

BENCHMARKING PPP PROCUREMENT 2017 IN SOUTH AFRICA

| Regulatory and Institutional Framework for PPPs | |
|---|--|
| Does the regulatory framework in your country allow procuring PPPs? | Yes |
| Yes. If yes, please specify the relevant regulatory framework and the year of adoption: | <p>PPP in South Africa is regarded as a specialized form of procurement, the starting point is the regulatory framework governing public sector procurement in the national and provincial spheres of government. Public procurement is regulated under: Section 217 of the Constitution of South Africa; Section 51(1) (a) (iii) of the Public Finance Management Act 1 of 1999 ("PFMA"); The Preferential Procurement Policy Framework Act 5 of 2000, and the Preferential Procurement Regulations (adopted in 2011); the Broad-based Black Economic Empowerment Act, 2003 and the Promotion of Administrative Justice Act 3 of 2000.</p> <p>In addition to the above regulatory framework, the following legislation regulates the feasibility, procurement and implementation of PPPs: Treasury Regulation 16 to the PFMA (adopted in 2005 and amended in 2007 and 2013), hereinafter the Treasury Regulation; the PPP Manual issued as various National Treasury Practice Notes by the PPP Unit in the National Treasury, including the Standardized PPP Provisions issued as National Treasury PPP Practice Note 1 of 2004, hereinafter the standardized provisions. Our study will be focused on those specialized PPP texts.</p> |
| and provide a link to a government-supported website where the mentioned regulatory framework is available or provide an electronic copy of it: | <p>http://mfma.treasury.gov.za/Legislation/Pages/default.aspx</p> |
| Besides national defense and other matters of national security, does the regulatory framework explicitly prohibit or restrict PPPs in any of the following sectors? Transportation. | No |
| If yes, please provide the relevant legal/regulatory provisions: | n/a |
| Water and irrigation | No |

| | |
|---|--|
| If yes, please provide the relevant legal/regulatory provisions: | n/a |
| Energy generation and distribution | No |
| If yes, please provide the relevant legal/regulatory provisions: | n/a |
| Telecom | No |
| If yes, please provide the relevant legal/regulatory provisions: | n/a |
| Health | No |
| If yes, please provide the relevant legal/regulatory provisions: | n/a |
| Education | No |
| If yes, please provide the relevant legal/regulatory provisions: | n/a |
| Other | No |
| If yes, please provide the relevant legal/regulatory provisions: | n/a |
| Please identify the PPP procuring authorities in country_name and provide their website(s) (if available): | All national and provincial government departments, all constitutional institutions listed in Schedule 1 to the PFMA, all national and provincial public entities listed in schedules 2, 3A, 3B, 3C and 3D to the PFMA and any subsidiary of any such entity. https://www.gtac.gov.za/ and http://www.treasury.gov.za/ |
| In addition to the PPP procuring authorities listed above, is there a specialized government entity that facilitates the PPP program (PPP Unit)? | Yes |
| If yes, please indicate its name, and its website (if available): | The National Treasury's PPP Unit: http://www.ppp.gov.za/Pages/About.aspx |

| | |
|--|--|
| If yes, what are the main responsibilities of the PPP Unit (check all that apply). PPP regulation. | Yes |
| PPP policy guidance and capacity building for other public authorities. | Yes |
| PPP promotion among the public and/or private sectors in national and international forums. | Yes |
| Technical support in implementing PPP projects. | Yes |
| Gatekeeping (approval of PPP projects). | Yes |
| Procurement of PPPs. | No |
| Oversight of PPP implementation. | Yes |
| Other | No |
| please specify: | n/a |
| Preparation of PPPs | Score: 96 |
| Does the Ministry of Finance or Central Budgetary Authority approve the PPP project before launching the procurement process? | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | <p>Pursuant to section 16.4.2 of the Treasury Regulations of March 2005, an institution may not proceed with the procurement phase of a PPP without written treasury approval for the feasibility study on aspects relating to the affordability, value for money and appropriate technical, operational and financial risk transfer. The relevant treasury is defined in the Treasury Regulations as the National Treasury or the authority to which its powers have been delegated by the Minister of Finance in terms of the PFMA.</p> <p>Moreover, according to section 16.6.1, prior to the issuing of procurement documentation to any prospective bidders, the institution must obtain approval from the relevant treasury for the procurement documentation, including at least the main terms of the proposed agreement, the aspects of affordability, value for money and risk transfer.</p> |
| If yes, is a second approval by the | Yes |

| | |
|--|--|
| Ministry of Finance or Central Budgetary Authority required before signing the PPP contract? | |
| If yes, please provide the relevant legal/regulatory provisions (if any): | Pursuant to section 16.7.1 of the Treasury Regulations, after the procurement procedure has been concluded but before the accounting officer or accounting authority of an institution enters into a PPP agreement, he or she must obtain approval from the relevant treasury. |
| Besides the procuring authority and the Ministry of Finance or Central Budgetary Authority, does any other authority(s) approve the PPP project before launching the procurement process? | No |
| If yes, please specify the relevant authority | n/a |
| and provide the relevant legal/regulatory provisions (if any): | n/a |
| If yes, is a second approval by the same authority required before signing the PPP contract? | No |
| If yes, please provide the relevant legal/regulatory provisions (if any): | n/a |
| Does the government integrate the prioritization of PPP projects with all other public investment project prioritization? (e.g. in the context of a national public investment system)? | Yes |

