



## PUBLIC-PRIVATE PARTNERSHIPS AND PRIVATE SECTOR PARTICIPATION: OPPORTUNITY AWAITS

**JACKWELL FERIS, director and sector head: Industrials, Manufacturing and Trade at Cliffe Dekker Hofmeyr, discusses the opportunities presented by amended National Treasury Regulation 16 for public-private partnerships distinguishing that from private sector participation initiatives**

**P**ublic-private partnerships (PPPs) have long been a recognised mechanism for delivering public infrastructure and services by a state with limited resources. In South Africa, there has been an attempt to do so through the introduction of Regulation 16 of the Public Finance Management Act 1 of 1999 (PFMA), which has served as the primary regulatory instrument governing PPPs, specifically designed for "institutions" as defined within the PFMA, which includes national and provincial government departments, constitutional institutions and certain public entities listed in

Schedules 3A, 3B, 3C, and 3D of the PFMA that perform specific institutional functions.

In response to the evolving economic landscape and the pressing need for infrastructure development, the Minister of Finance, Enoch Godongwana, published the amended National Treasury Regulation 16 for PPPs on 7 February 2025 (Treasury Regulation 16). These amendments, effective 1 June 2025, are the result of a comprehensive review of the South African PPP framework. The primary goals of this review and the subsequent amendments are to create more favourable conditions for attracting greater private sector

participation, mobilising significant private sector financing and leveraging the technical expertise of the private sector to augment the limited capacity within the public sector. This initiative also seeks to ease the strain on stretched government finances by shifting some of the burden of infrastructure investment to the private sector.

Notably, the PPP regulatory framework had remained largely static for almost 15 years, despite considerable changes in the economic environment. This extended period without significant regulatory updates suggests that the amendments represent a potentially critical and long-awaited step towards aligning the PPP framework with current infrastructure needs and investment realities. The strong emphasis on attracting private capital and expertise underscores the government's recognition that PPPs are an essential tool for addressing South Africa's infrastructure deficit, especially

given the constraints on public resources. It is important to note that while Treasury Regulation 16 focuses on PPPs for specific government institutions, the government is also developing separate private sector participation (PSP) frameworks for state-owned entities (SOEs) in strategic sectors such as energy and transport (ports and rail). These PSP frameworks aim to address the unique challenges and opportunities within these sectors and may involve different models of private sector engagement compared to traditional PPPs under Treasury Regulation 16.

#### **KEY IMPACTS OF THE AMENDED TREASURY REGULATION 16 FOR PPPS**

The amended Treasury Regulation 16 introduces several key changes with distinct implications for different categories of PPP projects undertaken by institutions, as defined in the PFMA.

##### **Impact on unsolicited projects**

A significant development in the amended regulations is the official establishment of a transparent system for handling and evaluating unsolicited PPP proposals (USPs). An unsolicited proposal is defined as a proposal prepared by a private sector proponent and submitted to a public sector institution for the development of a PPP project. The amendments introduce specific incentives aimed at encouraging greater private sector participation through this route. For a USP to be considered, it must demonstrate innovation and align with one or more strategic sectors or objectives identified by the procuring institution. Furthermore, the proposal must support the core functions of the institution to which it is submitted.

The amended regulations also introduce the possibility of a development fee, which may be recovered by a proponent whose unsolicited proposal is not ultimately selected as the preferred bid. However, it is important to note that amended Treasury Regulation 16.14.4 outlines specific circumstances under which this development fee may be

#### **CLEAR COMMUNICATION AND CO-ORDINATION WILL BE ESSENTIAL TO ENSURE THE DISTINCTION BETWEEN PPPS UNDER TREASURY REGULATION 16 AND THE SEPARATE PSP FRAMEWORKS FOR SOES IS WELL UNDERSTOOD BY BOTH THE PUBLIC AND PRIVATE SECTORS.**

forfeited, such as if the procurement process is unsuccessful for any reason. Despite the introduction of this framework, USPs will still be subject to a competitive bidding process to ensure adherence to the constitutional principles of fairness, equitability, transparency, competitiveness and cost-effectiveness. The process for pursuing a USP involves registration of the proposed project with the relevant treasury and obtaining written approval to proceed. Typically, the proponent submitting the unsolicited proposal will be responsible for preparing the detailed feasibility study and for paying a review fee to the receiving department.

The formal structuring of USPs represents a notable departure from the previous regulations, which lacked a clear and defined process for handling such proposals. This new framework offers a more predictable and transparent pathway for private sector entities to bring forward innovative infrastructure project ideas. While the potential for recovering development costs is a positive step towards incentivising USPs, the conditions under which these costs may be forfeited, coupled with a perceived lack of clarity on the evaluation process for USP proponents compared to other bidders, could still introduce a degree of uncertainty for potential proponents.

