Sustainable Energy Briefing 25: South Africa's Law Regarding Budgeting and Procurement

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In order to influence government procurement, civil society could look to two separate avenues: (1) the budgetary process that pays for procurement, and (2) the procurement process itself. Each process must comply with values of transparency, accountability, and effective financial management.

The budget process provides the most legally required avenues for public participation. During the preparation of the budget, in the October before the budget is tabled, the Minister of Finance tables the Medium Term Budget Policy Statement in Parliament. The Select and Standing Committees on Finance and Appropriations each must submit a report to the National Treasury on the MTBPS, and the public is invited to participate in hearings before the drafting of this report.

Once the budget is tabled in February, the public has the opportunity to participate in public hearings in the Committees on Finance regarding the fiscal framework. The public also may participate in hearings on the Appropriations Bill in the Committees on Appropriations. These hearings must take place sometime from March-July.

The procurement process itself involves little opportunity for public comment. There are regulations that limit the behaviour of national departments involved in large-scale procurement, for example by requiring feasibility studies prior to procurement from an external provider. The majority of regulations, however, require only that the departments communicate with the National Treasury. To receive such information or to oversee these stages of the procurement process, civil society would likely have to submit requests under the Promotion of Access to Information Act.

With energy procurement specifically, licensing must occur after the conclusion of the procurement process but before the actual use of any energy facility. The operator of any energy generation facility must get a license from the National Energy Regulator. Nuclear facilities must also receive licenses from the National Nuclear Regulator. Both of these processes involve requirements for public comment.

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I. Introduction

In order for the state to purchase goods or services, it must participate in a procurement process. Procurement is regulated by the Constitution, the Public Finance Management Act (No 1 of 1999) ("PFMA"), and Treasury regulations. Procurement is also part of the larger budget process; in order to pay for any goods or services, Parliament must approve the expenditure in an Appropriations Bill. The aforementioned laws also govern the budget process, with the addition of the Money Bills Amendment Procedure and Related Matters Act (No 9 of 2009) ("Money Bills Amendment Act"). Therefore, there is a two pronged approach to oversight and public participation regarding any particular procurement: (1) the procurement process itself, namely the planning, competitive bidding and awarding of a tender, and (2) the associated budget process.

II. Money basics

A. South Africa's financial structure

The Constitution in section 213 establishes the National Revenue Fund. With limited exceptions, all money received by the national government must be paid into this fund. Money can be taken out of the Fund in two circumstances: first, through an appropriation approved by Parliament; second, through a direct charge against the Fund, for example the payment of salaries to the National Assembly members or the payment of a province's equitable share of national revenue.[1]

[1] Constitution, sections 58, 213; Other direct charges include the refund of taxes, levies or duties (PFMA, section 12(2)); the transfer of taxies collected for a province from the National Revenue Fund into the province's Revenue Fund (PFMA, section 12(3)); the use of emergency funds (PFMA, section 16); see also Schedule 5 of the PFMA.

Money for procurement would not be a direct charge, against the Revenue Fund, and so must be approved by an Appropriations Bill in Parliament. Money is approved for appropriations through the budget process. Broadly, the budget is the determination by the government on how to allocate the state's revenue. It involves drafting and consideration by the executive (including Cabinet and national departments) and approval by Parliament. This is explained in more detail below.

There are additional limits on how the government may spend public money. The government may not borrow money or "enter into any other transaction that binds or may bind that institution or the Revenue Fund to any future financial commitment" unless the transaction is authorized by the PFMA. Further, a transaction that binds the Revenue Fund to any future financial commitment may only be entered into by the Minister of Finance.[2] It is unclear whether this indicates that only the Minister of Finance may enter into a multi-year contract.

B. Government individuals and institutions with duties related to financial management

South African law requires that those involved in the management of public finances uphold the values of transparency, effectiveness, and accountability.[3] The government is also bound by the overarching principle of legality, namely that the exercise of public power is only legitimate where it is lawful.[4] Additionally, the public has rights that are relevant to the oversight of the nation's financial management, including section 33, which guarantees a right to "just administrative action," and sections 32 and 195, which provide for access to information.

As described below, a number of different government entities are responsible for promoting and fulfilling those values.