| | |
|--|--|
| If yes, please provide the relevant legal/regulatory provisions (if any): | PPP manual (module 4) requires the procuring authority to check whether the project is in accordance with the institution's policy and priorities in the need analysis: to be in an institution's best interests, a project needs to align with the institution's policy and priorities. |
| If yes, which of the following options best describes the way your government prioritizes PPP projects? (Please select only one). The regulatory framework provides for the inclusion of PPPs in the national public investment system and/or details a specific procedure to ensure the consistency of PPPs with other public investment priorities. | No |
| If yes, please specify: | n/a |
| The regulatory framework prescribes the need for PPPs to be consistent with all other investment priorities without establishing a specific procedure to achieve that goal. | Yes |
| The regulatory framework does not include any provisions. | No |
| Other | No |
| please specify: | n/a |
| Among the PPP projects procured within the last two (2) years, how many of them were prioritized along with all other public investment | Most of the projects |

| | |
|---|--|
| projects? Please elaborate: | |
| Which of the following assessments are conducted when identifying and preparing a PPP? (check all that apply): 10.1. Socio-economic analysis (cost-benefit analysis of the socio-economic impact of the project) | Yes |
| Relevant legal/regulatory provision (if any) | The PPP Manual (Module 4: Feasibility Study) prescribes various stages in the feasibility study of a PPP. One of the stages, after the value assessment is completed, is to conduct an economic valuation in order to understand if the project will be economically viable and to give a clear economic rationale for the project. |
| Is there a specific methodology? | Yes |
| If yes, elaborate. | PPP manual (module 4 p.40) requires to (i) Give a clear economic rationale for the project. (ii) Identify and quantify the economic consequences of all financial flows and other impacts of the project. (iii) Detail the calculation or shadow prices/opportunity costs for all inputs and outputs (iv) Identify an appropriate 'no-project' scenario and Identify the economic benefits the opportunity costs of a 'no-project' scenario. (v) Provide a breakdown of the economic costs and benefits of the project into its financial costs and benefits, and various externalities. (vi) Do a detailed stakeholder analysis, including the project entity, private sector entity, government, and others. |
| Affordability assessment, including the identification of the required long term public commitments (explicit and implicit) | Yes |
| Relevant legal/regulatory provision (if any) | Section 16.4.1.(c) of the Treasury Regulation indicates that among other aspects the feasibility study to be approved by the Treasury must assess whether the agreement will " (...) ii) be affordable for the institution" |
| Is there a specific methodology? | Yes |
| If yes, elaborate | Module 4 (Part 6) of the PPP Manual requires to Demonstrate affordability and indicates 2 steps as follows : Determine the institutional budget available for the project and Compare the risk-adjusted PPP reference model with the available institutional budget. |
| Risk identification, allocation and assessment (risk matrix) | Yes |

| | |
|--|---|
| Relevant legal/regulatory provision (if any) | According to section 16.4.1 of the Treasury regulation, to determine whether a proposed PPP is in the best interests of an institution, the accounting officer or the accounting authority must undertake a feasibility study that (c) assesses whether the agreement will – (iii) transfer appropriate technical, operational and financial risk to the private party. |
| Is there a specific methodology? | Yes |
| If yes, elaborate | Module 4 of the PPP manual (p.23) prescribes to construct the risk-adjusted PSC model in 8 steps : Step 1: Identify the risks ; Step 2: Identify the impacts of each risk Step; 3: Estimate the likelihood of the risks occurring; Step 4: Estimate the cost of each risk; Step 5: Identify strategies for mitigating the risks; Step 6: Allocate risk Step; 7: Construct the risk matrix; Step 8: Construct the risk-adjusted PSC model; Step 9: Preliminary analysis to test affordability |
| Financial viability or bankability assessment. | Yes |
| Relevant legal/regulatory provision (if any) | A Financial viability or bankability assessment is not required as a standalone study. However, the PPP Manual (Module 4: Feasibility Study) includes in both the value assessment and the economic valuation assessments (Stages 4 and 5) express references to financial options (e.g. the economic valuation must "identify and quantify the economic consequences of all financial flows and other impacts of the project") in a way that a financial viability or bankability assessment is covered. |
| Is there a specific methodology? | Yes |
| If yes, elaborate | PPP Manual, Module 4, Part 7: Initial value-for-money test gives indications about how to assess financial viability. |
| Comparative assessment to evaluate whether a PPP is the best option when compared to other procurement alternatives | Yes |
| Relevant legal/regulatory provision (if any) | Treasury Regulation 16.4.1. (c) Indicates that among other aspects the feasibility study to be approved by the Treasury must assess whether the agreement will "(...) i) provide value for money". The PPP Manual (Module 4: Feasibility Study) provides a very detailed regulation of the value assessment (Stage 4) whose goal is to determine whether a PPP is the best procurement choice for the project. |
| Is there a specific methodology? | Yes |
| If yes, elaborate | Module 4 of the PPP Manual identifies steps to follow for the solution options analysis : Step 1: List all the solution options the institution has considered; Step 2: Evaluate each solution option including among others (i) Financial impacts (ii) Funding and affordability (iii) Risk (iv) Market capability and appetite (v) Qualitative factors (vi) Early considerations of suitability for a PPP; Step 3: Choose the best solution option. |
| Market assessment (showing evidence of enough interest in the market for the project) | Yes |

