The new municipal PPP regulations

Regulations governing public/private partnerships (PPPs) in the local government sphere came into effect on 1 April 2005. Section 120 of the Municipal Finance Management Act (MFMA) also regulates PPPs, and the new PPP regulations have the effect of elaborating or expanding on some of the concepts introduced in section 120.

Of particular interest to those who work with contracts relating to municipal services (municipal officials, consultants, private sector contractors whose businesses constitute municipal services) will be the way in which the new PPP regulations interface with the, by now more familiar, provisions of Chapter 8 of the Systems Act 32 of 2000.

Apply both MFMA and Systems Act

Where a municipality is considering concluding an agreement with a private sector party for the provision of a municipal service, it is quite possible that the transaction will constitute both a service delivery agreement, as contemplated in the Systems Act, and a PPP, as contemplated in the MFMA and the PPP regulations. A service delivery agreement is an agreement between a municipality and an 'external mechanism'

(including a private sector company or other legally recognised private entity), in terms of which the external mechanism provides a municipal service either for its own account or on behalf of the municipality. The definition of a PPP covers an agreement in which a private party performs a municipal service for, or on behalf of, a municipality for its own commercial purposes, assumes substantial financial, technical and operational risk in relation to performance of the service and receives a benefit from its performance of the service by way of consideration paid by the municipality and/or charges or fees to be collected from users of the service.

So, for example, where a municipality appoints a private company to design and build and then to operate, on behalf of the municipality, a new waste disposal site, the agreement may constitute both a service delivery agreement and a PPP.

What must a municipality comply with when it is contemplating a transaction that may be both a service delivery agreement and a PPP?

Section 78 Procedure

The first thing the municipality must do is decide whether, in its circumstances, section 77 of the Systems Act obliges it to comply with the procedure contained in section 78. If the proposed new waste disposal site will amount to a significant extension of its existing waste disposal facilities, then the obligation to comply with section 78 is triggered.

This has important implications from a PPP perspective: legally, the municipality cannot consider a PPP until it has completed the assessment prescribed in section 78(1) of the internal mechanism possibilities and has then decided, in terms of section 78(2), to 'explore the possibility' of using an external mechanism to provide the service.

A transaction may be both a service delivery agreement and a public/ private partnership.

key points

- **Where a municipality is considering concluding an agreement with a private sector party for the provision of a municipal service, that the transaction may constitute both a service delivery agreement and a PPP.**
- **Municipalities should design a single, comprehensive feasibility study that covers enquiries under both Acts.**

MFMA feasibility study

To explore external mechanisms, the municipality must carry out further assessments and feasibility studies. However, before it initiates these, the PPP regulations say it must notify the National Treasury and the provincial treasury that it intends to carry out a feasibility study for a PPP. If it is asked to do so, it must appoint a transaction advisor for the proposed PPP. It may then carry out the required studies.

Municipalities would be well advised to design a single, comprehensive feasibility study that covers the issues required in terms of sections 78(3)(b) and (c) of the Systems Act, section 120(4) of the MFMA and regulation 3 of the PPP regulations. Technically, the study will then be carried out in terms of section 78(3) of the Systems Act, with municipalities able to show that, from a content perspective, the study meets the requirements of regulation 3(3) of the

PPP regulations and that, from a procedural perspective, there is therefore no need for a separate PPP-specific feasibility study.

Combining the enquiries

Once the studies have been completed, they need to be considered by the municipal council. The Systems Act does not explicitly make this a requirement, but it is implicit in that the decision to conclude a service delivery agreement (the only method by which a municipality can appoint an external mechanism) is one of the matters which, in terms of section 59 of the Systems Act, cannot be delegated by a municipal council. The MFMA is explicit on this requirement [and the PPP regulations are explicit on this requirement where the municipality combines the Systems Act and PPP feasibility studies: see regulation 3(3)(b)].

In terms of section 120(6), the report on the study must be submitted to the council for a decision in principle on whether the municipality should continue with the proposed PPP. Section 120(6) also prescribes public participation procedures with which the municipality must comply.

In addition, the municipality must solicit the views and recommendations of the National Treasury, the Department of Provincial and Local Government and in some cases, for example, electricity, the national department responsible for the sector in which the municipal service falls. Once the municipality has decided in principle that it wishes to proceed with the PPP, the procurement process, again regulated by the Systems Act, the MFMA and the PPP regulations, can then start.

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