##### **Impact on projects valued at less than R2-billion**

The amended Treasury Regulation 16 introduces a simplified approval process for PPP projects with an estimated total project cost of less than R2-billion undertaken by institutions, as defined in the PFMA. These projects are now exempt from the

requirement of obtaining Treasury Approval IIA (approval of procurement documentation) and Treasury Approval IIB (approval to appoint the preferred bidder) from the relevant treasury. Instead, the accounting officer or accounting authority of the institution undertaking the project is empowered to authorise and sign off on the relevant project documentation.

Despite this significant streamlining, projects valued below R2-billion are still required to submit their procurement documents to the newly established PPP Advisory Unit for its views and recommendations before these documents are finalised and released for procurement purposes. The introduction of this threshold for simplified approvals is a key mechanism intended to reduce bureaucratic red tape and accelerate the implementation of smaller PPP projects. This change is particularly relevant for provincial and

#### **THE STRONG EMPHASIS ON ATTRACTING PRIVATE CAPITAL AND EXPERTISE UNDERSCORES THE GOVERNMENT'S RECOGNITION THAT PPPS ARE AN ESSENTIAL TOOL FOR ADDRESSING SOUTH AFRICA'S INFRASTRUCTURE DEFICIT**

Jackwell Feris



LEGAL 53





### **THIS INITIATIVE ALSO SEEKS TO EASE THE STRAIN ON STRETCHED GOVERNMENT FINANCES BY SHIFTING SOME OF THE BURDEN OF INFRASTRUCTURE INVESTMENT TO THE PRIVATE SECTOR.**

municipal entities, which may have previously found the comprehensive Treasury approval process overly burdensome for smaller-scale infrastructure developments. The continued involvement of the PPP Advisory Unit, even for these smaller projects, suggests a deliberate balance between simplifying the approval pathway and maintaining a level of expert oversight and quality assurance.

**Impact on projects exceeding R2-billion**  
 Based on the specific exemptions granted to projects valued below R2-billion, it can be reasonably inferred that PPP projects with an estimated total cost exceeding this threshold, undertaken by institutions defined in the PFMA, will remain subject to the more comprehensive Treasury approval processes that were in place under the previous regulations, including the requirements for Treasury Approval IIA and Treasury Approval IIB.

While the core approval stages for these larger projects might not have been significantly altered by the amendments, other changes introduced in the amended Treasury Regulation 16 will still apply. This includes the establishment and enhanced role of the PPP Advisory Unit, which is mandated to provide advice and support throughout the PPP project cycle, regardless of the project value. Additionally, the new framework for handling unsolicited proposals will also apply to projects exceeding R2-billion. The primary focus of the streamlining efforts appears to be on smaller projects, suggesting that larger, more complex infrastructure projects will continue to undergo a more rigorous and detailed scrutiny process. However, the enhanced support and guidance from the PPP Advisory Unit could potentially lead to greater efficiency and potentially faster overall timelines for these larger projects as well.

### **APPLICABILITY ACROSS GOVERNMENT SPHERES**

Treasury Regulation 16 is the primary regulatory instrument governing PPPs at the national and provincial levels of government, operating under the framework of the PFMA. The recent amendments to Treasury Regulation 16 were drafted with consideration for all three spheres of government – national, provincial and local.

However, the regulations governing PPPs at the municipal level, the Municipal PPP Regulation 309, which operates under the Municipal Finance Management Act 56 of 2003 (MFMA), are undergoing a separate amendment process. These amendments require more time for finalisation due to procedural requirements, including consultation with Parliament, and are expected to be finalised by June 2025. While the amended Treasury Regulation 16 establishes the PPP Advisory Unit with a mandate to support both national departments and municipalities, corresponding amendments to the municipal PPP regulations have not yet been enacted.

This delay in finalising the municipal regulations could potentially create a temporary divergence in the regulatory landscape for PPPs across different spheres of government. Municipalities might continue to operate under the existing regulations or face a period of uncertainty until the amended Municipal PPP Regulation 309 is finalised. The long-term intention, however, appears to be the establishment of a more unified and coherent regulatory environment for PPPs throughout South Africa, as evidenced by the parallel efforts to amend both the national and municipal regulations.

### **DISTINCTION OF PRIVATE SECTOR PARTICIPATION FOR STATE-OWNED ENTITIES**

It is crucial to distinguish the PPP framework under the amended Treasury Regulation 16 from other forms of private sector participation, particularly concerning SOEs. It is important to note that Treasury Regulation 16 does not directly apply to Schedule 2 public entities. The amended Treasury Regulation 16 focuses on projects where the private sector performs an institutional function or uses state property on behalf of these institutions. The PSP frameworks that government is actively developing for strategic sectors managed by SOEs, while also aiming to attract private sector investment and expertise, may differ in their objectives, scope, and mechanisms from the traditional PPP model governed by

Treasury Regulation 16. For instance, in the energy sector, the focus might be on independent power producers and private investment in transmission infrastructure. Similarly, in the transport sector, the emphasis is on private sector involvement in freight rail and port operations through concessions and other arrangements, while the infrastructure remains under state ownership. These PSP initiatives are often driven by sector-specific policies and aim to address the unique operational and financial challenges faced by SOEs in these critical areas. Therefore, while both PPPs under Treasury Regulation 16 and the emerging PSP frameworks seek to leverage private sector capabilities, they operate within distinct regulatory and policy contexts and target different parts of the public sector.