| | |
|--|--|
| Relevant legal/regulatory provision (if any) | According to the PPP Manual (Module 4), the solution options analysis should include a Market capability and appetite assessment (page 12). |
| Is there a specific methodology? | Yes |
| If yes, elaborate | Module 4 (p12) of the PPP Manual requires to assess each solution option using the following considerations: Is there the capability within the private sector to deliver the required services? Will the service delivery be sufficiently reliable? Is it possible that such delivery would provide value for money? What are the BEE enterprises in the sectors and are BEE charters being implemented? Are there local suppliers for this service? What market competition is there for this type of project? Do the output specifications restrict which suppliers can be used? It may be appropriate to use a form of market testing, possibly an Expression of Interest. |
| Among the PPP projects procured within the last two (2) years, for how many of them were all of the required assessments conducted? Please elaborate: | All of the projects |
| Does the procuring authority include a draft PPP contract in the request for proposals? | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | According to section 16.5.1 of the Treasury Regulation: "Prior to the issuing of procurement documentation for a PPP to any prospective bidders, the institution must obtain approval from the relevant treasury for the procurement documentation, including a draft PPP agreement". |
| If no, please elaborate (provide examples): | n/a |
| Have standardized PPP model contracts and/or transaction documents been developed? | Yes |
| If yes, please specify and provide a government-supported website where the mentioned standards are available or provide an electronic copy of them: | http://www.ppp.gov.za/Pages/Governance.aspx?RootFolder=%2fLegal%20Aspects%2fStandardised%20PPP%20Provisions&FolderCTID=&View={33F91A9E-68FB-40CC-B511-45D91A7CC95B} This website provides for Standardized PPP provisions |

| | |
|--|--|
| Does the procuring authority obtain the permits necessary to develop and operate the PPP project before calling for tenders in any of the following areas? Environmental permits. | <p>Yes</p> |
| If yes, please provide the relevant legal/regulatory provisions (if any): | <p>Practice</p> |
| Urban and zoning permits. | <p>No</p> |
| If yes, please provide the relevant legal/regulatory provisions (if any): | <p>n/a</p> |
| Other permits. | <p>No</p> |
| If yes, please provide the relevant legal/regulatory provisions (if any): | <p>n/a</p> |
| Does the procuring authority make available to PPPCo the necessary land or right of way to develop the PPP project (if any)? Land | <p>Yes</p> |
| If yes, please provide the relevant legal/regulatory provisions (if any): | <p>As indicated in sections 11.2.2 and 11.2.3 of the PPP standardized provisions, if the Project will involve the Institution accessing and using the site then the Institution should seek legal advice prior to commencing the procurement process to ensure that the Institution's rights of access and use are properly protected after the Institution Asset is made available to the Private Party.</p> <p>In a particular project the Institution may already own the land and improvements. In this case, it can transfer an interest in the land and improvements to the Private Party (for instance by way of a lease), while at the same time securing for itself an interest in the land (by way of a sub-lease) which allows it access to and use of the land and improvements for the Project Term of the PPP Agreement.</p> |
| If no, please elaborate (provide explanation): | <p>n/a</p> |
| Does the procuring authority make available to PPPCo the necessary land | <p>Yes</p> |

| | |
|---|---|
| or right of way to develop the PPP project (if any)? Right of way | |
| If yes, please provide the relevant legal/regulatory provisions (if any): | According to section 11.2.2 of the PPP standardized provisions, if the project will involve the Institution accessing and using the site then the Institution should seek legal advice prior to commencing the procurement process to ensure that the Institution's rights of access and use are properly protected after the Institution Asset is made available to the Private Party. |
| If no, please elaborate (provide explanation): | n/a |
| Does the regulatory framework establish any exceptions where the preparation process described above does not apply or allows for a "fast track" procedure? | Yes |
| If yes, please provide the relevant legal/regulatory provisions: | According to section 16.11.1 of the Treasury Regulations, The National Treasury may under certain terms and conditions and upon written application from an institution, exempt that institution from the application of this regulation or from any commercial transaction that falls within the definition of "public private partnership". |
| What is the average number of calendar days that the procuring authority spends on each of the following activities to prepare a PPP project? Conducting the required assessments: | 274 |
| Obtaining the required approvals from other relevant authorities: | 105 |
| Preparing the draft PPP contract: | 90 |
| Obtaining any permits, land and/or right of way that the procuring authority must provide according to the regulatory framework: | 242.5 |

| PPP Procurement | Score: 80 |
|---|---|
| Are the bid evaluation committee members required to meet specific qualifications? | <p>Yes</p> |
| If yes, please specify and provide the relevant legal/regulatory provisions (if any) | <p>Treasury Regulation 16A.6.2 (b) states that the supply chain management system must provide for "the establishment, composition and functioning of bid specification, evaluation and adjudication committees".</p> <p>In terms of the PPP Manual (Module 5: PPP Procurement) it is recommended that the following evaluation teams be established: technical evaluation teams (TETs) with specialist focuses e.g. technical, financial, etc.; an evaluation co-ordination committee (ECC) whose role it is to co-ordinate the TETs during their evaluation and to compile the total project evaluation notes and reports into a single recommendation on process and outcome to pass through to the PEC; and the Project Evaluation Committee (PEC) whose role it is to (a) accept bids as complete and compliant, (b) receive and evaluate the report and recommendations of the ECC (c) score bids, (d) decide on a BAFO process, and (e) select a preferred and a reserve bidder.</p> |
| If no, please elaborate (provide examples): | <p>n/a</p> |
| If yes, which of the following options best describes the required qualifications of the committee members? (Please select only one). The regulatory framework details the qualifications required and/or the specific membership of the bid evaluation committee. | <p>No</p> |
| If yes, please specify: | <p>n/a</p> |
| The regulatory framework requires generally sufficient qualification without detailing the specific qualifications required to be a member of the bid | <p>Yes</p> |