As the overseer of the nation's finances, the National Treasury has a number of duties relevant to procurement. Treasury is responsible for the "effective and efficient" management of the National Revenue Fund.[5] Treasury must "promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions."[6] Treasury further has a general duty to enforce the PFMA and any prescribed norms and standards, as well as the authority to investigate "any system of financial management and internal control" in any national department.[7]

The PFMA requires each department or public entity to appoint an accounting officer.[8] The accounting officer is the head of the department unless "exceptional circumstances" lead Treasury to approve someone else.[9] The accounting officer has a variety of duties related to financial management. Of particular relevance, the accounting officer must ensure that the department or public entity maintains "an appropriate procurement and provision system which is fair, equitable, transparent, competitive and cost effective."[10] The accounting officer must make sure that the department's expenditure is in accordance with approved appropriations, and must prevent unauthorized expenditure.[11] Further, the accounting officer must collect and protect information about revenue.[12]

The PFMA also places responsibility on lower officials within the departments. Every official in a department "is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility."[13]

The Chief Financial Officer of each department also has financial duties. He must assist the accounting officer in discharging the duties of the PFMA, which relate to effective financial management and robust budgeting.[14]

2 PFMA, section 66

3 Constitution section 215 (related to the budget), 217 (related to procurement); PFMA sections 2 and 6 (related to the duties of the Treasury)

4 Phoebe Bolton, the Law of Government Procurement in South Africa, 2007, p 35 (quoting the Constitutional Court in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*). See also p 73-80

5 National Treasury. Treasury Regulations for departments, trading entities, constitutional institutions and public entities. March 2005, clause 15.1 (hereinafter, "2005 Treasury Regulations")

6 PFMA, section 6(1)(g)

7 PFMA, section 6(2)

8 PFMA, sections 36 and 49

9 PFMA, section 36; for public entities, the accounting authority is the board or controlling body, or the chief executive officer (PFMA, section 49)

10 PFMA, sections 38 and 51

11 PFMA, sections 39 and 51

12 2005 Treasury Regulations, clause 7.2.1

13 PFMA, section 45

14 2005 Treasury Regulations

Any of these officers may be guilt of financial misconduct. For example, if the accounting officer wilfully or negligently fails to comply with duties of the PFMA set out in sections 38, 39, 40, 41, or 42 she is guilty of an offence; this offence may be punished with a fine or imprisonment not exceeding five years.[15]

III. The budget

A. Overview

South Africa is committed to a multi-year approach to the budget.[16] The Medium Term Expenditure Framework ("MTEF") was introduced in 1997/1998; while Parliament does not vote on this framework, the estimated three year financial projections provides some stability for departmental planning and aids policy debates.[17] The MTEF is articulated annually in the Medium Term Budget Policy Statement ("MTBPS") presented to Parliament.[18] The MTBPS is discussed in more detail below.

The annual budgetary process begins with the departments submitting draft departmental budgets to the executive. The executive reviews these budgets and makes final decisions on allocation. A number of executive bodies will be involved in this process, including representatives from national, provincial, and local government. The budget is then tabled in the legislature. This process begins around January and lasts until the February of the following year. Once the budget is tabled in Parliament, various committees consider it for approval. After passage in Parliament, the National Treasury monitors spending. Adjustments budgets may be tabled mid-year if necessary. Audits assess departmental performance during and after the fiscal year.[19]

The requirements for the contents of the budget are found in the Constitution, the PFMA, and the Money Bills Act.[20] The budget itself consists of a number of documents, including:

1. The Minister of Finance's Budget Speech, which lays out the government's general spending priorities;
2. The National Treasury's Budget Review, which presents fiscal analysis and proposed spending;
3. The Division of Revenue Bill, which allocates revenue between the national, provincial, and local spheres of government in terms of the Intergovernmental Fiscal Relations Act (No 97 of 1997), pursuant to section 214 of the Constitution;
4. The Appropriations Bill, which serves as the Parliamentary authorization for payment of "the requirements of the state." This is enacted under 213(2) of the Constitution and 26 of the PFMA;
5. The Estimates of National Expenditure, which sets out the details of planned expenditure and planned performance indicators; and
6. The fiscal framework, which is "the framework for a specific financial year that gives effect to national executive's macro-economic policy" and includes estimates of all revenue, expenditure, borrowing, and interest and debt servicing charges.[21]

Of these documents, Parliament will vote on the fiscal framework, the Division of Revenue Bill, and the Appropriations Bill. This takes place from February to July each year.

