

**LOCAL GOVERNMENT: MUNICIPAL FINANCE MANAGEMENT ACT
MUNICIPAL PUBLIC-PRIVATE PARTNERSHIP REGULATIONS**

The Minister of Finance, acting with the concurrence of the Minister of Provincial and Local Government, has in terms of section 168 of the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003), made the regulations as set out in the Schedule.

SCHEDULE

Definitions

1. In these Regulations, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act, has the same meaning, and –
“**Act**” means the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003);

“**activity**”, in relation to a public-private partnership, means the municipal function or the management or use of municipal property which is or is to be outsourced to a private party in terms of a public private partnership agreement;

“**affordable**”, in relation to a public-private partnership agreement, means that the financial obligations (if any) to be incurred by a municipality in terms of the agreement can be met by –

- (a) funds designated in the municipality’s budget for the current year for the activity outsourced in terms of the agreement;
- (b) funds destined for that activity in accordance with the future budgetary projections of the municipality;
- (c) any allocations to the municipality; or
- (d) a combination of such funds and allocations;

“**municipal function**” means –

- (a) a municipal service; or
- (b) any other activity within the legal competence of a municipality;

“**municipal property**”, in relation to a municipality, includes any movable, immovable or intellectual property, owned by or under the control of –

- (a) the municipality; or

- (b) a municipal entity under the sole or shared control of the municipality;

“private party” excludes –

- (a) a municipality;
- (b) a municipal entity; or
- (c) an organ of state, including an institution listed in any of the Schedules to the Public Finance Management Act, 1999 (Act No. 1 of 1999);

“project officer” means a person appointed in terms of regulation 7 (1);

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

- (a) performs a municipal function for or on behalf of a municipality, or acquires the management or use of municipal property for its own commercial purposes, or performs both a municipal function for or on behalf of a municipality and acquires the management or use of municipal property for its own commercial purposes;
- (b) assumes substantial financial, technical and operational risks in connection with -
 - (i) the performance of the municipal function;
 - (ii) the management or use of the municipal property; or
 - (iii) both; and
- (c) receives a benefit from performing the municipal function, from utilising the municipal property or from both, by way of –
 - (i) consideration to be paid or given by the municipality or a municipal entity under the sole or shared control of the municipality;
 - (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 subparagraphs (i) and (ii);

“transaction advisor” means a person appointed in terms of regulation 2 (1) (b);

“value for money”, in relation to a public-private partnership agreement, means that the performance of a private party in terms of the agreement will result in a net benefit to the municipality in terms of cost, price, quality, quantity, risk transfer or any combination of those factors.

Initiation of feasibility studies

2. (1) Before a municipality initiates a feasibility study for a public-private partnership contemplated in section 120 (4) of the Act, the accounting officer of the municipality must –
 - (a) notify the National Treasury and the relevant provincial treasury in writing of the municipality's intention, together with information on the expertise within the municipality to comply with that section of the Act; and
 - (b) if requested to do so by the National Treasury or the relevant provincial treasury, appoint a person with appropriate skills and experience, either from within or outside the municipality, as the transaction advisor to assist and advise the municipality on the preparation and procurement of the public-private partnership agreement.

- (2) Subregulation (1) also applies when a municipality in terms of section 78(2) of the Municipal Systems Act explores the provision of a municipal service through an external mechanism to be appointed in terms of a public-private partnership agreement.

Additional matters to be addressed in feasibility studies

3. (1) A feasibility study conducted in terms of section 120 (4) of the Act, in addition to the matters specified in that section, must –
 - (a) identify and define the activity which the municipality proposes to outsource to a private party;
 - (b) assess the needs of the municipality in respect of such activity, including –
 - (i) the various options available to the municipality to satisfy those needs; and
 - (ii) the advantages and disadvantages of each option;
 - (c) assess the projected impact of the proposed outsourcing of the activity to a private party on the staff, assets, liabilities and revenue of the municipality or a municipal entity under the sole or shared control of the municipality, which must include an assessment of –
 - (i) the number of officials of the municipality or such entity that would become redundant as a result of the outsourcing of the activity;

- (ii) the cost to the municipality or such entity of any staff retrenchments or the retention of redundant staff;
 - (iii) any assets of the municipality or such entity proposed to be placed under the control of the private party;
 - (iv) any assets of the municipality or such entity that would become obsolete as a result of the outsourcing of the activity;
 - (v) any liabilities of the municipality or such entity proposed to be ceded to the private party;
 - (vi) any debt of the municipality or such entity attributed to the activity to be outsourced which the municipality or such entity would retain; and
 - (vii) any revenue to be foregone by the municipality or such entity as a result of the outsourcing of the activity; and
- (d) recommend an appropriate plan for the procurement of the proposed public-private partnership agreement, if outsourcing of the activity is the preferred option.

(2) An assessment in terms of subregulation (1) (b) must show comparative projections of –

- (a) the full costs to the municipality for the activity if that activity is not outsourced through a public-private partnership agreement; and
- (b) the full costs to the municipality for the activity if that activity is outsourced through a public-private partnership agreement.