| | |
|---|---|
| evaluation committee. | |
| The regulatory framework does not include any provisions. | No |
| Other | No |
| please specify: | n/a |
| Does the procuring authority issue a public procurement notice of the PPP? | Yes |
| If yes, please specify the means of publication and provide the relevant legal/regulatory provisions (if any): | Treasury Regulation 16A.6.3 establishes that the accounting authority must ensure that "(...) c) bids are advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer or accounting authority may determine" PPP manual module 5 prescribes to advertise and distribute the RFQ: The method of RFQ distribution must follow the institution's procurement plan. This typically involves advertising the project in relevant publications, in the Government Gazette, on the institution's website, and by making press statements about the project, calling on interested parties to collect copies of the RFQ from the institution and/or downloading these from its website. It may include an open briefing session for potential bidders to introduce the project and to stimulate private sector interest. Any such public briefings should be careful not to present any information that is not contained in the RFQ document. |
| If yes, is the public procurement notice published online? | Yes |
| If yes, please specify the website: | http://www.etenders.gov.za/ http://www.ppp.gov.za/Pages/OtherCallforBids.aspx?RootFolder=%2fOther%20Call%20for%20Bids%2f2014&FolderCTID=&View={D7E1F776-109D-4127-B199-5ADB83AD1522} |
| Does the procuring authority grant the potential bidders a minimum period of time to submit their bids? | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | According to section 16A.6.3(c) of the Treasury Regulation, the accounting officer or accounting authority must ensure that (...) bids are advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer or accounting authority may determine; The PPP Manual (Module 5, page 10) provides as follows: "There is a direct correlation between the time allowed for preparing bids and the quality of the bids. ... Accordingly, give bidders enough time to meet all the bid requirements. Ascertain what bidders view to be adequate time for preparing a bid during or after pre-qualification." |
| and the time in calendar days : | 21 |

| | |
|---|---|
| Do the tender documents detail the stages of the procurement process? | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | <p>PPP Manual: Module 5, page 23, provides that the RFQ document should contain information on the procurement process, including the "stages and timelines". In the case of large, complex or innovative PPP projects, the procuring authority may decide to allow pre-qualified bidders to participate in the preparation of the final RFP. The procuring authority's procurement plan must have been communicated to the pre-qualified bidders, must clearly identify the two stages, and set out the intention of and rules for each. PPP Manual: Module 5, page 26.</p> <p>PPP Manual: Module 5, page 28, provides that the general information to bidders must include information on the procurement framework and timelines. The RFP must outline how the procurement will be carried out in terms of processes and the timing of the processes. The RFP must also spell out the governing legislation and regulations on the procurement, with a statement about the project's compliance with these requirements to date. The procurement processes must be comprehensively described, including any parallel processes, such as securing approvals and consents.</p> |
| If no, please elaborate (provide examples): | n/a |
| Does the procurement process include a pre-qualification stage to select a number of qualified bidders to present the full proposal? | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | <p>Pursuant to section 16.6.4 of the Treasury regulation, the procurement procedure must include – (a) an open and transparent pre-qualification process;</p> <p>Furthermore, according to the PPP Manual: Module 5, page 19 - 20, National Treasury considers it to be best practice for an institution to limit the number of private parties eligible to participate in the PPP procurement by carrying out a pre-qualification exercise. Only pre-qualified bidders will be allowed to enter the RFP stage.</p> |
| If yes, do the tender documents specify the prequalification criteria in order to make them available to all of the bidders? | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | Module 5 PPP manual p.24 requires that the Request for Qualification indicate the evaluation criteria and methodology. |
| Among the PPP procurement processes conducted within | Most of the projects |

| | |
|--|--|
| <p>the last two (2) years that had a prequalification stage, how many of them included prequalification criteria in the tender documents? Please elaborate</p> | |
| <p>Can interested parties/potential bidders submit questions to clarify the public procurement notice and/or the request for proposals?</p> | <p>Yes</p> |
| <p>If yes, please provide the relevant legal/regulatory provisions (if any):</p> | <p>PPP Manual: Module 5, page 55, provides as follows: The bidders may request further clarification after they have reviewed the RfBAFO and roadmap. They may submit questions to the institution in a one-on-one meeting or in writing. Meetings may also be held jointly between the institution and both bidders, for all functional areas such as legal, financial and technical. The institution must reserve the right to refuse to answer any question that would compromise the competitive nature of the process. A bidder may request that a question be asked in confidence, but the institution reserves the right to distribute the questions and answers to the other bidder if they are common to both bidders. Minutes must be kept of all meetings, both joint and one-on-one.</p> |
| <p>If yes, does the procuring authority disclose those questions and clarifications to all of the potential bidders?</p> | <p>Yes</p> |
| <p>If yes, please provide the relevant legal/regulatory provisions (if any):</p> | <p>PPP Manual Module 5, page 50: A bidder may request that a question be asked in confidence, but the institution reserves the right to distribute the questions and answers to the other bidder if they are common to both bidders. Minutes must be kept of all meetings, both joint and one-on-one." National Treasury PPP Practice Note No. 06 Of 2004 (page 44): "Formal correspondence between bidders and the institution must always be in writing. Questions from bidders should indicate how confidential the response needs to be. Confidential answers only go to the relevant bidder; others go to all bidders together with the question".</p> |
| <p>Among the PPP procurement processes conducted within the last two (2) years where questions were submitted, in how many were the questions and</p> | <p>All of the projects</p> |

| | |
|---|----------------------|
| <p>clarifications disclosed to all of the potential bidders? Please elaborate:</p> | |
| <p>Besides questions and clarifications, can the procuring authority conduct other types of dialogue with the potential bidders?</p> | No |
| <p>If yes, please specify and provide the relevant legal/regulatory provisions (if any):</p> | n/a |
| <p>If yes, does the procuring authority disclose the content and the results of the dialogue to all of the potential bidders?</p> | n/a |
| <p>If yes, please provide the relevant legal/regulatory provisions (if any):</p> | n/a |
| <p>Among the PPP procurement processes conducted within the last two (2) years where any other type of dialogue was conducted, in how many was the content and the result of the dialogue disclosed to all of the potential bidders? Please elaborate:</p> | Most of the projects |
| <p>Does the procuring authority require the bidders to prepare and present a financial model with their proposals ?</p> | Yes |