Treasury must "manage the budget preparation process" and "exercise control over the implementation of the annual national budget."[22] The Constitution requires that "budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector."[23]

B. Budget in Detail

1. Preparation for the Budget

Each department must submit annual budget documentation to Parliament, which is compliant with the annual budget

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15 PFMA, sections 81 and 86

16 PFMA, section 28 requires the Finance Minister to annually table a multi-year budget projection that includes the Minister's key macroeconomic policies. Further, the MTBPS includes a proposed fiscal framework for the coming three years (Money Bills Amendment Act, section 6)

17 Guide to the Budget, IDASA, p 12; allocation decisions in the MTEF are the result of discussions by the Ministerial Committee on the Budget, which in turn are based on policy proposals submitted to the Minister of Finance by the departmental ministers

18 Guide to the Budget, IDASA, 12

19 Guide to the Budget, IDASA, p 4

20 Constitution, section 215; PFMA section 27(3); Money Bills Amendment Act 7(2)

21 Money Bills Amendment Act, chapter 1

22 PFMA, sections 6(1)(c)-(d)

23 Section 215

circulars made by the National Treasury.[24] In mid-April, Treasury sends out guidelines to the national departments to help them prepare for the following year's budget.[25] The departments prepare an annual three-year strategic plan that is tabled in Parliament at least seven days prior to the discussion of the department's budget vote.[26] Departments also must prepare a breakdown of anticipated departmental revenue and expenditure for the coming fiscal year.[27] From approximately April-August, this detailed departmental planning and budgeting takes place. By the end of June, the national departments will submit their budgets to the National Treasury.[28] Treasury must review these and return comments within four weeks.[29]

From June- September, the executive engages in discussions on the overall budget framework and the division of revenue.[30] During August and September, the Medium Term Expenditure Committee, an interdepartmental committee, considers the allocation of funds for the departments and then makes recommendations to the Minister's Committee on the Budget ("MinComBud").[31] MinComBud makes recommendations to cabinet on departmental allocations and the macroeconomic framework.[32] Cabinet then considers these issues.

Parliament is also active in preparing for the following years budget from approximately July-September. Committees submit a Budgetary Review and Recommendation Report ("BRRR") for each department that reviews the department's performance, specifically service delivery and the effectiveness of the department's use of resources.[33] The BRRRs are considered in preparation for the following year's budget and the MTBPS. They are submitted after the adoption of the most recent Appropriations Bill and prior to the tabling of the MTBPS in October. When tabling the next budget, the Minister of Finance must include a report explaining how that budget gives effect to recommendations in the BRRRs, or explaining why it does not.[34]

This preparatory work results in the tabling of the MTBPS in October. This is a documented drafted by Treasury and approved by the Cabinet.[35] The MTBPS is tabled in Parliament by the Minister of Finance and must include a proposed fiscal framework for the coming three years, an explanation of the government's macro-economic policy position, spending priorities for the government, and more.[36]

After the tabling of the MTBPS, the Committees on Finance are referred matters related to the multi-year fiscal framework and the government's fiscal and macro-economic policy position. The Committees on Appropriations are referred matters related to the spending priorities of the national government, the division of revenue, and proposed adjustments to conditional grant allocations to the provincial and local governments. Each committee must, within 30 days after the tabling of the MTBPS, submit a report to Parliament.[37] The Committees on Finance must report on the proposed fiscal framework, while the Committees on Appropriations must report on the proposed division of revenue.[38]

These committees invite public comments on the MTBPS for their reports.[39] Last year (2011), the Standing and Select Committees on Appropriations held public hearings specifically regarding the government's spending priorities.[40] These hearings involved submissions by the Ceasefire Campaign, the South African Local Government Association ("SALGA") and the Financial and Fiscal Commission.[41] In 2010, public hearings were held with the Financial and Fiscal Commission, the Department of Cooperative Governance, and SALGA.