(3) Subregulations (1) and (2) need not be complied with if the activity which the municipality proposes to outsource is a municipal service in respect of which an assessment in terms of section 78 (3) (b) and a feasibility study in terms of section 78 (3) (c) of the Municipal Systems Act have already been carried out, provided that –

- (a) such assessment and feasibility study cover the matters referred to in subregulations (1) and (2); and
- (b) the documents reflecting the results of such assessment and feasibility study are included in the documents submitted to the council in terms of section 120 (6) (a) of the Municipal Finance Management Act.

Procurement of public-private partnership agreements

4. (1) When complying with Part 1 of Chapter 11 of the Act, the accounting officer of the municipality must solicit the views and recommendations of the National Treasury and the relevant provincial treasury on –
 - (a) the proposed bid documentation at least 30 days before bids are publicly invited; and
 - (b) the evaluation of the bids received and of any preferred bidder at least 30 days before any award is made.

- (2) An award of a public-private partnership agreement –
 - (a) may be made only after the process set out in section 120 (6) of the Act has been completed; and
 - (b) is subject to compliance with section 33 of the Act.

- (3) When complying with section 120 (6) (c) (i) of the Act, the municipality must specifically solicit the views and recommendations of the National Treasury on –
 - (a) the proposed terms and conditions of the draft public-private partnership agreement;
 - (b) the municipality's plan for the effective management of the agreement after its conclusion; and
 - (c) the preferred bidder's –
 - (i) competency to enter into the public-private partnership agreement; and
 - (ii) capacity to comply with his or her obligations in terms of the public-private partnership agreement.

- (4) A provincial treasury is a prescribed organ of state for purposes of section 120 (6) (c) (iv) of the Act, and when complying with this section the municipality must specifically solicit the views and recommendations also of the relevant provincial treasury on the matters set out in paragraphs (a) to (c) of subregulation (3).

Basic requirements to which public-private partnership agreements must comply

5. (1) A public-private partnership agreement between a municipality and a private party must –

- (a) provide value for money to the municipality;
- (b) be affordable for the municipality;
- (c) describe in specific terms the nature of the private parties role in the public-private partnership;
- (d) confer effective powers on the municipality –
 - (i) to monitor implementation of, and to assess the private party's performance under, the agreement;
 - (ii) to manage and enforce the agreement;
- (e) impose financial management duties on the private party, including transparent processes relating to internal financial control, budgeting, accountability and reporting;
- (f) provide for the termination of the agreement if the private party –
 - (i) fails to comply with terms or conditions of the agreement; or
 - (ii) deliberately provides incorrect or misleading information to the municipality;
- (g) restrain the private party, for the full period of the agreement, from offering otherwise than in accordance with the agreement an employment, consultancy or other contract to a person –
 - (i) who is an official of the municipality or a municipal entity under the sole or shared control of the municipality; or
 - (ii) who was such an official at any time during a period of one year before the offer is made; and
- (h) restrain the private party, for a period of three years, from offering an employment, consultancy or other contract to an employee of the municipality directly involved in the negotiation of the agreement.
- (i) comply with section 116 (1) of the Act.

(2) Any municipal employee participating in the negotiation of the public-private partnership agreement may not be employed in the public-private partnership for a period of three years.

Signing of public-private partnership agreements

6. (1) Only the accounting officer of a municipality may sign a public-private partnership agreement on behalf of the municipality.
- (2) The accounting officer may not sign a public-private partnership agreement unless section 33 of the Act has been complied with.

Project officers

7. (1) As soon as a municipality initiates a project that may be a public-private partnership, the accounting officer must appoint a person with appropriate skills and experience, either from within or outside the municipality, as the project officer for the public-private partnership.
- (2) The project officer is responsible for performing –
 - (a) the duties set out in section 116 (2) (c) (i) and (ii) of the Act; and
 - (b) any other duties or powers delegated by the accounting officer to the project officer in terms of section 79 of the Act.

Responsibilities of accounting officers

8. The accounting officer of a municipality which has entered into a public-private partnership agreement must, in addition to complying with section 116 (2) of the Act, take all reasonable steps to ensure –
 - (a) that the outsourced activity is effectively and efficiently carried out in accordance with the agreement;
 - (b) that municipal property which is placed under the control of the private party in terms of the agreement is appropriately protected against forfeiture, theft, loss, wastage and misuse; and
 - (c) that the municipality has contract management and monitoring capacity.

Amendment of public-private partnership agreements

9. (1) A public-private partnership agreement may be amended by the parties provided –
 - (a) section 116 (3) of the Act has been complied with; and

- (b) the amendment is consistent with the basic essentials of public-private partnership agreements set out in regulation 5 and other applicable provisions of these Regulations.

(2) At least 60 days before a public-private partnership agreement is amended, the accounting officer must solicit the views and recommendations of the National Treasury and the relevant provincial treasury on the reasons for the amendment. The period may be shortened if the National Treasury and relevant provincial treasury respond earlier.

Municipal entities

10. No municipal entity may initiate, procure or enter into a public-private partnership agreement on its own or on behalf of its parent municipality, but may be a party to a public-private partnership agreement initiated, procured and entered into by its parent municipality.

Exemption

11. A municipality that has commenced with the procurement of a public-private partnership prior to 1 December 2004 is exempt from these regulations in relation to that partnership, provided the agreement is concluded by 30 June 2005.

Commencement

12. These regulations take effect on 7 March 2005.