| | |
|---|---|
| If yes, please provide the relevant legal/regulatory provisions (if any): | According to PPP Manual: Module 5, page 35, the RFP must require bidders to submit financial models that allow the institution to thoroughly interrogate the proposal in detail. |
| If no, please elaborate (provide examples): | n/a |
| Does the procuring authority evaluate the proposals strictly and solely in accordance with the evaluation criteria stated in the tender documents? | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | Supreme court of appeal of south Africa, Westinghouse v Eskom Holdings (476/2015) [2015] ZASCA 208 :The Board Tender Committee (BTC) of Eskom had taken the decision to award the tender to Areva for various strategic considerations that fell outside the bid evaluation criteria. The Gauteng Local Division had considered that the strategic considerations were relevant to the award and that the decision was thus not unlawful. It did not take into account that Westinghouse had not known what these criteria were before the decision was made and had thus not had an opportunity to deal with them. The court also did not take into account that a tender process must be procedurally fair, and that a bid should be evaluated only against the bid criteria contained in the invitation to tender. |
| Among the PPP procurement processes conducted within the last two (2) years, in how many of them was the evaluation of the bidders conducted in accordance with the criteria stated in the tender documents? Please elaborate: | All of the projects |
| In the case where only one proposal is submitted (sole proposals), does the procuring authority follow any special procedure before awarding the PPP? | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | The PPP Manual (Module 5 - PPP Procurement) states regarding the number of pre-qualified bidders: Where only two or even only one bidder pre-qualifies, the project is placed at a great disadvantage, because competitive bidding is essential for getting value for money. In principle, under South African procurement law – and subject to the |

| | |
|--|--|
| | institution's procurement policy – it is not necessary to cancel a bidding process if only one bid is made. However, this may be an indication that the project has not been well structured or conceived and the institution should follow some guidance. |
| If yes, what of the following options best describes the way the procuring authority deals with sole proposals? (Please select only one). The regulatory framework details a specific procedure that the procuring authority must follow before awarding a PPP contract where only one proposal is submitted. | Yes |
| Please specify: | PPP Manual (Module 5 - PPP Procurement) requires to ascertain the likely reasons for the limited interest, and revisit the RFQ documentation and the feasibility study to see what assumptions could be revised to increase market interest. Any changes in the feasibility study must be evaluated for changes in affordability, value for money and risk transfer. <ul style="list-style-type: none"> - Secure a revised TA: if any changes to assumptions in the feasibility study are made. - Carry out a second pre-qualification exercise if the project assumptions have been changed and if a revised TA has been secured. - If the feasibility study is not revised: carry out the pre-qualification exercise again, with a wider circulation to attract a suitable number of bidders, or ; continue with the limited number of pre-qualified bidders, but with a revised procurement plan that uses the PSC prepared in the feasibility study as an active 'competitor' for the bids. |
| The regulatory framework considers sole proposals valid as long as they meet the conditions outlined in the tender documents. | No |
| The regulatory framework does not allow the award of a PPP contract if only one proposal is submitted. | No |
| The regulatory framework does not include any provisions. | No |
| Other | No |
| please specify: | n/a |

| | |
|---|---|
| In practice, what is the average number of calendar days between the initial publication of the PPP public procurement notice and the award of the PPP? Number of calendar days: | 342 |
| Does the procuring authority publish the award notice? | Yes |
| If yes, please specify the means of publication and provide the relevant legal/regulatory provisions (if any): | Treasury Regulation 16A6.3(d) provides that "awards are published in the Government Tender Bulletin and other media by means of which the bids were advertised"; |
| If yes, is the public procurement award notice published online? | Yes |
| If yes, please specify the website: | www.etenders.gov.za/ |
| Does the procuring authority provide all the bidders with the result of the PPP procurement process? | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | PPP Manual: Module 5, page 25 provides that, upon choosing the pre-qualified bidders, communicate with both unsuccessful and pre-qualified bidders as soon as possible, and publicly announce the prequalified bidders. It is important to communicate an appropriate level of detail on the decision to unqualified bidders, complying with administrative law requirements. |
| If no, please elaborate (provide examples): | n/a |
| If yes, does the notification of the result of the PPP procurement process include the grounds for the selection of the winning bid? | No |
| If yes, please provide the relevant legal/regulatory provisions (if any): | n/a |

| | |
|--|--|
| Does the regulatory framework restrict or regulate in any way negotiations with the selected bidder between the award and the signature of the PPP contract? | <p>Yes</p> |
| If yes, please provide the relevant legal/regulatory provisions: | <p>National Treasury PPP Practice Note 04 of 2004 states that the final terms of the contract may not deviate materially from the original terms of reference or terms of the draft contract, taking into account the transaction advisor's proposed changes which will have been submitted by the transaction advisor as part of the bid.</p> |
| Among the PPP procurement processes conducted within the last two (2) years, in how many of them were the terms and conditions changed between the award and the signature of the PPP contract? Please elaborate: | <p>Some of the projects</p> |
| Does the procuring authority publish the PPP contract? | <p>No</p> |
| If yes, please specify the means of publication and provide the relevant legal/regulatory provisions (if any): | <p>n/a</p> |
| If yes, is it published online? | <p>n/a</p> |
| If yes, please specify the website: | <p>n/a</p> |
| Does the regulatory framework establish any exceptions where the procurement process described above does not apply or allows for a "fast track" procedure? | <p>Yes</p> |
| If yes, please provide the relevant | <p>In terms of Regulation 16.10.1 of the Treasury Regulations: 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</p> |

