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NATIONAL TREASURY

NO. 4394 **19 February 2024**

CALL FOR COMMENTS ON PROPOSED AMENDMENTS TO TREASURY REGULATIONS UNDER PUBLIC FINANCE MANAGEMENT ACT

The Minister of Finance, in terms of section 78 of the Public Finance Management Act, 1999 (Act No. 1 of 1999), publishes for comment the proposed amendments to the Treasury Regulations that were published under Government Notice No. R. 740 in Government Gazette No. 23463 of 25 May 2002, as amended, as set out in the Schedule.

Written comments on the proposed amendments should be submitted to CommentsPPPDraftLegislation@treasury.gov.za within 30 days after the date of publication of this notice.

An explanatory note will be published on the National Treasury website: https://www.treasury.gov.za.

SCHEDULE

Definition

1. In this Schedule, "Regulations" means the Treasury Regulations that were published under Government Notice No. R. 740 in Government Gazette No. 23463 of 25 May 2002, as amended by Government Notice No. R. 225, published in *Government Gazette* No. 27388 of 15 March 2005, Government Notice No. R. 146 published in *Government Gazette* No. 29644 of 20 February 2007 and Government Notice No. R. 874, published in *Government Gazette* No. 37042 of 15 November 2013.

Amendment of regulation 16.1

2. Regulation 16.1 of the Regulations is hereby amended—

(a) by the insertion after the definition of 'affordability' of the following definitions:

"**'financial commitments and contingent liability'** or **'FCCL'** means—

(a) financial commitments, referring to financial obligations that an institution expects will materialise in the normal course of a PPP project and in the form of contractual payment commitments under a PPP agreement, and for which commitments the institution will require direct budget allocation, and which obligations do not depend on the occurrence of uncertain future events, even if the quantum of those commitments may fluctuate; and

(b) contingent liabilities, referring to—

(i) explicit conditional liabilities, assumed by an institution under a PPP agreement, arising on the occurrence of certain future known risk events and calculated in accordance with contractual mechanisms; or

(ii) implicit conditional liabilities, that would in practice fall on the institution, arising on the occurrence of other future known events but not expressly set out in a PPP agreement,

where the timing and the full impact is unknown at the time of contracting, and the institution will only have contractual obligation or residual duty as the grantor of the rights under the PPP Agreement, to make payments in respect of those liabilities if the event in question occurs;

'innovative' means a USP that introduces a novel (whether original or enhancement of an original) idea, method, technology, or process that enhance the efficiency, effectiveness, sustainability, the overall performance of a PPP or infrastructure development, or both, and the delivery of PPP or infrastructure projects, or both, through collaboration between public and private entities;";

(b) by the insertion after the definition of 'institutional function' of the following definition:

"**'PPP Advisory Unit'** means the PPP Unit within the Government Technical Advisory Centre, or any functionary delegated or instructed in terms of section 10(1)*(a)* of the Act to perform a power entrusted, or duty assigned, to the National Treasury by regulation 16;";

(c) by the insertion after the definition of 'project officer' of the following definition:

"**'proponent'** means any private sector party, whether natural or juristic, that prepares and submits a USP, excluding a person prohibited in terms of regulation 16.15;";

(d) by the insertion after the definition of 'state property' of the following definitions:

"**'strategic sectors'** means one or more sectors that the National Treasury identifies as strategic sectors and listed in National Treasury's guideline regulating the preparation, submission and evaluation of USPs;

'total project cost' means all the costs, capital expenditure, operational expenditure costs including maintenance and refurbishment costs, associated with the development, implementation, and operation of a PPP project, including all direct and indirect costs incurred throughout the entire life cycle of the project;";

(e) by the deletion of "and" at the end of the definition of 'transaction advisor'; and

(f) by the insertion after the definition of 'transaction advisor' of the following definition:

"**'unsolicited proposal'** or '**USP**' means an unsolicited proposal prepared by a proponent and submitted, in terms of regulation 16.11, to the institution for the development of a PPP project by the institution; and".