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24 2005 Treasury Regulations, clauses 6.1 and 6.2

25 Guide to the Budget, IDASA, p 24

26 2005 Treasury Regulations, clause 5

27 2005 Treasury Regulations, clause 15.10.2; this must take place "no later than the last working day of February preceding the financial year to which it relates."

28 Guide to the Budget, IDASA, p 25

29 Guide to the Budget, IDASA, p 25

30 Guide to the Budget, IDASA, p 25

31 Guide to the Budget, IDASA, p 28; National Treasury, Presentation on the South African Budget Process, 24 October 2011

32 Guide to the Budget, IDASA, p 26

33 Money Bill Amendment Act, section 5

34 Money Bills Amendment Act, section 7(4)

35 Guide to the Budget, IDASA, p 27

36 Money Bills Amendment Act, section 6

37 Money Bills Amendment Act, section 6

38 Money Bills Amendment Act, section 6

39 Guide to the Budget, IDASA, p 27. Note that the Money Bills Amendment Act, section 6 does not explicitly require public participation. It seems, however, that the committees do hold these public hearings each year.

40 http://www.pmg.org.za/report/20111109-public-hearings-spending-priorities-mtbps

41 http://www.pmg.org.za/report/20111109-public-hearings-spending-priorities-mtbps

After the adoption of the report by the House, the reports are referred to the Minister of Finance.[42] When the Minister tables the next budget, he must include a report that explains how the budget gives effect to (or the reasons why it does not give effect to) the recommendations in the reports on the MTBPS.[43]

The executive continues to discuss the medium term allocations and projected adjustments.[44] In December and January, the executive prepares draft versions of the Division of Revenue Bill and Appropriations Bill. Treasury also prepares the national estimates of expenditure based on departmental advisement.[45] The budget is eventually tabled in February.[46]

Note that the Division of Revenue Bill involves additional preparation and participation. The Budget Council and the Budget Forum established in the Intergovernmental Fiscal Relations Act include representatives from provincial and local government. The Minister must convene meetings of these bodies to consult on financial matters, including the Division of Revenue Bill, at least twice and once per fiscal year, respectively.[47] The Financial and Fiscal Commission[48] must also be consulted before the introduction of the Division of Revenue Bill.[49] This memorandum does not explore the Division of Revenue Bill in depth because it does not deal with procurement.

2. Passing the Budget

The Minister of Finance tables the budget in February. The fiscal framework, the Division of Revenue Bill, and the Appropriation Bill are tabled in Parliament at the same time.[50] The National Council of Provinces ("NCOP") and the National Assembly ("NA") each must have a committee on finance, which considers and reports on the macro-economic and fiscal policy and the fiscal framework.[51] Each House also must have a committee on appropriations, which handles the Division of Revenue Bill, the Appropriations Bill, and adjustments bills.[52]

The fiscal framework is adopted first, followed by the Division of Revenue Bill and then the Appropriations Bill. The timeline is generally short. The adoption of the fiscal framework takes place by mid-March[53] and the passage of the Division of Revenue Bill by the end of April.[54] The Appropriations Bill must be passed by the end of July.[55]

Before adoption of the fiscal framework, the committees on finance must conduct joint public hearings on the fiscal framework and revenue proposals.[56] In 2012, these hearings occurred on the 28th and 29th of February (the budget was tabled 22 February) and involved submissions by the Treasury, the Financial and Fiscal Commission, organized labor, organized business, the People's Budget Coalition and groups representing accountants.[57] The Committees on Finance will recommend the adoption or rejection of the fiscal framework, and may make recommendations to the Minister of Finance or other departments related to implementation or desired information.[58]

The Money Bills Act also requires that the standing rules of the Committees on Appropriations provide for public hearings

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42 Money Bills Amendment Act, section 6

43 Money Bills Amendment Act, section 7(4)

44 Guide to the Budget, IDASA, p 27

45 Guide to the Budget, IDASA, p 27

46 PFMA, section 27 requires only that the annual budget be tabled in Parliament before the start of the financial year (which is April 1). Traditionally, however, the budget is tabled in February (Guide to the Budget, IDASA, p 27).