| | |
|---|--|
| legal/regulatory provisions: | PPP or in general, from complying with any or all of the provisions of this regulation 16. Treasury Regulation 16A6.4 states that, if in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority. |
| Unsolicited proposals | Score: 75 |
| Does the regulatory framework allow for the submission of unsolicited proposals? (if no, skip to section F) | Yes |
| If yes, please provide the relevant legal/regulatory provisions: | National Treasury Practice Note No 11 of 2008/2009 is related to unsolicited Proposals |
| If yes, please specify, to the best of your knowledge, the percentage of PPP investments in your country approved as unsolicited proposals during the last five (5) years: | 0 |
| Does the procuring authority conduct an assessment to evaluate unsolicited proposals? | Yes |
| If yes, please specify and provide the relevant legal/regulatory provisions (if any): | Paragraph 4.2.2 of the Practice Note 11 of 2008/2009 (Practice Note 11) provides that if the unsolicited proposal is a PPP, the accounting officer or accounting authority must comply with the requirements of Treasury Regulation 16 and the Practice notes relevant thereto, as read with paragraph 5.1 of this practice note (that regulates specialties for the bidding process for unsolicited proposals). |
| If yes, does it ensure that the unsolicited proposal is consistent with the existing government priorities? | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | If the unsolicited proposal is a PPP it must comply with all requirements of regular PPPs, it would also be prioritized along other investments. PPP manual (module 4) requires the procuring authority to check whether the project is in accordance with the institution's policy and priorities in the need analysis: to be in an |

| | |
|---|--|
| | institution's best interests, a project needs to align with the institution's policy and priorities. |
| If yes, which of the following options best describes how unsolicited proposals are evaluated against existing government priorities? (Please select only one). The regulatory framework details a specific procedure to ensure the consistency of PPPs with other public investment priorities. | No |
| If yes, please specify: | n/a |
| The regulatory framework requires unsolicited proposals to be among the existing government priorities without establishing specific procedures to achieve that goal. | Yes |
| The regulatory framework does not include any provisions. | No |
| Other | No |
| please specify: | n/a |
| Among the unsolicited proposals approved within the last two (2) years, how many of them were a part of the existing government priorities? Please elaborate: | n/a |
| Does the procuring authority initiate a competitive PPP procurement | Yes |

| | |
|---|--|
| procedure when proceeding with the unsolicited proposal? | |
| If yes, please provide the relevant legal/regulatory provisions (if any): | According to the National Treasury Practice Note No 11 (5.), if the unsolicited proposal agreement is concluded, then the institution must prepare and issue bid documents. |
| Does the procuring authority grant a minimum period of time to additional prospective bidders (besides the proponent) to prepare their proposals? | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | <p>Pursuant to section 16A.6.3(c) of the Treasury Regulation, the accounting officer or accounting authority must ensure that (...) bids are advertised in, at least, the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for a shorter period of time, as determined by the accounting officer or accounting authority.</p> <p>PPP Manual: Module 5, page 10 provides as follows: "There is a direct correlation between the time allowed for preparing bids and the quality of the bids. ... Accordingly, give bidders enough time to meet all the bid requirements. Ascertain what bidders view to be adequate time for preparing a bid during or after pre-qualification."</p> |
| and the time in calendar days: | 21 |
| Does the procuring authority use any of the following mechanisms to reward/compensate the presentation of unsolicited proposals? (check all that apply): Access to the best and final offer. | Yes |
| Developer's fee (reimbursing the original proponent for the project development cost). | Yes |
| Bid bonus. | No |
| Swiss challenge (If unsuccessful, the original proponent has the option to match the winning | No |

| | |
|--|---|
| bid and win the contract). | |
| Other | No |
| please specify: | n/a |
| Please provide the relevant legal/regulatory provisions (if any): | <p>According to Policy of the South African national roads agency in respect of unsolicited proposals, May 1999: The two most advantageous Tenders will be selected by the Agency, from whom Best and Final Offers will be invited. Should the Scheme Developer's Tender not be among these, he will, however, be afforded the opportunity to also submit a Best and Final Offer, which will be evaluated along with those of the Selected Tenderers.</p> <p>National Treasury Practice Note No 11 5.1.1 (e) moreover indicates that reimbursing the proponent should the proponent not be awarded the contract for the provision of the product or service at the conclusion of the competitive bidding process. The quantum of reimbursement shall be those audited costs of the proponent from the point in time where the accounting officer or accounting authority was solicited by the proponent to the conclusion of the competitive process, in terms of the unsolicited proposal agreement.</p> |
| PPP Contract Management | Score: 79 |
| Has the procuring or contract management authority established a system to manage the implementation of the PPP contract? | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any) | <p>In terms of Regulation 16.7.1 of the Treasury Regulations: 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:</p> <ul style="list-style-type: none"> (a) measuring the outputs of the PPP agreement; (b) monitoring the implementation of the PPP agreement 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. |
| If yes, which of the following tools does it include (check all that apply)? Establishment of a PPP contract management team. | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | PPP Manual (module 6 p7) states that the project officer's main responsibilities in relation to managing the PPP are to appoint a PPP agreement management team with the |

| | |
|--|--|
| | necessary technical skills to administer institutional obligations and protect institutional rights in the PPP agreement. |
| Participation of the members of the PPP contract management team in the PPP procurement process. | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | Practice |
| Possibility to consult with PPP procurement experts when managing the PPP contract. | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | Page 9 of PPP Manual - Module 6 provides for outside expertise: where contract management expertise is brought in from outside the institution, either on an ad hoc basis or under a long-term arrangement, it will be important to ensure that commercially confidential information held by the institution is protected. The terms of reference, timeframes and the basis of fees for such advisors must be clearly defined to ensure that management of the PPP agreement rests with the institution. Any contract with independent professional advisors providing contract management services must contain clear arrangements for reporting the results of performance monitoring to the institution and the private party. |
| Elaboration of a PPP implementation manual or an equivalent document. | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | PPP manual module 6 p.7-8 states that the project officer's main responsibilities in relation to managing the PPP agreement are to: develop and maintain the PPP agreement management manual and related PPP agreement administration systems. |
| Other | No |
| please specify: | n/a |
| If there is a contract management team, in how many of the PPP projects procured within the last two (2) years did the management system and tools fully inform the contact | Some of the projects |