Insertion of regulation 16.2A

3. The following regulation is hereby inserted after regulation 16.2 of the Regulations:

"**16.2A PPP Advisory Unit**

16.2A.1 The PPP Advisory Unit is responsible for—

(a) rendering advice and guidance to institutions on the application to register a project with the National Treasury as a PPP project in terms of regulation 16.3.1*(a)*;

(b) rendering advice and support to institutions during the feasibility phase of the PPP process, each phase of the PPP procurement process and of the entire life cycle of the PPP process, which entails among others—

(i) advice on the feasibility of PPP projects and infrastructure projects;

(ii) specialised procurement support on the PPP process to ensure knowledge of and adherence to applicable regulations, other relevant regulatory material, and best practices; and

(iii) guidance on all life-cycle aspects of the PPP process to ensure compliance with established procedures and standards;

(c) providing technical support to the National Treasury as required in relation to approvals in respect of PPP projects in terms of regulation 16 in relation to—

(i) the preparation and submission of a report of its technical recommendations to the National Treasury on any application submitted by an institution for any Treasury Approval sought in terms of regulation 16;

(ii) the preparation and submission of a report, to the relevant functionary within the National Treasury, on the risks attendant on each PPP project for which Treasury Approval: I has been granted; and

(iii) the preparation and submission of a report, to the relevant functionary within the National Treasury, on the FCCL attendant on each PPP project applying for Treasury Approval: III;

(d) providing knowledge management to institutions and interested stakeholders to attain consistency in the application of the PPP regulatory framework; and

(e) any other function that the Minister may determine for the effective implementation of regulation 16.".

Amendment of regulation 16.4

4. Regulation 16.4 of the Regulations is hereby amended—

(a) by the substitution for paragraph *(c)* of subregulation 16.4.1 of the following paragraph:

"*(c)* in relation to a PPP pursuant to which an institution may incur any financial commitments, demonstrates the affordability of the PPP for the institution, and assesses the FCCL impact of the project on the institution, through the submission of an FCCL assessment report;"; and

(b) by the insertion after subregulation 16.4.4 of the following subregulations:

"16.4.5 After the granting of Treasury Approval: I, the accounting officer or accounting authority, must proceed with the procurement of that project through a PPP procurement process as envisaged in regulations 16.5 and 16.6.

16.4.6 If the accounting officer or accounting authority, having commenced a PPP procurement process, fails to adhere to its procurement timelines as submitted in its application for Treasury Approval: IIA, or as published in its procurement documentation, the accounting officer or accounting authority must inform the National Treasury in writing of the delay and the reasons for the delay, and the steps taken to mitigate the delay.

16.4.7 The accounting officer or accounting authority of an institution may only abandon or suspend a procurement process after consultation with the National Treasury following submission of a report to the National Treasury addressing—

(a) the reasons for the decision to abandon or suspend;

(b) the justifiability of the decision to abandon or suspend in view of the circumstance surrounding the procurement of the project on a PPP basis;

(c) the decision to abandon or suspend having been exercised in good faith; and

(d) what is in the best interests of the institution in the circumstances.''.

Amendment of regulation 16.5

5. Regulation 16.5 of the Regulations is hereby amended—

(a) by the substitution for subregulation 16.5.4 of the following subregulation:

"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—

(a) 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;

(b) demonstrating how these criteria were satisfied in the preferred bid;

(c) assessing the FCCL impact of the project on the institution, through the submission of an FCCL assessment report having regard to the FCCL assessment report submitted pursuant to regulation 16.4.1; and

(d) including any other information as required by the relevant treasury."; and

(b) by the insertion after subregulation 16.5.5 of the following subregulation:

"16.5.6 Notwithstanding any other provisions of regulation 16.5, a PPP project with an estimated total project cost of less than R2 billion when the institution makes an application to the relevant treasury for Treasury Approval: I on that basis, is exempted from the requirement of obtaining Treasury Approval: IIA and Treasury Approval: IIB approvals from the relevant treasury, in terms of this regulation, provided that—

(a) the institution must submit the procurement documents for the relevant PPP project to the PPP Advisory Unit for its views and recommendations, prior to such documents being finalised to be released for procurement purposes;

(b) the accounting officer or accounting authority of the institution provides formal authorisation and sign off on all project preparation and procurement documents for that PPP project, after considering the recommendations of the PPP Advisory Unit on the procurement documents;

(c) prior to taking a decision on either—

(i) the qualification of bidders following a request for pre-qualification; or

(ii) the selection of a preferred bidder following a request for proposal process,

the institution must prepare and furnish reports to the PPP Advisory Unit for its views and recommendations, in the format determined by the National Treasury, as applicable at the time of the pre-qualification of bidders or appointment of a preferred bidder with respect to the evaluation of the responses to the request for qualification or proposals submitted in response to the request for proposal; and

(d) the accounting officer or accounting authority may only appoint pre-qualified bidders in response to the request for qualification or a preferred bidder in response to the request for proposal after considering the recommendations of the PPP Advisory Unit on such reports. The PPP Advisory Unit must furnish its recommendations after consultation with the National Treasury.".

