

Treasury Regulation 16:

Public-Private Partnerships

issued in terms of the
Public Finance Management Act, 1999

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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 –

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

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

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

“institutional function” means –

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

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

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

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

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

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

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

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

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

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

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

16.2 Exclusive competency of accounting officers and accounting authorities

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

16.3 Project inception

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

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

16.4 Feasibility study – Treasury Approval: I

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

- (a) explains the strategic and operational benefits of the proposed PPP for the institution in terms of its strategic objectives and government policy;
- (b) describes in specific terms –
 - (i) in the case of a PPP involving the performance of an institutional function, the nature of the institutional function concerned and the extent to which this institutional function, both legally and by nature, may be performed by a private party; and
 - (ii) in the case of a PPP involving the use of state property, a description of the state property concerned, the uses, if any, to which such state property has been subject prior to the registration of the proposed PPP and a description of the types of use that a private party may legally subject such state property to;

- (c) in relation to a PPP pursuant to which an institution will incur any financial commitments, demonstrates the affordability of the PPP for the institution;
- (d) sets out the proposed allocation of financial, technical and operational risks between the institution and the private party;
- (e) demonstrates the anticipated value-for-money to be achieved by the PPP; and
- (f) explains the capacity of the institution to procure, implement, manage, enforce, monitor and report on the PPP;

- 16.4.2 An institution may not proceed with the procurement phase of a PPP without prior written approval of the relevant treasury for the feasibility study.
- 16.4.3 The treasury approval referred to in regulation 16.4.2 shall be regarded as Treasury Approval I.
- 16.4.4 If at any time after Treasury Approval I has been granted in respect of the feasibility study of a PPP, but before the grant of Treasury Approval III in respect of the PPP agreement recording that PPP, any assumptions in such feasibility study are materially revised, including any assumptions concerning affordability, value for money and substantial technical, operational and financial risk transfer, then the accounting officer or accounting authority of the institution must immediately –
- (a) provide the relevant treasury with details of the intended revision, including a statement regarding the purpose and impact of the intended revision on the affordability, value for money and risk transfer evaluation contained in the feasibility study; and
 - (b) ensure that the relevant treasury is provided with a revised feasibility study after which the relevant treasury may grant a revised Treasury Approval I.

16.5 Procurement – Treasury approvals: IIA and IIB **[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 the draft PPP agreement.
- 16.5.2 The treasury approval referred to in regulation 16.5.1 shall be regarded as Treasury Approval IIA.
- 16.5.3 The procurement procedure –
- (a) must be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective; and
 - (b) must include a preference for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination in compliance with relevant legislation.
- 16.5.4 After the evaluation of the bids, but prior to appointing the preferred bidder, the institution must submit a report for approval by the relevant treasury, demonstrating how the criteria of affordability, value for money and substantial technical, operational and financial risk transfer were applied in the evaluation of the bids, demonstrating how these criteria were satisfied in the preferred bid and including any other information as required by the relevant treasury.
- 16.5.5 The treasury approval referred to in regulation 16.5.4 shall be regarded as Treasury Approval IIB.

16.6 Contracting PPP agreements – Treasury Approval: III

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

16.7 Management of PPP agreements

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

16.8 Amendment and variation of PPP agreements

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

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

16.9 Agreements binding on the state

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

16.10 Exemptions

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