| | |
|---|---|
| management team? Please elaborate: | |
| Does the procuring or contract management authority establish a monitoring and evaluation system of the PPP contract? | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | Pursuant to section 16.7.1 of the Treasury Regulations, the accounting officer or accounting authority is responsible for ensuring that a PPP agreement is properly enforced, and must maintain mechanisms and procedures as approved in Treasury Approval III for – (a) measuring the outputs of the PPP agreement; (b) monitoring and regulating the implementation of, and performance in terms of, 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. |
| If yes, which of the following tools does it include (check all that apply)? PPPCo must provide the procuring or contract management authority with periodic operational and financial data. | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | PPP Manual module 6 p.26 indicates that the performance management plan should be based on the performance management model and include details of: the reporting obligations that will be imposed on the private party in relation to self-monitoring |
| The procuring or contract management authority must periodically gather information on the performance of the PPP contract. | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | The project officer should ensure that these mechanisms are implemented after the signing of the PPP agreement. In particular, performance monitoring systems should be established to enable the PPP agreement management team to: regularly check progress to ensure that project milestones are met, including site visits where necessary ; hold regular progress meetings with the private party and consider performance reports ; conduct regular and random inspections of the supplied goods and services ; check that all performance conditions and clauses in the PPP agreement are acted upon ; develop effective mechanisms for obtaining feedback from end users and other key stakeholders ; review third party monitoring reports ; inspect deliverables to ensure inferior goods or services are not accepted ; maintain comprehensive documentation on performance monitoring. (PPP Manual module 6 p.26) |

| | |
|---|--|
| The procuring or contract management authority must establish a risk mitigation mechanism. | Yes |
| If yes, please provide the relevant legal/regulatory provisions (if any): | PPP Manual module 6 p.22 (4) requires to establish risk mitigation procedures while the risk management plan will explain the mechanisms and procedures that the institution will use to manage, monitor and mitigate risk, the project officer should ensure that these mechanisms are put in place after the signing of the PPP agreement. Two highly effective risk mitigation instruments are: the risk register and the summary risk profile. |
| The PPP contract performance information must be available to the public. | No |
| If yes, please provide the relevant legal/regulatory provisions (if any): | n/a |
| Other | No |
| please specify: | n/a |
| Is PPP contract performance information publicly available online? | n/a |
| If yes, please specify the website: | n/a |
| Does the regulatory framework expressly regulate a change in the structure (i.e. stakeholder composition) of PPPCo? | Yes |
| If yes, please provide the relevant legal/regulatory provisions: | Pursuant to section 16.8.2 of the Treasury regulation, 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. Part O of the Standardized PPP Provisions is related to step-in, by Institution (72), by the lenders (73) and clause 74 provides for direct agreement. Section 83.3 is related to Changes in Shareholding and Control. |
| If yes, which of the following circumstances are specifically regulated? (check all that apply): Any change in PPPCo | Yes |

| | |
|---|--|
| <p>during an initial period (e.g. construction and first five years of operation).</p> | |
| <p>If yes, please provide the relevant legal/regulatory provisions:</p> | <p>Section 83.3 of the Standardized PPP Provisions states that (b) [[Prior to the expiry of a period of [x] months commencing on the Service Commencement Date], the Private Party shall procure that there is no sale, assignment, cession, transfer, exchange, renunciation or other disposal of the whole or any part of the Equity and/or the Shareholder Loans, nor any dilution of the Equity, of [x] (or of any company of which [x] is a subsidiary) without the prior written approval of the Institution.557]</p> |
| <p>In case of a change affecting the controlling interest, the replacing entity must meet the same technical qualifications as the original operator.</p> | <p>No</p> |
| <p>If yes, please provide the relevant legal/regulatory provisions:</p> | <p>n/a</p> |
| <p>Flexibility to substitute non-controlling interest after the initial period.</p> | <p>Yes</p> |
| <p>If yes, please provide the relevant legal/regulatory provisions:</p> | <p>Section 83.3 of the Standardized PPP Provisions indicates that (b) [[Prior to the expiry of a period of [x] months commencing on the Service Commencement Date], the Private Party shall procure that there is no sale, assignment, cession, transfer, exchange, renunciation or other disposal of the whole or any part of the Equity and/or the Shareholder Loans, nor any dilution of the Equity, of [x] (or of any company of which [x] is a subsidiary) without the prior written approval of the Institution.557]</p> |
| <p>Does the regulatory framework expressly regulate the modification or renegotiation of the PPP contract (once the contract is signed)?</p> | <p>Yes</p> |
| <p>If yes, please provide the relevant legal/ regulatory provisions:</p> | <p>Pursuant to section 16.8.2 of the Treasury Regulations, 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.</p> |
| <p>If yes, which of the following circumstances are specifically regulated? (check</p> | <p>No</p> |