Amendment of regulation 16.6

6. Regulation 16.6 of the Regulations is hereby amended—

(a) by the substitution for paragraph *(a)* of subregulation 16.6.1 of the following paragraph:

"*(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 revised in terms of regulation 16.4.4, and assesses the FCCL impact of the project on the institution, through the submission of an FCCL assessment report, having regard to the FCCL assessment report submitted pursuant to regulation 16.4.1*(c)*;"; and

(b) by the insertion after subregulation 16.6.2 of the following subregulation:

"16.6.3 The accounting officer or accounting authority of an institution may only conclude a PPP agreement after having complied with the section 66(2) or (3) of the Act, as may be applicable, and having obtained Treasury Approval: III.".

Amendment of regulation 16.7

7. Regulation 16.7 of the Regulations is hereby amended by the insertion after subregulation 16.7.3 of the following subregulation:

"16.7.4 During the term of any PPP Agreement, the accounting officer or accounting authority of an institution must, as part of its duties in terms of regulation 13.1.4, report on the FCCL impact of the project on the institution.".

Amendment of regulation 16.8

8. Regulation 16.8 of the Regulations is hereby amended—

(a) by the substitution for subregulation 16.8.3 of the following subregulation:

"16.8.3 The accounting officer or accounting authority of the institution must assess whether the proposed amendment to the PPP agreement will result in substantial variations to the project parameters relating to affordability, project cost, scope, duration, risk transfer or other critical elements that may impact the overall value, risk, or performance of the PPP project, and if so, that will constitute a material amendment in respect of which the accounting authority or accounting officer must make representations to the relevant treasury substantiating the proposed amendment."; and

(b) by the insertion after subregulation 16.8.3 of the following subregulations:

"16.8.4 In order to motivate for the proposed material amendment, the accounting officer or accounting authority must make representations to the relevant treasury which must include, but is not limited to—

(a) An explanation of the proposed amendment, including its nature, purpose and potential impact on project parameters;

(b) an assessment of the anticipated variations to project parameters;

(c) a justification for the proposed material amendment, including the reasons for the change and the expected consequences to the project or the public interest;

(d) a re-valuation of the value for money report to assess the impact of the changes on the project value for money assessment, and a re-evaluation of the FCCL assessment report to assess the impact of the changes on the project FCCL; and

(e) a risk assessment outlining potential risks associated with the material amendment and proposed risk mitigation measures.

16.8.5 The relevant treasury may, with conditions, approve the material amendment, in terms of regulation 16.8.2, only upon receiving and considering the motivation of the accounting officer or accounting authority of the institution for the proposed material amendments in accordance with regulation 16.8.4.

16.8.6 If the amendments are not material and do not require approval of the relevant treasury in terms of regulation 16.8.1, the accounting officer or accounting authority of an institution must promptly inform the relevant treasury of the amendments and the impact of the amendments to the project parameters, referred to in regulation 16.8.2, and submit a report on the impact on the value for money of the project following the amendments. Upon submission of the report, the relevant treasury may require the institution to submit a report on the FCCL impact following the amendments.”.

Amendment of regulation 16.10

9. Regulation 16.10 of the Regulations is hereby amended by the insertion after subregulation 16.10.1 of the following subregulations:

“16.10.2 The National Treasury may, upon receipt of an application in terms of regulation 16.10.1, request the institution to submit such additional information to enable the National Treasury to decide on the application.

16.10.3 If an institution obtains a general exemption in terms of regulation 16.10.1—

(a) The terms and conditions must specify that the exemption is applicable for a defined period only and will be subject to periodic reporting by the accounting officer or accounting authority to the relevant treasury and the periodic assessment and review of the exemption by the relevant treasury, for the duration of the exemption; and

(b) the accounting officer or accounting authority must re-apply for the general exemption at such intervals as determined by the relevant treasury, to assess the continued need or justification of the general exemption and ensure ongoing compliance by the institution with the terms and conditions upon which the exemption was granted in terms of regulation 16.10.1.”.

Insertion of regulations after regulation 16.10

10. The following regulations are hereby inserted after regulation 16.10 of the Regulations:

“**16.11 Unsolicited bid proposal for PPP project**

16.11.1 A proponent that intends to develop a PPP project must, in the form determined by the National Treasury, submit a USP to the institution responsible of the institutional function that the PPP project relates to.

16.11.2 For a USP to qualify for consideration and acceptance by an institution, the PPP project proposed, if developed, must be innovative, pursue a project within one or more of the strategic sectors or objectives relating to the institutional function of the institution both.

16.11.3 An institution is not obliged to accept a USP submitted by a proponent solely on account of the USP complying with regulation 16.11.2.