47 Intergovernmental Fiscal Relations Act, sections 4, 7, 10

48 Established by section 220 of the Constitution

49 Intergovernmental Fiscal Relations Act, section 10

50 Money Bills Amendment Act, section 7

51 Money Bills Amendment Act, section 4

52 Money Bills Amendment Act, sections 4 and 10

53 Money Bills Amendment Act, section 8. Subsection 8(3) requires that the committees present a report accepting or amending the fiscal framework to the respective Houses within 16 days of tabling the Budget. If the report includes amendments, the Houses must consider those reports for adoption by resolution also within 16 days after the tabling of the budget (8(7))

54 Money Bills Amendment Act, section 9(3) requires that the Division of Revenue Bill be passed no later than 35 days after the adoption of the fiscal framework.

55 The Appropriations Bill must be passed or rejected within four months after the start of the financial year to which it relates (Money Bills Amendment Act, section 10(7)).

56 Money Bills Act, section 8

57 Report of the Standing Committee on Finance on the 2012 Fiscal Framework and Revenue Proposals, 1 March 2012 <http://www.pmg.org.za/files/doc/2012/comreports/120302pcfinancereport.htm>

58 Recommendations regarding the fiscal framework 2012 included, for example, that the Minister of Finance ensure low income taxpayers do not finance the National Health Insurance Plan; that the Minister of Higher Education and Training table a detailed plan on the proposed construction of new universities; and that the Minister of Energy should review the pricing policy for electricity. (Report of the Standing Committee on Finance on the 2012 Fiscal Framework and Revenue Proposals, dated 01 March 2012)

in the consideration of the Division of Revenue Bill[59] and on the Appropriations Bill.[60] Departmental allocations in the Appropriations Bill (votes) are approved by Parliament at the functional programme level; this limits the ability of accounting officers to shift funds in the course of the financial year without obtaining authorization.[61]

If the approved budget later proves inadequate, the Minister may also table adjustments budgets to approve expenditure arising from significant and unforeseeable economic and financial events or unavoidable expenditure recommended by the executive.[62] Lack of planning for something that is foreseeable is not appropriately included in the adjustments budget.

IV. Procurement

A. Overview

Procurement is governed by the Constitution, the Public Finance Management Act, and regulations of the National Treasury. While the State Tender Board Act (No 86 of 1968) has not yet been repealed, Treasury regulations permit accounting officers of national departments to procure services in terms of the PFMA.[63]

The Constitution specifically requires that procurement be "fair, equitable, transparent, competitive and cost effective."[64] Each department and public entity must give effect to this provision by ensuring "an appropriate procurement and provision system which is fair, equitable, transparent, competitive and cost effective."[65] These values are echoed in the authority of Treasury to make regulations concerning "the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective."[66]

The March 2005 Treasury Regulations again echo these values, requiring each accounting officer develop an effective and efficient supply chain management system in his institution for the acquisition of goods and services which is "fair, equitable, transparent, competitive and cost effective."[67] Supply chain management is intended to integrate procurement with other financial management and the entirety of the procurement process, including demand management and post-procurement monitoring.[68]

A guide on supply chain management produced by the Treasury explained that Treasury's policies and regulations aim to improve accountability by placing responsibility for procurement decisions in the hands of each accounting officer.[69] This extends beyond the immediate procurement process to actions such as the training of the department's supply chain management personnel.[70] An accounting officer that fails to implement measures suggested in guideline documents may be personally liable for failures in financial management in the event of scrutiny by the Standing Committee on Public Accounts.[71]

B. Decision to Procure

The first step of procurement is the decision that the purchase of a good or service is necessary. For energy, this decision is based upon the Integrated Resource Plan 2010-2030 ("IRP 2010"), promulgated 6 May 2011. The IRP 2010 involved government technical analysis as well as public participation. It is an iterative process, expected to be revised every two years.[72] The aim of the IRP 2010 is to provide a "cost optimized" energy mix to meet South Africa's energy needs.[73] Toward that end, the IRP 2010 recommends a number of firm and proposed commitments to certain levels of nuclear, coal, and renewable energy.