| | |
|--|---|
| all that apply): A change in the scope and/or object of the contract. | |
| If yes, please provide the relevant legal/regulatory provisions: | n/a |
| A change in the risk allocation of the contract. | Yes |
| If yes, please provide the relevant legal/regulatory provisions: | According to section 16.8.2 of the Treasury regulation, the relevant treasury will approve a material amendment only if it is satisfied that the PPP agreement, if so amended, will continue to provide – (c) substantial technical, operational and financial risk transfer to the private party. |
| A change in the investment plan or duration of the contract. | No |
| If yes, please provide the relevant legal/regulatory provisions: | n/a |
| Does the regulatory framework expressly regulate the following circumstances that may occur during the life of the PPP contract? (check all that apply): Force Majeure. | Yes |
| If yes, please provide the relevant legal/regulatory provisions: | Standard Clause Section 48 of the Standardized PPP Provisions indicates how parties should act in case of force majeure: notice to the other party, effect on the payment, modification on the PPP agreement and end of a force majeure event. |
| Material Adverse government action. | Yes |
| If yes, please provide the relevant legal/regulatory provisions: | Section 49 of the Standardized PPP Provisions is related to unforeseeable discriminatory government conduct. “Unforeseeable Conduct” is defined as occurring if, after the Signature Date, the Institution or any Responsible Authority takes any action (including the introduction, application, or change of any law, regulation, by-law or order having the force of law) or fails to carry out its obligations as prescribed by law. |
| Change in the Law. | Yes |
| If yes, please provide the relevant legal/regulatory provisions: | According to Section 49 of the Standardized PPP Provisions, a change of Law is treated as an unforeseeable conduct, a standard clause indicates compensation and/or relief in case of negative effects and payment if effects are positive. A written notice is required. |
| Refinancing. | Yes |

| | |
|--|---|
| If yes, please provide the relevant legal/regulatory provisions: | Section 76 to 81 of the Standardized PPP Provisions contain standard clauses regarding Refinancing with key principles, institution approval, exemptions and method of calculating, sharing and paying refinancing gains. |
| Other. | No |
| If yes, please specify and provide the relevant legal/regulatory provisions: | n/a |
| Does the regulatory framework establish a specific dispute resolution mechanism for PPPs? | Yes |
| If yes, please specify and provide the relevant legal/regulatory provisions | Pursuant to section 16.8.1 of the Treasury regulations, the accounting officer or accounting authority is responsible for ensuring that a PPP agreement is properly enforced, and must establish mechanisms and procedures for – (c) resolving disputes and differences with the private party. PPP standardized provisions provide a standard clause for dispute resolution in general (86) and one for Fast-track Dispute Resolution (86.2). |
| If yes, which of the following options best describes the dispute resolution mechanism for PPPs? (Please select only one). The regulatory framework details specific resolution mechanisms for disputes arising during the implementation of the PPP. | No |
| If yes, please specify: | n/a |
| The regulatory framework prescribes that a dispute resolution mechanism should be regulated in the contract. | Yes |
| The regulatory framework provide the parties with recourse to arbitration but no | No |

| | |
|--|---|
| other alternative dispute resolution mechanism. | |
| Other | No |
| please specify: | n/a |
| Does the regulatory framework allow for the lenders to take control of the PPP project (lender step-in right) if either PPPCo defaults or if the PPP contract is under threat of termination for failure to meet service obligations? | Yes |
| If yes, please provide the relevant legal/regulatory provisions: | Part O of the Standardized PPP provision contains standard clauses for step in by institution, by landers and by standard direct agreement. |
| If yes, which of the following options best describes the lender step-in right? (Please select only one). The regulatory framework expressly regulates the lender step-in rights. | No |
| If yes, please specify: | n/a |
| The regulatory framework prescribes that the lender step-in rights should be regulated in the contract. | No |
| The regulatory framework prescribes that a direct agreement should be signed with the lenders. | Yes |
| Other | No |
| please specify: | n/a |
| Does the regulatory framework expressly establish | Yes |

| | |
|---|---|
| the grounds for termination of a PPP contract? | |
| If yes, please specify: | A Project may be terminated prior to the Expiry Date for any one of the following reasons: Institution Default; Private Party Default; Force Majeure; or Corrupt Acts. |
| and provide the relevant legal/regulatory provisions: | Section 60 of the National Treasury Standardized PPP Provisions |
| If yes, does the regulatory framework also establish the consequences for the termination of the PPP contract? | Yes |
| If yes, please provide the relevant legal/regulatory provisions: | <p>According to the Standardized provisions (clause 61), When either Party has exercised its right to terminate the PPP Agreement, the PPP Agreement will be terminated in accordance with its provisions and the Parties will generally no longer have any rights or obligations under this PPP Agreement. The PPP Agreement may, however, provide for certain provisions to survive its termination (such as certain indemnities) and the Parties will still have rights and obligations in respect thereof post termination. Also all rights and obligations of the Parties that have accrued prior to the termination may be enforced post termination. There are also certain rights and obligations that arise only as a result of termination of the PPP Agreement and these must be clearly provided for and must also be expressed to survive termination of the PPP Agreement. These should include the Private Party’s obligation to clear the Project Site, the procedure for transfer of the Project Assets to the Institution⁴¹⁵ and the Private Party’s obligations to assist in the transitional arrangements in relation to a new Private Party if the Institution decides to appoint one.</p> <p>The standard clause provides rules for : (a) Termination (b) Continued Effect – No Waiver (c) Continued Performance (d) Transfers to Institution of Assets, Contracts, etc. on Termination Only (e) Transfers to Institution on Termination or Expiry (f) Transitional Arrangements (g) Continuing Obligations.</p> |
| Are you aware of any reforms (in practice or in laws, regulations, policies, etc.) related to PPPs that: Took place in 2015, are ongoing and/or are planned to be adopted BEFORE June 1, 2016? | Yes |
| Please describe: | National Treasury Instruction 1 of 2015/2016, Standard for Infrastructure Procurement and Delivery Management First edition, requires tenders to be published on the eTender Publication Portal as well as the outcome of each tender. |

| | |
|--|---|
| | Terms of Reference for the Provision of Long Term Advisor Services to the Government Technical Advisory Centre. |
| Are you aware of any reforms (in practice or in laws, regulations, policies, etc.) related to PPPs that: 50.2. Are ongoing and/or are planned to be adopted AFTER June 1, 2016? | Yes |
| Please describe: | Draft new Treasury Regulations have been published for comment. Amendments have been proposed to the regulations promulgated under the PPPFA. |