16.11.4 A USP must be prepared in a manner that enables the institution to evaluate the USP and decide on whether to accept the USP and register the development of the USP with the relevant treasury or whether to reject the USP.

16.11.5 The accounting officer or accounting authority of an institution must—

(a) evaluate the USP;
(b) decide whether the institution accepts the USP and the proposed PPP project to be developed pursuant to the USP; and
(c) notify the proponent of the decision.

16.11.6 If a proponent's USP is accepted by the institution—

(a) the accounting officer or accounting authority must register the development of the feasibility study for the PPP project proposed in the USP by the proponent with the relevant treasury; and
(b) the proponent must submit a statement in the manner determined by the National Treasury stating which protection, confidential, proprietary, or otherwise, is claimed in relation to its USP and the PPP project to be developed pursuant to the USP.

16.11.7 All costs incurred by the proponent in the preparation and submission of a USP must be borne by the proponent.

16.12 Registration of proposed PPP project

16.12.1 Upon accepting the USP, the accounting officer or accounting authority must in writing notify the relevant treasury of the USP and comply with regulation 16.3 for the inception of the proposed project as a PPP.

16.12.2 Before the development of the feasibility study for the proposed PPP project, the relevant treasury must provide the institution with written approval—

(a) authorising the proponent to commence with the development of the feasibility study for the proposed PPP project;
(b) authorising the accounting officer or accounting authority of the institution to appoint a transaction advisor to assist the institution with its responsibilities in the development of the feasibility study for the proposed PPP project; and
(c) determining its validity period which must be equivalent to a reasonable period required to develop a feasibility study and processing of approvals contemplated in regulation 16.4.

16.12.3 Upon the issuance of the approval referred to on in regulation 16.12.2, the proponent must pay the institution a review fee to enable the institution to comply with regulation 16.12.2*(b)*.

16.12.4 Upon the issuance of the approval referred to in regulation 16.12 and for the duration of the validity period of the approval, the institution may not—

(a) carry out a feasibility study or unrelated feasibility study for the proposed PPP project by the proponent or recognise a USP for the same project by another proponent; and

(b) use the review fee, referred to in regulation 16.12.3.

16.12.5 The institution and the proponent may not proceed with the development of the feasibility study contemplated in the USP without the approval referred to in regulation 16.12.2.

16.13 Procurement of USP PPP project

16.13.1 The feasibility study developed by a proponent must be submitted by the institution to the relevant treasury to obtain the approval referred to in regulation 16.4.

16.13.2 Unless otherwise provided, every PPP project proposed pursuant to a USP, which has Treasury Approval: I, must be procured in accordance with a process that is fair, equitable, transparent, competitive, and cost-effective.

16.13.3 Pursuant to the feasibility study contemplated in the USP obtaining Treasury Approval: I, regulations 16.5 and 16.6 applies to the procurement of a PPP project to be developed pursuant to the feasibility study.

16.14 USP pre-qualification

16.14.1 If a PPP project developed pursuant to the feasibility study contemplated in the USP is procured through a bidding process that includes a pre-qualification stage, the proponent must be automatically pre-qualified and be shortlisted to submit a bid proposal in response to the procurement documentation.

16.14.2 If in response to a request for proposal issued for the procurement of the USP as a PPP project, the proponent submits a compliant proposal and is not selected as the preferred bidder, the proponent is entitled to the payment of a development fee by the institution, as a contribution by the institution for the costs incurred by the proponent in relation to the development of the feasibility study for the proposed PPP project, except if the project reaches financial close.

16.14.3 The development fee, referred to in regulation 16.4.1, must be processed and treated as a pass-through cost from the preferred bidder that is appointed, as specified in the procurement document for the proposed PPP project.

16.14.4 If a request for proposal is issued for the procurement of the USP as a PPP project and—

(a) the proponent does not ~~to~~ participate in the procurement, or participated but failed to submit a compliant proposal; or

(b) the procurement fails for any reason, or the project fails to reach financial close,

the proponent is not entitled to the payment of a development fee referred to in regulation 16.14.1.

16.15 Proponents prohibited from submitting USP

16.15.1 Proponents that are listed on the National Treasury database of the list of restricted suppliers may not submit to an institution a USP for the development of a PPP.

16.15.2 A proponent or a director or officer of the proponent convicted of a criminal offence—

(a) related to professional conduct; or

(b) in terms of section 214(1)*(a), (b)* or *(c)* of the Companies Act, 2008 (Act No. 71 of 2008),

may not submit a USP for the development of a PPP to an institution.".

Commencement

11. The amendments in this Schedule to the Regulations take effect on the date of publication in the *Gazette*.

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