59 Money Bills Amendment Act, section 9(5)(b)

60 Money Bills Amendment Act, section 10(8)(a)

61 Guide to the Budget, IDASA, p 14

62 PFMA, section 30

63 G.N.R. 1733 of 5 December 2003, Amendment to Regulations of the State Tender Board Act in terms of Section 13, section 2. Another guide by the Treasury envisions the eventual repeal of the State Tender Board Act, and directs tender boards to delegate their authority to departments, and only step in in targeted situations (National Treasury, "Supply Chain Management: A Guide for Accounting Officers/Authorities," February 2004, clauses 2.2.2, 2.3.1, 2.3.2).

64 Section 217

65 PFMA, sections 38 and 51

66 PFMA, section 76(4)(c)

67 2005 Treasury Regulations, section 16A.

68 National Treasury, "Supply Chain Management: A Guide for Accounting Officers/Authorities," February 2004

69 National Treasury, "Supply Chain Management: A Guide for Accounting Officers/Authorities," February 2004, clauses 1.2.1-1.2.2

70 National Treasury, "Supply Chain Management: A Guide for Accounting Officers/Authorities," February 2004, clause 2.6.1

71 National Treasury, "Supply Chain Management: A Guide for Accounting Officers/Authorities," February 2004, clauses 1.2.1-1.2.2

72 IRP 2010, clause 1.1

73 IRP 2010, clauses 2.1 and 2.2

Once the government decides to procure a good or service, the department must behave in accordance with applicable Treasury regulations. In May 2011, the Treasury released an instruction note to the various departments under its authority in the PFMA. This note requires accounting officers of all institutions to submit to Treasury by 30 April of each year a procurement plan containing all planned procurement exceeding R500,000 for the coming financial year.[74]

Because each department has responsibility for creating a constitutionally compliant system for procurement, each department may have promulgated separate regulations governing its procurement. For example, the Department of Energy promulgated regulations to govern the adoption of all new generation capacity except that from nuclear power.[75] These regulations provide for a discretionary feasibility study that examines the anticipated cost of the proposed new generation capacity, the value for money, and whether the appropriate generator of power is Eskom (the state) or an external provider.[76] These regulations also lay out the decision-making authority and general guidelines for a power purchase agreement between the state and an external provider.[77]

C. The Tender Process
1. In general

Treasury regulations give preference to competitive bidding for large-scale government procurement.[78] For procurement to occur by other means, it must be "impractical" to invite competitive bids, and the reasons for deviating must be recorded and approved by the accounting authority.[79]

The first step in the tender process is compiling bid documents. The National Treasury provided General Conditions of Contract that must form part of any bid documentation.[80] The accounting officer must ensure that bid documentation and the general conditions of contract accord with the instructions of the National Treasury. The accounting officer must also ensure that bid documentation includes evaluation and adjudication criteria.[81]

This is followed by inviting bids. The accounting officer must ensure that the bids are advertised in at least the *Government Tender Bulletin* for at least 21 days.[82] Within 10 working days after the closure of any advertised competitive bid over R500,000, institutions must publish on its website the names of all bidders that submitted bids and, when practical, also publish the price and preferences.[83]

After the submission of bids has concluded, the organization must evaluate the bids. The process is concluded by the selection of the winning bidder and the awarding of a contract.

Before signing a formal contract, the accounting officers must ensure that such contracts are legally sound to avoid potential litigation and to minimize possible fraud and corruption.[84] There are also obligations for checking conflicts of interest to prevent abuse of the supply chain management system.[85]

There are additional regulations regarding bids over R10 million, but the National Treasury postponed these regulations indefinitely in the Supply Chain Management Circular September 2011.[86]

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74 National Treasury Instruction Note on enhancing compliance monitoring and improving transparency and accountability in supply chain management, May 2011; clause 3.1.1

75 G.N.R. 399 of 4 May 2011, Electricity Regulations on New Generation Capacity.

76 Electricity Regulations on New Generation Capacity, section 5.

77 Electricity Regulations on New Generation Capacity, sections 6 and 9

78 2005 Treasury Regulations, clause 16A6.1 requires that procurement take place within the threshold values determined by the National Treasury. National Treasury Practice Note No 8 of 2007/2008, clause 3.4.1 set the threshold for competitive bidding at R500,000.

