement requires agreement by the parties, the National Treasury and the consultant shall, in the first instance, attempt to come to an agreement in relation to any such dispute by consultation and negotiation in good faith.
- 14.2 In the event that the parties, after consultation and negotiation, are unable to come to an agreement, then either party may give written notice to the other party of its intention to cancel the agreement.

15. Notices

- 15.1 The parties choose as their respective *domicilium citandi et executandi* for all purposes of the giving of notices and the serving of any process, and for any other purpose arising from the agreement as follows:

In the case of the National Treasury:

Address: 240 Vermeulen Street, Pretoria 0001

Telefax no: 012-315 5477

In the case of the consultant:

Address: [insert consultant's address]

Telefax no: [insert consultant's fax number]

- 15.2 A notice shall be deemed to have been duly given:
- 15.2.1 On delivery, if delivered to any party's physical address in terms of this clause 15.1;
- 15.2.2 On despatch, if sent to any party's then telefax number in terms of clause 15.1 as confirmed by telefax confirmation printout.
- 15.3 Either party may change its address to any physical address in the Republic of South Africa and telefax number for this purpose, by notice in writing to the other party.

16. Entire contract

- 16.1 The agreement contains all the express provisions agreed on by the parties with regard to the subject matter of the agreement, and the parties waive the right to rely on any alleged express provision not contained in the agreement.

17. No representations

- 17.1 No party may rely on any express, tacit or implied term, representation, promise, warranty or the like which allegedly induced that party to enter into the agreement, unless the term, representation, promise, warranty is recorded in the agreement.

18. Variation, cancellation and suspension

- 18.1 No contract varying, adding to, deleting from or cancelling the agreement, and no suspension of any right under the agreement shall be effective unless reduced to writing and signed by or on behalf of the parties.

19. Waiver

- 19.1 No waiver by a party of any right under the agreement shall be effective unless reduced to writing and signed by or on behalf of all the parties.

20. Indulgences

- 20.1 No indulgence granted by a party shall constitute a waiver or abandonment of any of that party's rights under the agreement. Accordingly, that party shall not be precluded, as a consequence of having granted that indulgence, from exercising any rights against the other party which may have arisen in the past or which may arise in the future.

21. Assignment

- 21.1 Save as expressly provided in the agreement, the consultant shall not cede any of its rights nor delegate any of its obligations in terms of the agreement without the prior written consent of the National Treasury.

22. Costs

- 22.1 Each party shall bear its own legal costs of, and incidental to, the negotiation, drafting and preparation of the agreement.
- 22.2 Any costs, including attorney and own client costs, incurred by a party, arising out of the breach by either party of any of the provisions of the agreement, shall be borne by the party in breach.

23. Subcontracting

- 23.1 The consultant shall not, without the prior written consent of the National Treasury (which shall not be unreasonably withheld), subcontract or delegate any of the services to any parties other than those listed as members of the consultant as contained in the proposal and reflected in the deliverables schedule (Schedule A).
- 23.2 The consultant shall not be relieved of any obligations, responsibility or liability under the agreement by the appointment of any subcontract to carry out any part of the services. As between the consultant and the National Treasury, the consultant shall be responsible for the payment, performance, act, defaults, omissions, breaches and negligence of all subcontractors. All reference in the agreement to any performance payment, act, default, omission, breach or negligence of the consultant shall be deemed to include any or the same by a subcontractor.

24. Governing law and language

- 24.1 The agreement shall be governed by the laws of the Republic of South Africa, and its language shall be English.

25. Counterparts

- 25.1 The agreement shall be capable of execution in counterparts, all of which when read together shall constitute one and the same document.

Signed and witnessed by the parties on the following dates and at the following places respectively:

Date: Place: Witness: Signature:

for the National Treasury

Date:

Place:

Witness:

Signature:

for the consultant

Schedule A: Deliverables Schedule

63. A review of international practice for treatment of explicit contingent liabilities incurred through PPPs in at least three countries that have similar PPP markets and public accounting systems. The countries preferred by the Treasury for analysis are the UK, Australia, and New Zealand although prospective consultants are free to make alternative proposals;
64. a review of the contingent liabilities arising in three PPPs to date being the Department of Trade and Industry (**the dti**) Head Office, the Chapman's Peak Toll Road and the Gautrain;
65. an analysis of Accounting Standards Board Proposed Guideline On Accounting For Public Private Partnerships treatment of direct and contingent liabilities with particular focus on any possible "double counting" of contingent and direct liabilities;
66. in addition consultation with the Office of the Accountant- General, the Asset and Liability Management Branch of the National Treasury and the PPP Unit is essential. The national Treasury has carried out preliminary work and has established terms of reference for the CLC and this will be shared with the consultant. It is expected that the consultant will a) maintain the confidentiality of the information and b) not be constrained in any way to the initial work and any conclusions drawn therein;
67. a detailed summary of options for the treatment of contingent liabilities by the National Treasury in accordance with the PFMA and based on international practice. These options must include:
68. the manner in which contingent liabilities are assessed and quantified in terms of impact and likelihood;
69. distinction on the basis of the materiality of contingent liability;
70. distinction on the Institution incurring such contingent liability (e.g. provincial or national department or public entity);
71. legislative requirements for approval of contingent liabilities;
72. once the preferred option is identified by the task team, a detailed methodology for the treatment, quantification and, if appropriate, approval of contingent liabilities;
73. an assessment of the alignment of the proposed treatment of contingent liabilities with the existing PPP approval process in terms of treasury regulation 16 so as to avoid duplication of approvals;
74. recommendations as to any appropriate revision of the proposed accounting treatment for PPPs and
75. recommendations as to the simplest and most effective process for the approval and/ or recordal of contingent liabilities arising from PPP Agreements

Schedule B: Payment Schedule

Milestone	Deliverable	Payment Amount (incl VAT)
Mobilisation Allowance	76. Signed Agreement for this assignment	
Review Report	77. The reviews of international and local practice as required in Scope of Work items 1) and 2) in Schedule A above.	
Analyses	78. The analyses required in terms of Scope of Work items 3) in Schedule A above	
Final Accepted Report	79. Options, assessments of impact and recommendations as required in Scope of Work items 5) to 9) in Schedule A above	
	80.	