Building on this crucial distinction, the evolving PSP frameworks are particularly evident in strategic sectors under the direct legislative mandate of certain Schedule 2 public entities, which, unlike departments or other public bodies, are not directly governed by the Treasury Regulation 16 PPP framework. For instance, in the energy sector, the South African National Treasury, in collaboration with the Ministry of Electricity and Energy, issued a Request for Information (RFI) to gauge market appetite for Independent Transmission Projects (ITPs) under the National Transmission Company South Africa (NTCSA). This initiative directly responds to the immense investment backlog in transmission infrastructure and Eskom's constrained balance sheet, signalling a move to attract private capital for expanding and strengthening the national grid. Such PSPs are developed within the specific governance and legislative regime of Schedule 2 entities, which operate under the PFMA, but follow tailored mechanisms rather than TR16's prescriptive procurement cycle. Furthermore, the recently enacted Electricity Regulation Amendment Act provides the enabling legislative environment for these changes, explicitly establishing NTCSA as the independent transmission system operator (TSO) and creating a framework that allows for private sector investment in transmission infrastructure development, even as the assets remain state-owned, thus departing significantly from the traditional PPP model.

#### RECOMMENDATIONS

The amendments to Treasury Regulation 16 represent a positive step towards revitalising the PPP landscape for institutions defined under the PFMA in South Africa. By streamlining approvals for smaller projects and providing a clearer framework for unsolicited proposals, the government aims to attract greater private sector participation and investment in much-needed infrastructure within these institutions' responsibilities. The establishment of a dedicated PPP Advisory Unit has the potential to significantly enhance the capacity of these public institutions to navigate the complexities of PPPs.

However, certain challenges and areas for further attention remain. The delayed finalisation of the municipal PPP regulations could create short-term inconsistencies and uncertainties for local government PPP initiatives. Additionally, while the introduction of a development fee for unsolicited proposals is a welcome incentive, the conditions for its forfeiture and the lack of a fully transparent evaluation pathway for USP proponents warrant further clarity to maximise the effectiveness of this new framework. Furthermore, clear communication and co-ordination will be essential to ensure the distinction between PPPs under Treasury Regulation 16 and the separate PSP frameworks for SOEs is well understood by both the public and private sectors.

To fully realise the intended benefits of these amendments and the broader strategy for private sector involvement, the following are key:

#### For the government

- Prioritise and expedite the finalisation of the amendments to the municipal PPP regulations to ensure a consistent regulatory environment across all spheres of government.
- Ensure the PPP Advisory Unit is adequately resourced with skilled personnel and the necessary capacity to effectively support the anticipated increase in PPP activity, particularly for projects below R2-billion within the defined institutions.
- Develop and publicise clear and detailed guidelines on the evaluation process for unsolicited proposals under Treasury Regulation 16, including the criteria for

#### **THIS NEW FRAMEWORK OFFERS A MORE PREDICTABLE AND TRANSPARENT PATHWAY FOR PRIVATE SECTOR ENTITIES TO BRING FORWARD INNOVATIVE INFRASTRUCTURE PROJECT IDEAS.**

assessing innovation and strategic alignment, and the specific procedures for the recovery of development fees.

- Provide clear and comprehensive information on the objectives, scope and mechanisms of the separate PSP frameworks being developed for SOEs, ensuring clarity on how these frameworks interact with the PPP regulations under Treasury Regulation 16.

#### For the private sector

- Actively explore the opportunities presented by the amended Treasury Regulation 16 for partnering with government institutions (as defined in the PFMA), particularly the streamlined processes for projects under R2-billion and the new framework for submitting unsolicited proposals.
- Proactively engage with the PPP Advisory Unit to seek guidance and support during the development and submission of PPP proposals under Treasury Regulation 16.
- Carefully assess the risks and conditions associated with the development fee recovery mechanism for unsolicited proposals under Treasury Regulation 16 before committing significant resources.
- Stay informed about the development and implementation of the PSP frameworks for SOEs in sectors of interest and understand the specific opportunities and requirements associated with these frameworks.

By addressing these considerations, the public and private sectors can work collaboratively to leverage the amended Treasury Regulation 16 and the broader PSP strategy to drive sustainable infrastructure development and economic growth in South Africa. ●