79 2005 Treasury Regulations, clause 16A6.4

80 The most recent version was published in July 2010.

81 2005 Treasury Regulations, clause 16A6.3

82 2005 Treasury Regulations, clause 16A6.3

83 National Treasury Instruction Note on enhancing compliance monitoring and improving transparency and accountability in supply chain management, May 2011, clause 3.2.1

84 National Treasury Instruction Note on enhancing compliance monitoring and improving transparency and accountability in supply chain management, May 2011, clause 3.6.1

85 2005 Treasury Regulations, clause 16A9

86 These regulations required "proof that budgetary provision exists for procurement of the goods and/or services", ancillary budgetary implications related to the bid, and any multi-year budgetary implications (National Treasury Instruction Note on enhancing compliance monitoring and improving transparency and accountability in supply chain management, May 2011; clause 3.4.1). They also required an audit of the bidding process (clauses 3.5.1-3.5.2), and Treasury assurance that the contract is awarded within the budgetary provision (clause 3.4.3)

2. Public private partnerships

The March 2005 Treasury regulations provide extensive guidance on public private partnerships, which are defined as commercial transactions between an institution and a private party in terms of a which a private party "performs an institutional function on behalf of an institution . . . and assumes substantial financial, technical and operational risks in connection with the performance of the institutional function . . . and receives a benefit for performing the institutional function."[87] This procurement procedure also must be "in accordance with a system that is fair, equitable, transparent, competitive and cost effective . . ."[88]

There are multiple levels of Treasury approval necessary for a PPP. As soon as an institution identifies a project that may be concluded as a PPP, the accounting officer must register the PPP with the relevant Treasury and inform Treasury of the institutional expertise to proceed with a PPP.[89] To determine whether the proposed PPP is in the nation's best interest, the accounting officer must undertake a feasibility study.[90] This study requires written approval of the Treasury, without which the procurement phase cannot proceed.[91]

Treasury must also provide approval for procurement documentation and a draft PPP agreement, without which the department cannot issue any procurement documentation to prospective bidders.[92] Additionally, after evaluation of bids but before appointing a preferred bidder, the procuring institution "must submit a report for approval by the relevant treasury, demonstrating how the criteria of affordability, value for money and substantial technical, operational and financial risk transfer were applied in the evaluation of the bids, demonstrating how these criteria were satisfied in the preferred bid."[93]

There is a final stage of Treasury approval after the end of the procurement procedure but before the conclusion of the agreement. This certifies again that the PPP agreement meets the values above, including affordability and value for money.[94] Treasury also must approve "a management plan that explains the capacity of the institution, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the PPP", as well as that "satisfactory due diligence including a legal due diligence has been completed in respect of the accounting officer or accounting authority and the proposed private party in relation to matters of their respective competence and capacity to enter into the PPP agreement."[95]

Without the receipt of the requisite Treasury approvals, a PPP agreement does not bind the state,[96] although Treasury may, upon written application, exempt an institution from complying with any or all of the preceding regulations.[97]

Although the Minister of Energy has said the government is considering government-to-government partnerships, an open bid system, and a selective listing of energy companies,[98] it is most likely that energy procurement will be a public private partnership. For nuclear specifically, the 2007-2008 terminated procurement process for one nuclear reactor indicated external procurement. Multinational companies continue to express interest in the assumed tender for the proposed nuclear fleet.[99]

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seccp@earthlife.org.za - Tel: +27 11 339 3662 - www.earthlife.org.za

87 2005 Treasury Regulations, clause 16.1
88 2005 Treasury Regulations, clause 16.5.3
89 2005 Treasury Regulations, clause 16.3.1
90 2005 Treasury Regulations, clause 16.4.1
91 2005 Treasury Regulations, clause 16.4.2
92 2005 Treasury Regulations, clause 16.5.1
93 2005 Treasury Regulations, clause 16.5.4
94 2005 Treasury Regulations, clause 16.6.1
95 2005 Treasury Regulations, clause 16.6.1
96 2005 Treasury Regulations, clause 16.9.1
97 2005 Treasury Regulations, clause 16.10.1
98 Mzwandile Faniso, "Nuclear plans ready by year end – Peters." Business Report, Cape Times, 5 June 2012
99 See, for example John C.K. Daly, "South Africa strides toward nuclear future – maybe." Oilprice.com, 2 March 2012; Reuters, "South Africa goes big on nuclear a year on from Fukushima," 9 March 2012